October 2020: The Top 11 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 11 stories from last month that all employers need to know about:

1. **CDC's Latest COVID-19 Guidance Complicates 6-15-48 Contact Tracing Procedures For Employers** – New COVID-19 contact tracing procedures released by the federal government on October 21 have expanded the category of individuals who are deemed to be in close contact with each other – and will complicate the already difficult task faced by employers when trying to maintain a safe workplace environment. The updated guidance now indicates that workers should be considered to be at risk of contracting the novel coronavirus if they were within six feet of an infected individual for a total of 15 minutes or more over a 24-hour period during the 48 hours before the infected individual exhibited symptoms or, if asymptomatic, 48 hours before the COVID-19 test was administered, even if the interactions that lead to a cumulative total of 15 minutes were brief and spread out over that time. What do employers need to know about this new standard, and more importantly what do you need to change about your workplace practices? (read more here)
2. **What Employers Need To Know About SCOTUS Nominee Amy Coney Barrett** – Amy Coney Barrett officially filled the empty seat on the Supreme Court bench on October 27, filling the vacancy caused by Justice Ruth Bader Ginsburg's death. Her appointment will have a long-lasting impact on the future of the SCOTUS, cementing a six-Justice majority of conservative jurists. There is a great deal of emotion and controversy surrounding this selection, but employers may still be curious about how Barrett would treat workplace law cases that come before her if she is elevated to the Supreme Court. Similar to the way we examined the nominations of Justice Sonia Sotomayor in 2009, Justice Elena Kagan in 2010, Justice Neil Gorsuch in 2017, and Justice Brett Kavanaugh in 2018, we now turn our attention to Judge Barrett (read more here).

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3. **10th Circuit: ADA Accommodation Claims Do Not Need Adverse Employment Actions To Succeed** – To prove that an employer failed to accommodate an employee's disability in violation of the Americans With Disabilities Act, an employee alleging disability bias does not need to show that the employer fired them or took a similar adverse employment action, the 10th Circuit Court of Appeals opined on October 28. The issue in *Exby-Stolley v. Bd. of Cty. Comm'rs* – whether an adverse employment action is required to maintain an ADA claim – has split the appeals courts across the country and may require final resolution by the Supreme Court. For now, though, employers in Colorado, Kansas, New Mexico, and other nearby states will need to be extra cautious when it comes to ADA compliance efforts due to this decision (read more here).
4. **OSHA (Again) Publishes New FAQs On Reporting Coronavirus In-Patient Hospitalizations** – The U.S. Occupational Safety and Health Administration (OSHA) published its newest series of answers to its COVID-19 Frequently Asked Questions (FAQs)addressing when an employer must report to OSHA an employee's hospitalization as a result of contracting COVID-19 at work. Why is this update important? Mainly because employers have been confused by OSHA's reporting requirements for COVID-19 cases since the pandemic began. To be blunt, OSHA's explanations have been extremely confusing. Indeed, OSHA published FAQs on its website on July 15 attempting to interpret the hospitalization reporting requirement of 29 CFR 1904.39(b)(6). Apparently, the guidance created so much confusion for employers that OSHA removed the FAQs from its website without explanation. But thankfully, the struggle to understand the hospitalization reporting requirements for work-related COVID-19 cases is over … for now. Here's what employers need to know about OSHA's newest interpretation of an employer's reporting obligations (read more here).
5. **California Appeals Court Orders Rideshare Drivers To Be Classified As Employees** – Rideshare companies in California have now been ordered by an appeals court to reclassify their drivers as employees, threatening to upend the very foundation of the gig economy business model that offers flexibility and freedom to workers and businesses alike. The October 22 ruling by the California Court of Appeal upholds the injunction granted several months ago by a state court judge in San Francisco against the two biggest ridesharing companies in the country. But once again there is a silver lining to this development that provides a glimpse of hope for these businesses and gig economy companies in general – the order will not go into effect immediately, meaning that a ballot measure that will be decided on Election Day could permit their business models to survive despite the judicial setback (read more here).
6. **Did Trump's COVID-19 Case Need To Be Reported To OSHA? What Employers Can Learn From President's Illness** – President Donald Trump's October hospitalization at the Walter Reed Medical Center captured the American public's attention, especially given the potential implications with the impending election. But for human resources and safety professionals, the news of the president's positive COVID-19 diagnosis and a subsequent hospitalization raised questions unrelated to the election: namely, whether his illness is considered "work-related," and if so, how would it be treated under the Occupational Safety and Health Administration's (OSHA) recordability and reporting laws. What can this most high-profile case of COVID-19 teach employers about mandatory safety reporting obligations? (read more here)

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7. **California AG Proposes Further Revisions To State Privacy Law Regulations** – The California Attorney General just proposed a third set of modifications to the regulations implementing the state's landmark privacy law. The regulations for the California Consumer Privacy Act (the CCPA) had previously gone into effect in August 2020, but the proposed modifications unveiled on October 12 would change and clarify certain requirements related to notice provisions and methods for opting in and opting out of the sale of personal information and verifying authorized agents (read more here).
8. **CDC Updates COVID-19 Testing Guidance For Employees And Students** – The Centers for Disease Control and Prevention (CDC) recently released updated guidance on COVID-19 testing protocols for K-12 schools, making clear that the Equal Employment Opportunity Commission (EEOC) permits schools to implement required testing policies for their employees. However, the October 13 additions to the CDC's published guidance suggests limits on how testing policies should be applied to students. Although CDC guidance is developed with public and charter schools in mind, private schools may also find these developments helpful (read more here).
9. **Keep Calm And Carry On: What Michigan Employers Should Do After State Supreme Court Invalidated Governor's COVID-19 Orders** – The Michigan Supreme Court issued a bombshell opinion on October 2 invalidating all of Governor Whitmer's executive orders since April 30, 2020, including those covering workplace safety standards, unemployment benefits, and the mask mandate. Obviously, this opinion has caused significant confusion among Michigan businesses as to what they can and should do now. This is especially true since it is currently unclear whether the opinion became effective immediately (i.e., the executive orders officially invalidated). This alert addresses what is being done by the Michigan government to fill the void caused by the opinion and what employers should do in the meantime (read more here).
10. **Michigan Health And Safety Agencies Institute Stopgap COVID-19 Regulations** – Soon after the Supreme Court's decision, two Michigan administrative agency directors issued emergency regulations to fill in for Governor Whitmer's now-invalidated COVID-19 executive orders. The emergency regulations largely mirror Governor Whitmer's now-invalidated mask mandate, workplace protections, employee protections, and "Safe Start" executive orders. This article addresses what the two emergency regulations cover, as well as how employers should respond (read more here).
11. **New Michigan COVID-19 Laws Should Prod Employers To Follow Workplace Safety Rules** – Michigan just passed four new COVID-19 bills touching on workplace safety, employee protections, and legal immunity for businesses – and employers will need to be sure to stay on top of state rules if they want to avoid liability or safety concerns. The bills, passed on October 21, were the result of a compromise between Governor Whitmer and the Republican-held state legislature. In general, the bills incentivize Michigan employers to maintain similar workplace protections as laid out in Governor Whitmer's now-invalid executive orders and MIOSHA's recently enacted emergency rules. This article addresses what Michigan employers should do in light of each of the new laws (read more here).

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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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