



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

Insights

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While you have been primarily focused on COVID-19-related matters for the past few months, that doesn't mean 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 face masks, reopening your business, or contact tracing? Here is a summary of the top stories you might have missed over the past month.

1. **Federal Court Blocks Labor Board's New Union Election Rules** – On the eve of their scheduled implementation date, a federal court judge in Washington, D.C. struck down significant portions of the National Labor Relation's Board new union representation procedures – handing a significant victory to unions attempting to keep the current “quickie election” rules in place. While the brief written decision handed down late on May 30 provides few details (but promises to be followed by a full opinion), it appears that challenged aspects of the new rule have been set aside for failure to comply with notice-and-comment rulemaking requirements established within the Administrative Procedure Act (APA). The court did not strike down the entire set of union election rules, however, upholding a portion of them and sending them back to the agency for further consideration in light of her other rulings. This includes a section of rules prolonging a collection of union election deadlines. What do employers need to know about this development?
2. **Employers Get EEO-1 Reporting Reprieve In 2020** – Employers across the country got a bit of good news on May 7 as the federal government announced that the EEO-1 reporting process would be delayed by a year, with the next reporting deadline pushed to March 2021. You are now temporarily spared from having to submit the annual EEO-1 report which requires businesses to submit employment data related to race, ethnicity, gender, and job category. Specifically, your 2019 EEO-1 reports, which we had expected to be due by March 31, 2020 (but which employers could not submit because the portal was not available) are now officially postponed. What do you need to know about this welcome development?
3. **NLRB Upholds Rule Prohibiting Cell Phones In Work Areas – But Does The Decision Help Your Organization?** The National Labor Relations Board found that a beverage manufacturer's rule prohibiting cell phones on the shop floor and work stations did not violate the National Labor Relations Act. The Board's May 20 decision recognized that this rule would potentially infringe on employees' ability to make calls or recordings about workplace issues. On balance, however, it

employees' ability to make calls or recordings about workplace issues. On balance, however, it held that any such infringement was outweighed by the company's legitimate business justifications for the policy. The decision is potentially a big win for manufacturers, but only to the extent they can articulate sufficient safety- or business-related justifications for prohibiting personal cell phones in the workplace.

4. **Labor Board Temporarily Changes Notice Posting Requirement** – The National Labor Relations Board usually requires employers to post on their premises notices of findings made against it by the Board within 14 days. However, the NLRB has temporarily modified this standard rule in order to account for the changing environment. Specifically, the Board recently decided that employers whose facilities are currently closed but have been ordered to post a notice of violations of federal labor law must wait to do so until their offices reopen.
5. **EEOC Supports Employers' Use Of The Work Opportunity Tax Credit** – The Equal Employment Opportunity Commission recently announced plans to issue its first formal opinion letter in over 30 years, confirming that employers can use the Work Opportunity Tax Credit (WOTC) for hiring individuals with disabilities, veterans, and other underrepresented workers without violating federal anti-discrimination laws. The agency said it would like to see more employers take advantage of what it described as the "highly underutilized" tax credit. In a major move to support that objective, the EEOC voted 2-1 to issue an opinion letter formalizing its view that the laws it enforces do not prevent the use of the credit. What do employers need to know about this development?
6. **"Bonus Material" – A Deeper Dive Into The U.S. Department of Labor's Final Regulations on the Fluctuating Workweek** – The U.S Department of Labor's final regulations addressing the Fluctuating Workweek (FWW) method of payment finally, explicitly confirm that you can pay an employee via the FWW method and still pay a bonus, commission, etc. Some of the stated requirements though, carried over from prior administrations and courts, leave areas open for continued discussion.
7. **Massachusetts Again Proposes Amendments To Paid Family and Medical Leave Regulations** – The Massachusetts Department of Family and Medical Leave (DFML) recently released proposed amendments to the Commonwealth's Paid Family and Medical Leave regulations, marking yet another proposed change to the state's nascent paid leave program, expected to begin in January 2021. According to DFML, the regulations are intended to clarify procedures, practices, and policies in the administrative and enforcement of the leave law. Though hearings have yet to be scheduled, they will likely be held via video conference due to social distancing requirements and the current state of emergency. Employers should review closely as any changes are likely to impact them and their employees.
8. **"Ban The Box" Law To Take Effect In Suffolk County** – Suffolk County, New York will soon follow other state and local governments that have enacted "ban the box" legislation focusing on an applicant's qualifications for a position prior to considering the applicant's possible conviction history. The Suffolk County legislature recently passed legislation restricting employers from asking applicants about their criminal histories in job applications, effective August 25, 2020.

9. **Off-Duty Facebook Post Grounds For Termination Of Public Employee, Pennsylvania Supreme Court Rules** – (Public) employers rejoice! In a unanimous decision, the Pennsylvania Supreme Court just ruled that PennDOT did not violate an ex-employee's free speech rights by firing her over a Facebook rant in which the ex-employee said she "don't give a flying s*** about those babies and [] will gladly smash into a school bus." This case should serve as a beacon for Pennsylvania public employers, navigating the often-murky waters of employee social media use.
10. **CCPA 2.0 May Be Heading to California's November 2020 Ballot: What Employers Need to Know** – In 2018, the California legislature enacted the California Consumer Privacy Act, which went into effect on January 1, 2020 but was amended six times before it even took effect. Concerned that amendments have weakened the CCPA and that consumers still do not understand how their personal information is being used by businesses, proponents of the CCPA have proposed a ballot initiative for the November 2020 ballot titled the California Privacy Rights Act of 2020 ("CPRA")—colloquially known as CCPA 2.0. The CPRA currently has over 930,000 signatures which are pending signature verification. The California Secretary of State needs to confirm 623,212 valid signatures for the initiative to qualify for the November 2020 ballot. The CPRA can continue to be circulated for additional signatures until June 15, 2020. While a limited sampling of signatures thus far shows only 75% of signatures are actually valid, this percentage would still be sufficient to meet the threshold to get the CPRA on this fall's ballot.
11. **FLSA Commissioned-Employee 7(i) Exemption – USDOL Clarifications Go Straight to Final** – The USDOL's Wage and Hour Division kicked off the week with an all-in-one maneuver. Approximately a year ago, the FLSA's 7(i) overtime exemption appeared on the regulatory agenda. Without any further notice, the USDOL suddenly moved on this item, and deftly tackled decades of confusion regarding which establishments might have employees meeting this exemption – without revising its position on the actual analysis.
12. **Massachusetts Court Has Bad "Prong B" News For Gig Businesses** – A federal court judge in Massachusetts just rejected Lyft's attempt to escape the reach of Prong B of the ABC Test, indicating it was "likely" that its rideshare drivers are employees and not independent contractors. The news wasn't great for Lyft, but more importantly, the May 22 decision doesn't portend well for gig economy companies trying to fit their traditional business model into the strict confines of the ABC Test. For those operating in states where misclassification conflicts are resolved using the test – we're looking at you, California – this development isn't the best news, and is definitely worth tracking.
13. **New York Employers Must Comply With Updated Wage Notice Requirements** – New York businesses who employ home healthcare workers or employees covered by the state prevailing wage laws must prepare to comply with changes to the state's wage notice law. As part of the state budget, lawmakers amended the Wage Theft Prevention Act (WTPA) to impose new requirements regarding the wage notices and paystubs that these employers must provide to their employees. Impacted businesses must be aware of the changes and take steps to comply with new obligations.

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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