The Top Non-COVID Workplace Law Stories You May Have Missed: March/April 2020

Insights
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While you have been primarily focused on COVID-19-related matters since mid-March, that doesn't the world of labor and employment law has taken a timeout. While the pace of new developments has slowed somewhat, there are still workplace law updates you need to know about. Are you thirsting to read about some news that's not related to social distancing or flattening the curve? Here is a summary of the top stories you might have missed over the past month or so.

1. **SCOTUS Sets High Bar For Those Bringing Race Discrimination Cases** – In a unanimous decision, the U.S. Supreme Court recently ensured that a high standard will be used when assessing whether claims of race discrimination under Section 1981 should advance past the early stages of litigation. This means that we should not see an increase in the number of claims brought against employers using of the nation's oldest civil rights laws.
2. **Labor Board Finalizes Amendments To Union Election Rules** – The National Labor Relations Board just finalized its "Election Protection Rule," amending regulations addressing "blocking charges" and certain aspects of the Board's voluntary recognition doctrine. The final rule, published in the Federal Register on March 31, slightly modifies the proposed rule issued in August 2019. It revises the Board's blocking charge policy, the voluntary-recognition bar rule, and rules related to union recognition in the construction industry. It will be effective on July 31, 2020. The final rule is one of several recent efforts by the current Board to shape the nation's federal labor policy through administrative rulemaking. The efforts include clarifying the Board's standards for joint employment, revisions to the so-called "quickie election" rule, and defining the employment status of student workers.
3. **Recent Court Case Highlights Limitations Of An "Unlimited" Vacation Policy In California** – A California state court just created a controversy for those employers in the state that provide unlimited vacation policies for their exempt workers, holding that in some such instances you may need to pay out vacation time upon separation. While, contrary to common belief, you are not legally required to provide paid or unpaid vacation to California workers, you should beware of the specific and often complex California laws concerning vacation benefits if you do provide paid vacation.
4. **Washington Expands And Clarifies Paid Family Medical Leave Law** – Although most employers have been distracted by the COVID-19 coronavirus crisis, Washington's governor recently signed into law changes and clarifications to the state Paid Family and Medical Leave (PFML) law that all

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employers will need to know about. Washington's law already provides paid leave benefits to nearly all employees for specific family and medical reasons and has been in effect since January 1, 2020. But while many employers are still learning the mechanisms for reporting and complying with its provisions, all Washington employers will now need to adjust once again to keep up with the changes.

5. **Voters Will Have Say Over California Misclassification Law Come November** – Over a million Californians have said they want a chance to vote on the misclassification law that threatens to upend the gig economy as we know it – and that means that their wish will soon be granted. Thanks to a signature-collecting effort that has already far surpassed the necessary 623,000 signatures needed to place a measure on the ballot, voters in California will have the opportunity to pass a law this November that will exempt certain gig economy workers from the reach of the ABC test and instead ensure they are classified as independent contractors. The ballot measure, known as the "Protect App-Based Drivers & Services Act," would see typical app-based drivers established as contractors regardless of AB 5 or the findings of state regulators if voters agree. Gig economy companies in California – and their workers – are now one step closer to regaining the independence and freedom that separated them from the business-as-usual world to begin with.
6. **Court Revives Philadelphia's Salary History Ban** – A federal appeals court recently 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 a 3rd Circuit Court of Appeals ruling, 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 this ruling and how best to come into compliance?
7. **The First Wave of CCPA Class Action Litigation Is Upon Us** – California's all-inclusive privacy law, the California Consumer Privacy Act (CCPA), which took effect on January 1, 2020, has already been cited in numerous lawsuits. Over this next year, employers are likely to see lawsuits testing the waters of the new statute. For now, the first wave of CCPA lawsuits raise several unsettled questions and serve as an important reminder to implement procedures to bring your business in compliance.
8. **Federal Court Decision Highlights Efficient And Effective Ways To Address Suspected FMLA Misuse** – A recent decision by a New Jersey federal court highlights the importance of thoroughly investigating allegations of suspected Family and Medical Leave Act (FMLA) misuse before taking action against an employee. The decision contains several important takeaways that employers in all jurisdictions can implement to ensure that reports of suspected FMLA misuse are fairly and appropriately addressed.
9. **Colorado Employers Will Soon Face New Wage And Hour Laws** – The Colorado Department of Labor and Employment recently adopted the Colorado Overtime and Minimum Pay Standards Order #36 (COMPS Order), meaning employers need to brace for new wage and hour laws

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related to employee coverage, the minimum salary threshold, and expanded break rights. The new laws, which replace the Colorado Minimum Wage Order #35, will go into effect on March 16, 2020. What are the more significant changes Colorado employers need to be prepare for?

10. **New Colorado Wage Laws Include Posting, Distribution, And Translation Requirements** – We have previously reported about the new wage and hour laws heading to Colorado in the very near future, but there are some compliance requirements contained in the impending law that employers may easily overlook. Although employers must understand and adapt to all aspects of the new legal framework brought about by the Colorado Department of Labor and Employment's new Colorado Overtime and Minimum Pay Standards Order #36 (COMPS Order), you should ensure you pay attention to the COMPS Order's significant new posting, distribution, and translation requirements.
11. **The Ties That Bind: NLRB Division Of Advice Rebukes Union Limitations On Employees' Right to Resign Membership** – A recently released advice memorandum from the National Labor Relations Board's Division of Advice found unlawful a union's attempt to restrict individuals from resigning their union membership. In a July 2019 memorandum, released by the Board on April 14, the Division of Advice found that the Laborers' International Union of North America (LIUNA) violated the National Labor Relations Act when it prohibited employees who authorized automatic dues deduction from resigning from union membership during the life of the agreement.
12. **Does Gig Work Block Unemployment Benefits? Pennsylvania Supreme Court On Verge Of Deciding Issue** – We wrote about this issue several times in 2018, and now we may be about to get answer to a question that could prove critical to the growth — or stagnation n— of the gig work labor pool: does performing gig work in between full-time jobs disqualify a worker from receiving unemployment benefits? The Pennsylvania Supreme Court is about to become the first state high court to decide this issue, and the country waits with bated breath to hear the answer.
13. **Supreme Court Makes It Easier For Federal Workers To Prove Age Discrimination** – In an 8-to-1 decision, the U.S. Supreme Court just made it easier for federal employees and applicants to prove age discrimination by ruling that courts should not apply a heightened causation standard in such cases. By rejecting a "but-for" test in federal worker Age Discrimination in Employment Act (ADEA) claims, the Court restricted federal agencies from considering an employee's or applicant's age with respect to personnel decisions.
14. **Washington Privacy Act Fails To Pass Legislature, But Signs Point To Continued Push In 2021** – For the second year in a row, the Washington legislature failed to pass an ambitious consumer privacy protection bill into law. As we discussed on this blog earlier, the proposed Washington Privacy Act (WPA) was brought by a bipartisan group of Washington legislators that looked to be the most protective consumer privacy act in the country. This year's WPA came on the heels of a similar bill proposed in 2019 that narrowly failed passing into law.

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

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Related People

Samantha Sherwood Bononno
Partner
610.230.2172
Email

Andrew C. Crane
Partner
949.798.2116
Email

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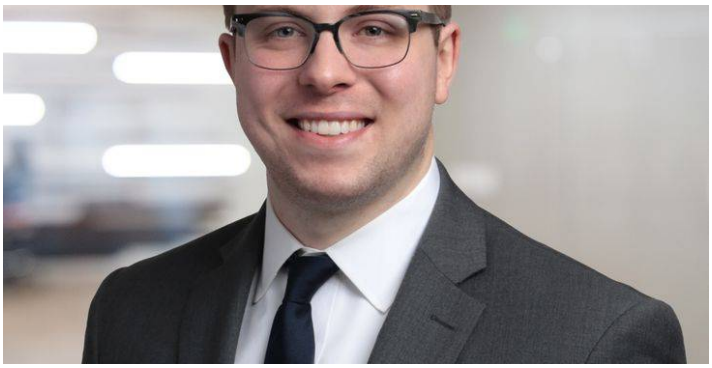

Ryan R. Jones
Associate
206.693.5062
Email

Nicole Kamm
Partner
818.230.4253
Email

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Richard R. Meneghello
Chief Content Officer
503.205.8044
Email

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

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

Tyler T. Rasmussen
Partner
949.798.2163
Email

David C. Roth
Partner
303.218.3647
Email

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Hannah Sweiss
Partner
818.230.4255
Email

Service Focus

Privacy and Cyber

Employee Leaves and Accommodations

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