

# WEB EXCLUSIVE: FEBRUARY 2020: THE TOP 15 LABOR AND EMPLOYMENT LAW STORIES

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

1. **5 Things You Need To Know About The Labor Board's New Joint Employment Rule** – The National Labor Relations Board published a final rule on February 25 that will soon fundamentally alter the definition of joint employment, making it more difficult for businesses to be held legally responsible for alleged labor law violations by staffing companies, franchisees, and other related organizations. The rule will also limit the ability of employees from affiliated companies to join together to form unions. Once it takes effect on April 27, an employer will only be considered a joint employer of a separate employer's employees if the two employers share or co-determine the employees' essential terms and conditions of employment, including wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. As the Board states, a putative joint employer must

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possess *and actually exercise* substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not sporadic and isolated. Below are the five key things all employers must know about this critical development ([read more here](#)).

2. **[Employers Can't Use Pay History To Escape Equal Pay Claims, Says 9th Circuit](#)** –Employers are not permitted to justify disparity in pay based on prior pay history, the 9th Circuit Court of Appeals just ruled, eliminating a defense to pay equity claims for businesses across the west coast. Although the Equal Pay Act (EPA) contains a catch-all provision allowing employers to defend pay differentials caused by “any other factor other than sex,” an *en banc* panel concluded in the February 27 ruling in *Rizo v. Yovino* that prior salary history does not fit into that exception. Employers in the 9th Circuit now have certainty when it comes to understanding the contours of the federal equal pay statute and need to adjust their business practices accordingly ([read more here](#)).
3. **[Sound The Alarm: What California's Latest Bag Check Case Means for You](#)** – In a unanimous decision, the California Supreme Court held that the time spent by employees waiting for and undergoing security checks of bags and other personal items is compensable time under California law, even when the policy only applies to employees who choose to bring personal items to work. However, in a bit of good news for employers, the court's February 13 decision left some wiggle room rather than craft a bright-line test by providing a multi-factor test as to whether “onsite employer-controlled activities” must be compensated as “hours worked.” In any event, this latest well-articulated decision instructs that, under the new multi-factor factor test, the element of employee choice is only one of several issues to consider when determining if the employee is subject to the employer's control for an activity and thus owed compensation for that time (*Frlekin v. Apple, Inc.*) ([read more here](#)).
4. **[SCOTUS ERISA Ruling May Open Floodgates For Increased Lawsuits](#)** – In a unanimous decision, the Supreme Court declined to limit the timeframe in which disgruntled employees could bring suit challenging the investment decisions made by plan fiduciaries. While the Employee Retirement Income Security Act (ERISA) provides a shrunken three-year statute of limitations

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when workers have “actual knowledge” of an alleged breach or violation, the Court concluded on February 26 that this shorter period is not triggered when the employee in question chose not to read or did not recall having read all the relevant information about the investments provided by the plan. In such situations, the Court ruled in yesterday’s decision, a longer six-year statute of limitations applies. This development opens employers and retirement plan fiduciaries up to an increased risk of legal challenges, while heightening the standard for evaluating breach claims and class action certifications (*Intel Corp. Investment Policy Committee v. Sulyma*) ([read more here](#)).

5. **[Labor Gets Wishlist Bill Passed In House](#)** – The U.S. House of Representatives passed a bill that would tilt the scales of labor law unequivocally in favor of organized labor. The Protecting the Right to Organize (PRO) Act would bring about a radical shift in labor relations and could even reverse the steady decline of unionization seen in this country since the 1950s. To reach this goal, the PRO Act takes aim at virtually every pro-employer right, outlawing and replacing them with a Frankenstein-like collection of pro-labor protections. What do employers need to know about the bill passed on February 6, and what could the future hold? ([read more here](#))
6. **[Court Revives Philadelphia’s Salary History Ban](#)** – A federal appeals court just resurrected the salary history ban that will now prevent Philadelphia employers from asking job applicants about how much they are paid or setting new salaries based on pay history. Thanks to the 3rd Circuit Court of Appeals ruling on February 6, employers in Philadelphia must immediately alter their hiring practices and cease the practice of asking questions about compensation history on applications, in interviews, and at any stage during the hiring practice. You must also ensure that you do not use this forbidden information when setting new salary levels. What do employers need to know about today’s ruling and how best to come into compliance? ([read more here](#))
7. **[Ban-The-Box Comes To Maryland](#)** – Maryland has just joined a growing number of states and local jurisdictions — including Baltimore, Montgomery County, and Prince George’s County — in banning private employers from requesting information about an applicant’s criminal



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history in job applications. Thanks to the state legislature overriding the governor's veto, it appears the ban-the-box law has taken effect immediately, so the time is now to make sure you are in compliance with Maryland's newest employment statute ([read more here](#)).

8. **[Judge Explains Her Decision to Block California's Ban on Mandatory Arbitration](#)** – California employers breathed a bit easier once a federal judge [pressed the indefinite pause button on the newly enacted law](#) aimed at preventing employers from utilizing mandatory arbitration agreements. Now, a few weeks later, U.S. District Court Judge Kimberly J. Mueller issued an order fully explaining her reasons for granting the preliminary injunction that blocked AB 51. The 36-page order, issued on February 7, said that the law not only would have placed arbitration agreements on unequal footing with other contracts, but it would have interfered with the stated objectives of the Federal Arbitration Act (FAA) ([read more here](#)).

9. **[Employers Must Use A New I-9 Form For 2020](#)** – The federal government just released [an updated Form I-9](#), and although you aren't required to use the new version until May 1, 2020, best practices dictate that you should start using it immediately. It has been a few years since United States Citizenship and Immigration Services (USCIS) updated the Form I-9, which verifies the identity of new hires and ensures they are authorized to work in the United States. But [with this recent announcement](#), you should take immediate steps to come into compliance or risk financial penalties ([read more here](#)).

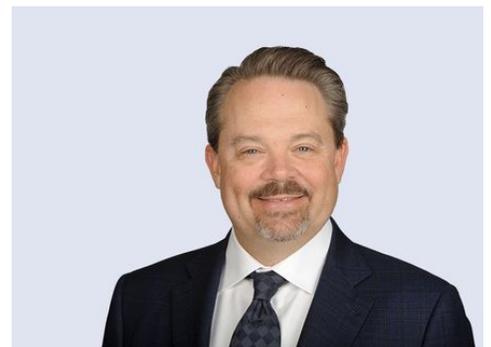
10. **[Judge Forces Instacart To Reclassify Workers As Employees – But Not This Instant](#)** – Gig economy company Instacart lost the latest round of its misclassification battle in San Diego, as a California state court judge granted a preliminary injunction forcing it to reclassify its independent contractor workers as employees. But the judge took some of the sting out of the ruling by putting on hold any enforcement efforts by the city, allowing this "lively area of the law" to work itself out a bit more before dropping the hammer on the company. The February 24 ruling is the latest example of the ABC Test in action, demonstrating just how disastrous it could be to the traditional gig economy model and just how far it can be taken by aggressive government officials ([read more here](#)).



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11. **What Employers Need To Know About Coronavirus Travel Restrictions** – In light of the coronavirus outbreak in China, President Trump issued [a Presidential Proclamation](#) limiting the entry of most foreign nationals who were physically present in China during the 14-day period before their attempted entry into the United States. This travel restriction took effect at 5:00 PM ET on February 2. Below are details for employers to understand your obligations and best practices during this time ([read more here](#)).
12. **Reminder: Coronavirus Emergency Does Not Trump HIPAA Privacy Rule** – The government sent a stern reminder to all employers, especially those involved in providing healthcare, that they must still comply with the protections contained in the HIPAA Privacy Rule during the Coronavirus outbreak. The Office for Civil Rights of the U.S. Department of Health and Human Services (HHS) issued a reminder in early February after the World Health Organization declared a global health emergency. In fact, the Rule includes provisions that are directly applicable to the current circumstances ([read more here](#)).
13. **Court Rejects Gig Economy Attempt To Block New California Misclassification Law** – A federal court judge denied a request by several gig economy giants (and a few contractors) to block AB-5, the new misclassification law in California that codifies the ABC test and makes it much more difficult to classify workers as independent contractors. The February 10 ruling means that gig economy companies across the state have no immediate avenues to escape the grasp of the ABC test, which became state law on January 1. If you were waiting to determine whether to make any adjustments to your business model in the hopes that the law wouldn't apply to your business, the time is now to give your attention to compliance solutions. While you can still hold out hope that there will be a legislative fix, or an eventual court ruling in businesses' favor, or [an election-day ballot measure](#) that would solve many problems, these potential solutions have uncertain futures and are not on the immediate horizon – so you shouldn't hold your breath ([read more here](#)).
14. **California AG Revises Proposed CCPA Regulations** – On February 10, the Attorney General issued revisions to the proposed regulations to the California Consumer Privacy Act (the CCPA) which were originally published in

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October of last year. While the Attorney General cannot bring an enforcement action until July 1, 2020, these revisions indicate that the office is gearing up to start bringing CCPA enforcement actions in July. Further, while employers won a brief reprieve for their employee and applicant personal information due to an amendment to the CCPA, it is important to remember that this reprieve only lasts until January 1, 2021. As the law currently stands, employers have only had to comply with a small portion of the CCPA for their employees and job applicants. However, absent an additional amendment, employers will be required to comply with the full-scope of the CCPA *in less than a year*. CCPA compliance takes time, and as the AG continues to revise and finalize the proposed regulations throughout the first half of 2020, employers need to take note and keep apprised of the changes and trends to ensure they will comply next January. The following outlines a sampling of the key changes made by the Attorney General to the proposed regulations ([read more here](#)).

15. **Gainesville Wants to Be the First City in the Country with Self-Driving Buses** – According to its Office of Mobility, the [city of Gainesville, Florida](#) is expected to make autonomous electric buses available as a new form of public transportation by the end of the year – which would make Gainesville the first city in the country to have self-driving buses on public roads. While a few other communities around the country have AVs that run in designated lanes, this would be a major step forward for the autonomous vehicle movement ([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.*