Insights, News & Events

JULY 2020: THE TOP 17 LABOR AND EMPLOYMENT LAW STORIES

Publication
Jul 31, 2020

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

1. **SCOTUS Upholds Broad Standard For Permitting Religious Exemption From Employment Discrimination Claims** – By a 7-to-2 vote, the U.S. Supreme Court issued an important and expansive ruling for religious institutions on July 8, holding that the "ministerial exception" primarily requires an inquiry into whether an employee carries out important religious functions for its religious employer. The ministerial exception allows a religious employer to use an employee's status as a "minister" to invoke the First Amendment's protections against government interference in the employer's selection of its employees. As a result of the ruling in the consolidated cases of *Our Lady of Guadalupe School v. Morrisey-Berru* and *St. James School v. Biel*, courts are barred from adjudicating employment discrimination claims brought by an employee who performed certain religious tasks for her religious employer. In light of this decision, religious employers should assess their employees' positions and

Related People

Sheila M. Abron
Partner
803.740.7676

Craig R. Annunziata
Regional Managing Partner
312.346.8061

ensure that job descriptions, handbooks, and contracts are clear regarding the important religious functions that employees perform, the behaviors that they model, and that their expected teachings and other responsibilities in carrying out the faith are clearly outlined and consistently evaluated and enforced (read more here).

2. **SCOTUS Rejects Review Of Salary History Defense To Pay Equity Claims** – The U.S. Supreme Court declined to weigh in on the question of whether employers can use prior salary history as a defense in equal pay claims, leaving an open question around the country about whether such a justification is a viable option. The July 2 action by the SCOTUS leaves intact the 9th Circuit's ruling rejecting such a defense, but also lets stand other rulings that seemingly permit employers to employ this reasoning in Equal Pay Act claims. So where do employers stand? (read more here).

3. **CDC Now Discourages Test-Based Strategy And Modifies Symptom-Based Strategy** – The Centers for Disease Control and Prevention just changed its guidance for discontinuing transmission-based precautions and disposition of patients with COVID-19 for both healthcareand non-healthcare settings. Generally, the guidance updated on July 20 reflects a better understanding of transmission and those most at risk for severe illness. Specifically, the CDC reports findings that people with mild to moderate COVID-19 remain infectious no longer than 10 days after their symptoms began, and those with more severe illness or those who are severely immunocompromised remain infectious no longer than 20 days after their symptoms began. Many employers and employees will view these changes as good news as the CDC gathers new information to help combat the spread of COVID-19. What do you need to know about this development for your own workplace? (read more here)

4. **Sexist, Racist, Or Abusive Conduct By Employees Engaged In Otherwise Protected Activities** – In a critical reversal of Board precedent, the NLRB just unanimously held that employees engaging in abusive conduct in the course of protected concerted activities are not automatically shielded from discipline under the National Labor Relations Act (NLRA). This welcomed decision will make it less challenging for employers to terminate employees who engage in abusive, sexist, and racist behavior in the course of protected activity, including

Suzanne K. Bogdan

Partner

954.847.4705

Myra K. Creighton

Partner

404.240.4285

Patrick W. Dennison

Partner

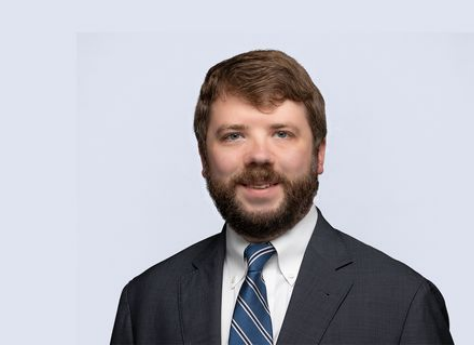
412.822.6627

union activity. What do employers need to know about this significant ruling? (read more here).

5. **Virginia Creates Nation's First Mandatory COVID-19 Workplace Safety Rules Effective July 27 – Look For Other States To Follow Suit** – Virginia just adopted the nation's first enforceable regulatory mandate regarding COVID-19 safety measures in the workplace. While the emergency standard adopted by the Virginia Safety and Health Code Board will only be applicable to and enforceable against employers in Virginia, it sets the groundwork for other state plan states to adopt similar enforcement measures, including California, North Carolina, Oregon, and Michigan. What do Virginia employers – and employers around the country – need to know about this development? (read more here)..

6. **Time To Reassess International Data Transfers After Court Declares EU-U.S. Privacy Shield Invalid: A 4-Step Action Plan** – The Court of Justice of the European Union just ruled that an important data protection scheme established between the European Union and the United States is invalid, calling into question many aspects of important data transfers carried out by private businesses in America. In what is being referred to as the "*Schrems II*" decision, the July 16 decision invalidating the EU-U.S. Privacy Shield reinforces the importance of data protection. It raises important questions as to the future of international data flows and use of data transfer mechanisms between the EU and companies around the globe, but especially those in the U.S. The immediate result: more than 5,300 companies who currently rely on the EU-U.S. Privacy Shield Framework for international data transfers must reassess their data transfer mechanisms. Below you will find a summary of the situation and a four-step action plan to address immediate concerns (read more here).

7. **Supreme Court Upholds Rules Expanding Exemptions To ACA's Contraceptive Mandate** – The Supreme Court just upheld two Trump-era rules expanding religious and moral exemptions to the Affordable Care Act's (ACA) contraceptive mandate. The July 8 decision in *Little Sisters of the Poor v. Pennsylvania*is just the latest in a long line of challenges relating to the contraceptive mandate and the third time in six years that the Supreme Court has ruled on its scope. In brief, this latest dispute centered on the Trump administration's final rules issued



Benjamin Dudek

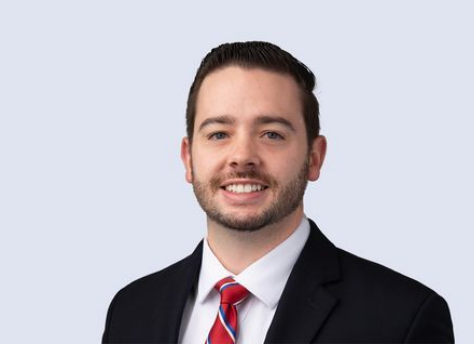
Partner

803.255.0000

Scott Fanning

Partner

312.346.8061



Nicholas S. Hulse

Partner

704.778.4183

in 2018 granting broader exemptions from the contraceptive mandate to for-profit and nonprofit employers that had sincerely held religious beliefs or moral objections to offering contraception coverage in their group health plans (read more here).

8. **What Employers Need To Know About DOL's New Guidance On Return-To-Work, Remote Work, And Wage And Hour Issues** – The Department of Labor issued several sets of new guidance materials to employers on July 20 as return-to-work, remote work, and wage and hour issues remain hot – and sometimes confusing – topics. The agency recognizes that the intersection between the Families First Coronavirus Response Act (FFCRA), the Family and Medical Leave Act (FMLA), and the Fair Labor Standards Act (FLSA) can be a challenging place for compliance purposes, and therefore compiled some additional materials to aid you in navigating this journey. We've reviewed the additional FAQs added by the Wage and Hour Division discussing the FLSA, the FFCRA, and the FMLA, and provided summaries of the significant developments below. What do employers need to know about updated compliance priorities when it comes to return-to-work, remote work, and wage and hour issues? (read more here).

9. **What You Need To Know About California Governor's COVID-19 Employer Playbook** – California Governor Gavin Newsom just released a 32-page COVID-19 Employer Playbookproviding additional guidance for California employers related to COVID-19 and safe re-opening. Though the July 24 Playbook provides a helpful overview for employers regarding steps to take to ensure a safe workplace, like other guidance issued since the start of the pandemic, there are areas that are still unclear and will likely require further guidance. Here are the Playbook highlights you need to know about (read more here).

10. **Illinois Releases Model Mandatory Sexual Harassment Training For Employers** – After a long wait, the Illinois Department of Human Rights (IDHR) recently published its model sexual harassment prevention training. This model training relates to the recent amendments and expansions of the Illinois Human Rights Act (IHRA) — the state's anti-discrimination and anti-harassment statute. These amendments put into place strict anti-harassment policy and training requirements for employers.

Nicole Kamm

Partner

818.230.4253

Lorie Maring

Partner

404.240.4225

Service Focus

Consumer Privacy Team

Counseling and Advice

Employee Benefits and Tax

Employee Leaves and Accommodations

Employment Discrimination and Harassment

Government Contracting, Compliance, and Reporting

International

Labor Relations

Accordingly, you need to be ready to ensure that your anti-harassment policies and training complies with the IHRA's new requirements and IDHR's model training (read more here).

11. **Illinois Issues Guidance For Employers' Requirement To Report Adverse Judgments And Administrative Rulings** – After state lawmakers passed sweeping expansions to the Illinois Human Rights Act (IHRA) in August 2019, employers have been left in the dark as to how the state would interpret and enforce the new requirement forcing employers to report adverse judgments or administrative rulings regarding unlawful discrimination to the Illinois Department of Human Rights (IDHR). This has been particularly frustrating given that the change went into effect on July 1, 2020. Fortunately, the IDHR just issued guidance for these requirements. What do Illinois employers need to know in order be ready to comply with their reporting obligations under the IHRA? (read more here).

12. **5 Most Likely FMLA Changes That Could Be On The Horizon, Per DOL Information Request** – The Department of Labor just provided employers a sign that it might be open to altering the Family and Medical Leave Act regulations and guidance, perhaps resolving some of the more difficult aspects of the law that cause the most administrative and implementation headaches. In a July 16 release, the DOL published a request for information seeking public input about the way it interprets and implements the federal leave law so it can "provide a foundation for examining the effectiveness of the current regulations in meeting the statutory objectives of the FMLA." What are the top five changes that could be on the horizon? (read more here).

13. **Transportation Arbitration Agreements Ruled Enforceable Under New Jersey's Arbitration Act Despite U.S. Supreme Court Ruling** – The New Jersey Supreme Court just ruled that state law ensures the enforceability of arbitration agreements with transportation workers despite a recent U.S. Supreme Court case that struck down such an agreement under federal law. The July 14 decision in *Arafa v. Health Express Corp.*, which sheds new light on the contours of the Supreme Court's *New Prime v. Oliveira*decision, is a welcome development for New Jersey employers – and is perhaps a sign of things to come for businesses across the country. What do you

Litigation and Trials

Pay Equity and Transparency

Privacy and Cyber

Wage and Hour

Workplace Safety

Industry Focus

Education

Hospitality

need to know about this latest development? (read more here).

14. **Employee Privacy Concerns Spurs Proposed Changes To Union Election Rules** – The National Labor Relations Board has just proposed new union election rules that would reduce the information employers must provide to unions prior to elections and allowing absentee voting by workers on military leave. The July 28 proposal is the third rule the Board has proposed during the Trump administration impacting elections of bargaining representatives. What do employers need to know about this proposal? (read more here).

15. **Gig Economy Companies May Soon Get Benefit Of Federal Misclassification Rule** – The formal regulatory notice released on July 1is so short and sterile that the average gig economy business could be forgiven for ignoring it: "The Department of Labor is proposing a regulation for determining independent contractor status under the Fair Labor Standards Act." But the implications are immense. Given the manner in which the current administration has treated the misclassification question, the announcement seems to be a signal that we will soon see a federal regulation that will provide a flexible standard permitting typical gig economy businesses to classify their workers as contractors under federal law. And according to Bloomberg Law's Ben Penn, the Department of Labor will aim to fast-track the rule so that it is completed by year's end, insulating the rule from the possibility that a new administration voted into the White House this November could quickly reverse course. What do gig economy businesses need to know about this interesting development? (read more here).

16. **South Carolina Passes New Lactation Break Law** – Governor Henry McMaster recently signed the South Carolina Lactation Support Act into law, soon requiring all employers in South Carolina to make reasonable efforts to provide workers with reasonable break time and space to express breast milk at work. What do employers need to know about this new requirement? (read more here).

17. **OFCCP Says TRICARE Providers Are Independent From Affirmative Action Obligations** – Just in time for Independence Day, the government agency overseeing affirmative action requirements for federal contractors declared that healthcare providers who participate in

TRICARE – the federal health care program providing benefits to uniformed service members, retirees and their families – are "independent" from its jurisdiction. The final rulereleased by the Office of Federal Contract Compliance Programs (OFCCP) on July 2 establishes a national interest exemption from Executive Order 11246 (E.O. 11246), Section 503 of the Rehabilitation Act of 1973 (Section 503), and the Vietnam Era Veterans' Readjustment Action of 1974 (VEVRAA) for those health care providers with agreements to furnish medical services and supplies to individuals participating in TRICARE. Thus, long-awaited regulations make clear that hospitals whose only "federal contract" is the acceptance of the military healthcare insurance program are not subject to the requirements or the enforcement of the OFCCP regulations (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.