June 2020: The Top 21 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 21 stories from last month that all employers need to know about:

1. **"No Contest": Supreme Court Finds Title VII Protects LGBTQ Individuals From Workplace Discrimination** – In a 6-to-3 vote today, the U.S. Supreme Court ruled on June 15 that workplace discrimination because of an individual's sexual orientation or gender identity — including being transgender — is unlawful discrimination "because of sex" under Title VII of the Civil Rights Act of 1964. The basis for the Court's ruling in *Bostock v. Clayton County*was summarized by Justice Gorsuch in his majority opinion: "An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." What do employers need to know about this historic decision? (read more here)
2. **SCOTUS Preserves DACA Program, Keeping Workplaces Intact For Now** – By a 5-4 vote, the U.S. Supreme Court ruled on June 18 the Trump administration did not provide adequate and appropriate justification to terminate the Deferred Action for Childhood Arrivals (DACA) program, preserving the ability of approximately 700,000 individuals – sometimes known as "Dreamers" – to remain in the country and in American workforces. Considering the decision, many DACA recipients will be able to apply to continue to extend their employment authorization or pursue additional educational opportunities (read more here).
3. **EEOC Warns Against Age Discrimination And Other Workplace Concerns During Back-To-Business Push** – In its latest round of updates to a series of COVID-19 Frequently Asked Questions, the Equal Employment Opportunity Commission warned employers they cannot prevent older workers from returning to work even if they want to protect such workers from the effects of COVID-19. The updates also provide additional guidance regarding ADA reasonable accommodations, preventing workplace harassment in a remote work environment, and addressing other workplace discrimination concerns. What do employers need to know about this latest agency guidance? (read more here)

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4. **A Second Bite At The Apple: EEOC Releases Plan For New Wellness Program Rule** – Is the EEOC finally ready to replace its invalidated rule allowing employers to incentivize participation in employer-sponsored wellness programs? Just maybe. On June 11, the EEOC voted 2-1 to send a notice of proposed rulemaking to the Office of Management and Budget (OMB). Despite the vote, the EEOC has not yet set a timeframe for sending the proposed new rule to the White House's budget office. Once the OMB receives the proposed new rule from the EEOC – and assuming that it is approved – the proposed new rule will then be shared publicly for comment. What do employers need to know about this latest development? (read more here)
5. **Key Takeaways From OSHA's New FAQs About Face Coverings In The Workplace** – The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) published a series of frequently asked questions and answersregarding the use of cloth face coverings, surgical masks, and respirators in the workplace. While much of the document summarizes concepts and principles that most employers should know by now, there are at least three important clarifying points that deserve your attention. What do employers need to know about this latest guidance? (read more here)
6. **NLRB Upholds Ban On Use Of Company Email For Union Organizing** – The National Labor Relations Board took the opportunity to double down on its recent reversal of the *Purple Communications* doctrine, holding that T-Mobile USA did not violate federal labor law by implementing a rule barring call center employees from using the company's email system to discuss union organizing activities. The decision represents another step away from Board doctrine that had previously upheld the right of workers to utilize an employer's electronic communications systems to solicit co-workers for organizing purposes during non-working time (read more here).
7. **Paycheck Protection Program Flexibility Act Provides Employers With More Options** –After much discussion and debate, Congress passed the Paycheck Protection Program Flexibility Act, which will implement substantial changes to the Paycheck Protection Program (PPP). President Trump signed the bill into law on June 5. Among other changes, the bill extends the time that businesses have to spend PPP loan funds and alters the forgiveness rules, including a reduction in the percentage of the loans that must be used for payroll purposes (read more here).
8. **NLRB Will No Longer Exercise Jurisdiction Over Religious Educational Institutions** – In a major reversal of a 2014 Obama-era precedent, the National Labor Relations Board ruled that it will no longer assert jurisdiction over *bona fide* religiously affiliated schools. This decision is of enormous significance for religiously affiliated colleges and universities which have faced union organizing in recent years – among their contingent faculty in particular. Such institutions will no longer have to be concerned about union organizing if they meet the new bright-line test established by the Board. What do you need to know about the June 10 decision in *Bethany College* (369 NLRB No. 98 (2020))? (read more here)
9. **California Initiative To Amend State Privacy Law Qualifies For November Ballot** – California's landmark privacy law could soon be amended with updated compliance burdens for employers – and it will be up to voters statewide to determine whether these changes take effect. An

amendment to the California Consumer Privacy Act(CCPA), titled as the California Privacy Rights Act (CPRA), has just qualified to appear on the November 3, 2020 statewide ballot. If voters approve the measure, the CPRA would require covered businesses to implement policies and procedures to provide consumers—including employees—with certain privacy rights. What do California employers need to know about this development to prepare for a possible revision to their compliance obligations? (read more here)

10. **Just The Beginning? OSHA Issues First COVID-19-Related Citation** – A nursing home in Georgia has received the first citation issued by the Occupational Safety and Health Administration (OSHA) related to the COVID-19 outbreak. The citation alleges six nursing home employees were hospitalized as a result of COVID-19 that was contracted while at work and the nursing home failed to report the hospitalizations to OSHA within the statutorily mandated time period. The citation alleges the employees were hospitalized around April 19, but the nursing home did not report the hospitalization to OSHA until May 5. OSHA has proposed a $6,500 fine for the alleged violation and classified the violation as "other than serious" (read more here).
11. **Colorado Employers Face Two Rounds Of New Paid Sick Leave Requirements** – Colorado now joins the growing number of states requiring most employers to provide paid sick leave – not only extending COVID-19-related sick leave protections to take effect immediately, but also creating a traditional paid sick leave requirement beginning January 1, 2021. What do Colorado employers need to know about the Healthy Families and Workplaces Act? (read more here)
12. **Maryland Employers To Soon Face Mandatory Notice Requirements Before Reductions In Force** – Thanks to an impending new law, Maryland employers faced with large employee reductions will no longer be able to simply determine on their own whether to follow the state's voluntary advance notification guidelines. Beginning on October 1, 2020, the state law will mandatethat certain employers provide advance notice to impacted employees and others ahead of such reductions in force. Because these new state requirements include lower thresholds and other provisions different and broader from the federal WARN Act requirements, they are likely to affect many Maryland employers. What do employers need to know about these significant changes to Maryland's mini-WARN Act? (read more here)
13. **CDC Issues New Testing Strategy For High-Density Critical Infrastructure Workplaces** – Noting that outbreaks at food processing facilities and other high-density critical infrastructure businesses have raised unique questions that require additional guidance, the Centers for Disease Control and Prevention (CDC) just released a new testing strategyfor those workplaces to augment existing testing guidance and measures aimed at reducing further transmission of COVID-19. The CDC notes that employers in these areas "have an obligation to manage the continuation of work in a way that best protects the health of their workers and the general public." The optional strategy unveiled by the agency involves employers conducting a risk assessment based on multiple factors that may impact the transmission of the virus within the workplace, including the unique characteristics of the workplace, the workforce, and the results of its own investigation and contact tracing (read more here).

14. **Total (Security) Recall: Labor Board Returns To Historical Precedent And Allows Discipline Of Newly Organized Union Members** – The National Labor Relations Board restored its longstanding precedent involving an employer's duty to bargain over discipline in a newly certified bargaining unit, ruling that employers have no obligation to negotiate with newly formed unions over disciplining workers before the initial collective bargaining agreement is finalized. The June 23 decision in *800 River Road Operating Company, LLC d/b/a CareOne at New Milford*marked a return to 80 years of established NLRB precedent. With Fisher Phillips attorneys representing CareOne at New Milford, the NLRB overturned *Total Security Management Illinois 1, LLC*, a controversial decision from the Obama era. In its 3-0 decision, the NLRB made clear employers have no statutory obligation to bargain before imposing discretionary discipline. In doing so, it relieved employers of a great deal of uncertainty surrounding their ability to impose "serious discipline" — including suspension, demotion, or discharge — under their existing disciplinary policies (read more here).
15. **Trump Proclamation Expands Restrictions On Legal Immigration** – President Trump issued a Proclamation to further restrict legal immigration, preventing employers from bringing new H-1B, H-2B, L-1A, L-1B, and J-1 workers from abroad into the United States. Effective June 24, 2020 (12:01am EDT), this Proclamation will bar new temporary visas for foreign workers and their dependents through 2020 and potentially longer. The Proclamation also immediately extends the prior suspension of immigrant visas for those applying from abroad for the remainder of 2020. What do employers need to know about this development? (read more here)
16. **Labor Department Announces Double Damages Reprieve For Employers** – The U.S. Department of Labor announcedthat, effective July 1, it will not seek liquidated damages in wage and hour investigations against employers as a matter of course. This is a welcome development for those employers otherwise facing the prospect of a double damages finding in the pre-litigation stages of an FLSA dispute with the federal agency (read more here).
17. **EEOC Clarifies That Employers Cannot Require COVID-19 Antibody Tests** – The EEOC further revised its guidance to employersto clarify that it does not deem workplace antibody testing lawful under the Americans with Disabilities Act (ADA). COVID-19 antibody tests have recently been touted as a way to help prevent infection spread in the workplace, as they could be incredibly useful to employers – if deemed effective and reliable. Unfortunately, we do not yet know if or the extent to which the presence of the relevant antibody means that an individual is completely or partially immune to future COVID-19 infection. While antibody tests have a vital role in analyzing the spread of and our response to COVID-19, so far this testing has not been determined to be a useful mass screening tool for employers – which prompted the EEOC to clarify its stance on the matter (read more here).
18. **Missouri Raises Bar For Pleading And Proving Punitive Damages, Including In Employment Claims** – Just as the 2020 legislative session wrapped up, the Missouri legislature passed a bill increasing the standards for pleading and making it harder to prove claims for punitive damages – especially in employment cases. S.B. 591 is expected to be signed by Governor Parsons, and, if

so, will apply to causes of action filed after August 28, 2020. This new law will be welcome news for employers. What do you need to know about the impending changes? (read more here)

19. **Chicago Enacts COVID-19 Anti-Retaliation Measures** – The City of Chicago has gone a step further than most other jurisdictions to protect employees who have encountered some of the devastating aspects of COVID-19. Adopting portions of the Chicago Minimum Wage and Paid Sick Leave Ordinance, the City just enacted new requirements prohibiting retaliation against a significant number of employees. The new ordinance – with new provisions effective immediately – requires employers to be cognizant of new developments related to COVID-19 and vigilant about their employment practices. The ramifications employers may face when found in violation of the new provision are significant and should give you pause before taking any adverse employment action. What do Illinois employers need to know about this new development? (read more here)
20. **San Francisco Passes Back-To-Work Emergency Ordinance Mandating Reemployment For Certain Workers** – The San Francisco Board of Supervisors passed the Back-to-Work Emergency Ordinance aimed at guaranteeing reemployment to certain workers who were laid off by covered employers due to the COVID-19 pandemic. This Ordinance creates a temporary right to reemployment when certain larger employers seek to hire workers for the same or substantially similar positions previously held by other workers who were recently laid off. This Ordinance also prohibits covered employers from discriminating against those laid-off workers with family care hardships and allows them to request reasonable accommodations for the hardships. The Ordinance, approved on June 23, will become effective immediately upon the Mayor's signature and will expire upon the 61st day following enactment unless extended. What do San Francisco employers need to know about this new obligation? (read more here)
21. **Seattle Approves Nation's First Hazard Pay System For Gig Workers** – Gig economy workers performing food delivery services in Seattle will receive an extra $2.50 per delivery during the COVID-19 pandemic thanks to a first-in-the-nation hazard pay law unanimously passed by the City Council on Monday. The bill now heads to Mayor Jenny Durkan's desk; she has indicated she will sign it into law this week. What do gig economy businesses need to know about this groundbreaking development? (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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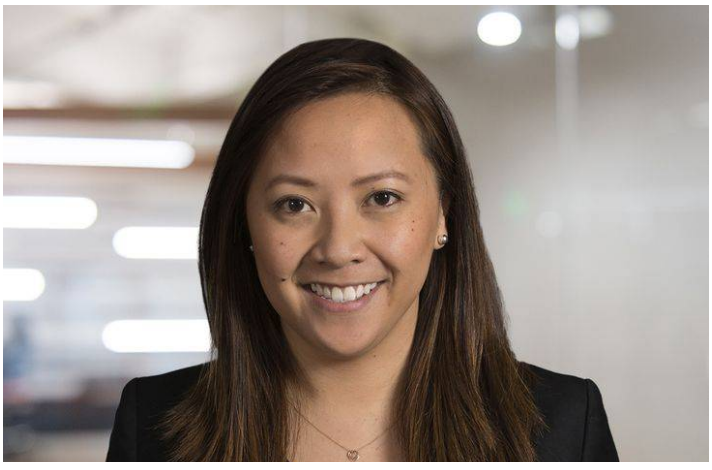

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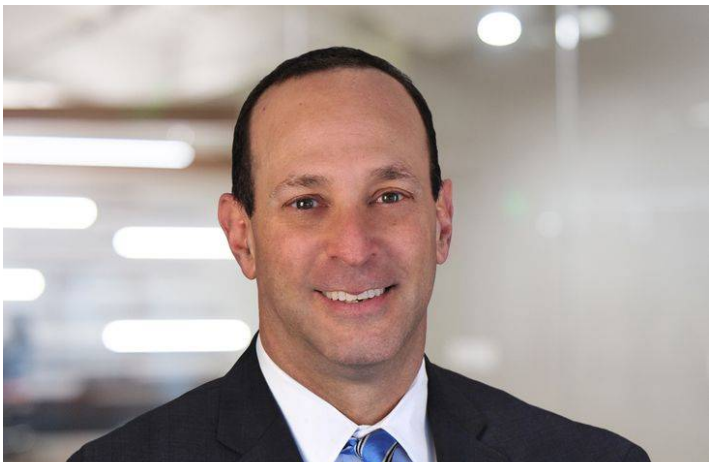

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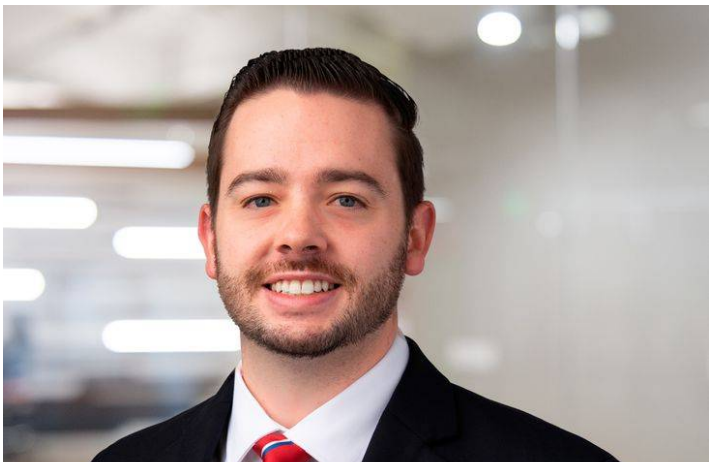

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