The Top 20 Non-COVID Workplace Law Stories Of 2020

Insights
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That this past year was the most challenging year in your professional life is an almost certainty. You were forced to learn entirely new statutory schemes, absorb new local health directives on a near-daily basis, create a new system for performing work and managing your workforce, and adapt your systems to ensure you provided a safe working environment at all times. But while you were busy doing several jobs at once, you may have neglected to keep up with all of the non-COVID-19 news that arose in 2020. And, unfortunately, there were plenty of labor and employment law developments that cropped up this past year.

The good news? Fisher Phillips was once again paying attention to all the workplace law news that you might have missed. Here are the top 20 non-COVID-19 labor and employment law developments from 2020 that you need to know about, each linked to a robust summary developed by our attorneys, and each containing plenty of practical guidance and suggestions. To ensure you remain in the know for 2021, feel free to quickly sign up for our Legal Alerts before you dive into this must-read collection.

1. **The Incoming Biden Administration Will Lead To Changes At Workplaces Across The Country**
   Without a doubt, the biggest non-COVID-19 workplace law development in 2020 is the one that will soon have an immediate and dramatic impact for all businesses across the country. We're referring, of course, to the election of Joe Biden as our nation's 46th president in November. We spent some time gathering our firm's collective wisdom on what the next administration will mean for workplace law and the nation's employers, and provided predictions in 11 key areas – ranging from wage and hour law to the future of work to pay equity.

   Beyond this specific analysis – which proved to be the most popular non-pandemic alert we produced all year – we also prepared deeper dives for what the new administration will mean for various industries and specific services. Check out our summaries related to what the Biden administration will mean for workplace safety and OSHA, at the federal labor board for both unionized and non-unionized workplaces, for employment-related immigration matters, for healthcare employers, for mine operators, and for gig economy businesses.

2. **Supreme Court Finds Title VII Protects LGBTQ Individuals From Workplace Discrimination**
   In a 6-to-3 vote, 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." We crafted a detailed summary about what employers need to know about this historic decision.

3. **New Federal Joint Employer Rules Faced Rollercoaster Year In 2020**

In a move that frustrated employers and ushered in a wave of confusion, a New York federal court judge struck down critical portions of the Labor Department's new joint employer rule that went into effect just a few months prior. Concluding that the agency's rule has "major flaws," U.S. District Judge Gregory Woods decided on September 8 that the rule did not comport with the Fair Labor Standards Act. The ruling tossed out the new standard that had applied to "vertical" employment relationships (when staffing company or subcontractor workers are contracted to work with another entity, for example), while keeping intact the rarer "horizontal" relationships between related entities that employ the same worker – which was not significantly changed by the final rule. Affected employers now have to chart a more difficult course in order to ensure they are not deemed liable in joint employer situations, and will head into 2021 and the incoming Biden White House uncertain about what the new year will bring.

Meanwhile, the National Labor Relations Board published a final rule on February 25 that fundamentally altered the definition of joint employment, making it more difficult for businesses to be held legally responsible for alleged labor law violations by staffing companies, franchisees, and other related organizations. The rule also limits the ability of employees from affiliated companies to join together to form unions. Once it took effect on April 27, an employer is only be considered a joint employer of a separate employer's employees if the two employers share or co-determine the employees' essential terms and conditions of employment, including wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. As the Board states, a putative joint employer must possess *and actually exercise* substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not sporadic and isolated. We summarized the five key things all employers must know about this critical development in our alert.

4. **Proposed Federal Rule Aims To Make It Easier To Classify Workers As Independent Contractors**

The Department of Labor issued a new proposed rule on September 22 that would make it easier for workers to be classified as independent contractors. The proposed test looks to the "economic reality" of each workplace relationship by weighing five simple factors and determining whether the worker is in business for themselves (and thus a contractor) or economically dependent on the hiring entity (employee). Stay tuned for developments in the waning weeks of 2020 to see if the rule goes into effect before President Trump leaves the White

House or if it is stalled by litigation. If it does take effect, it may be time to revisit your business models to determine whether you can capitalize on the new rule – while keeping in mind any state laws that may create a higher barrier for independent contractor status.

5. **What Employers Need To Know About New SCOTUS Justice Amy Coney Barrett**
   President Trump officially selected Judge Amy Coney Barrett to fill the empty seat on the Supreme Court bench on September 26, filling the vacancy caused by Justice Ruth Bader Ginsburg's death, and she was sworn in on October 27. Her appointment will have a long-lasting impact on the future of the SCOTUS, cementing a six-Justice majority of conservative jurists. Employers may be curious about how Justice Barrett will treat workplace law cases that will inevitably come before her. 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 turned our attention to Judge Barrett in a detailed analysis you can read here.

6. **DACA Program Gets Two Reprieves, Keeping Workplaces Intact**
   By a 5-4 vote, the U.S. Supreme Court ruled on June 18 that 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.

   Then, on November 14, another federal court judge struck down the Trump administration's latest attempt to significantly restrict the DACA program. However, as of the time of publication, federal immigration officials have not yet begun complying with this latest decision, leaving the country in a state of temporary limbo. We summarized what employers need to know about this development here.

7. **Businesses Nationwide Face New Privacy Obligations Thanks To California Vote**
   The presidential election wasn't the only development on Election Day that will affect workplaces. Californians passed a ballot measure that will soon expand the nation's most stringent data privacy law – and it will have an impact on employers across the country. By voting in favor of Proposition 24, the California Privacy Rights Act of 2020 (CPRA), employers and businesses will face an expansion of the state's landmark privacy law, the California Consumer Privacy Act of 2018 (CCPA). Most provisions of the CPRA go into effect on January 1, 2023, although some provisions have a 12-month lookback. What do employers and businesses need to know about this dramatic new legal obligation – especially those beyond the California border who may not recognize their obligations?

8. **California Employers Face Two New Workplace Laws**
   Sticking to all things California, employers in the Golden State will soon face two new onerous obligations thanks to laws passed by the state legislature in September. Most significantly, Governor Newsom signed into law a requirement that private employers with 100 or more employees must annually report to the state detailed pay data categorized by gender, race, and ethnicity. SB 973, signed into effect late on September 30, will require covered businesses to report this data to the Department of Fair Employment and Housing (DFEH) on March 31, 2021 and every March 31 thereafter. That date will be here before you know it, so California employers should begin to take compliance steps at once.

   Several weeks earlier, the governor signed legislation that will greatly expand the California Family Rights Act in a manner that will impact both small and large California employers. The CFRA requires covered employers to provide up to 12 weeks of unpaid leave during each 12-month period for purposes of family and medical leave. Senate Bill 1383 expands CFRA to apply to employers with five or more employees, and expands the scope of "family members" for whom employees can take leave to include many additional categories. It will go into effect on January 1, 2021 – giving you a short window of time to take action and develop compliance plans. The first of the year will be here before you know it, so the time to take action is now.

9. **Religion And The Workplace Take Center Stage In 2020**
   There were dramatic developments for employers in the past year when it comes to balancing religious liberties and workplace rights. Most significantly, the U.S. Supreme Court upheld a broad standard for permitting religious exemptions 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 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.

   A month before that decision, the National Labor Relations Board announced that it would no longer exercise jurisdiction over bona fide religious educational institutions. This decision, a major reversal of a 2014 Obama-era precedent, 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.

Finally, the EEOC released a draft of its updated guidance on religious discrimination, which – if adopted and finalized – could alter the legal standards applied in workplace disputes for the nation's employers generally and educational institutions specifically. While the November 17 release will not be finalized and adopted until a public comment period expires in mid-December and the commissioners have an opportunity to address specific concerns, the upcoming changes at the White House will not necessarily slow down the process.

10. **Federal Appeals Court Says Employers Can't Use Pay History To Escape Equal Pay Claims**
Employers are not permitted to justify disparity in pay based on prior pay history, the 9th Circuit Court of Appeals ruled on February 27, eliminating a defense to pay equity claims for businesses across the west coast. Although the Equal Pay Act (EPA) contains a catch-all provision allowing employers to defend pay differentials caused by "any other factor other than sex," an *en banc* panel concluded in *Rizo v. Yovino* that prior salary history does not fit into that exception. And on July 2, the U.S. Supreme Court declined to weigh in on this question, leaving the decision intact for the foreseeable future. Employers in the 9th Circuit now have certainty when it comes to understanding the contours of the federal equal pay statute and need to adjust their business practices accordingly.

11. **Labor Board Amends Union Election Rules But Runs Into Court Roadblock**
The National Labor Relations Board finalized its "Election Protection Rule" on March 31 amending regulations addressing "blocking charges" and certain aspects of the Board's voluntary recognition doctrine. It revised the Board's blocking charge policy, the voluntary-recognition bar rule, and rules related to union recognition in the construction industry. The final rule is one of several recent efforts by the current Board to shape the nation's federal labor policy through administrative rulemaking.

But on the eve of their scheduled implementation date, a federal court judge in Washington, D.C. struck down significant portions of the new union representation procedures – handing a significant victory to unions attempting to keep the current "quickie election" rules in place. 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 included a section of rules prolonging a collection of union election deadlines.

12. **Gulf Coast And Southeast Employers Faced Catastrophic Hurricane Damage**
In a record-breaking year, employers across the Gulf Coast and in the southeastern U.S. faced a string of natural disasters brought about by numerous hurricanes. From the time the first hurricane made landfall through the end of the season, these storms brought along with them

hurricane made landfall through the end of the season, these storms brought along with them many employment-related issues to address, including military leave, family and medical leave, unemployment compensation, workplace safety issues, and more. Fisher Phillips updated our Comprehensive FAQs For Employers On Hurricanes And Other Workplace Disasters to assist employers manage through this difficult time.

13. **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 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.

14. **NLRB Upholds Ban On Use Of Company Email For Union Organizing**
The NLRB took the opportunity in June to double down on its 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.

15. **A Second Bite At The Apple: EEOC Releases Plan For New Wellness Program Rule**
Will 2021 be the year that the EEOC finally replaces its invalidated rule allowing employers to incentivize participation in employer-sponsored wellness programs? Thanks to a key development in 2020, 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 can employers expect as we head into the new year? We summarized the developments here.

16. **EEOC Announces Record-High Recovery Against Employers In FY2020**
The federal agency charged with enforcing the nation's main workplace discrimination laws announced that it recovered over $535 million from employers on behalf of aggrieved workers and applicants this past fiscal year, a figure that shattered the previous record and set an all-time high. The EEOC's November 16 financial report also touted successes in clearing old

inventory of charges, increasing the percentage of resolutions achieved in favor of charging parties, and mediating thousands of charges to conclusion. The report further indicated that the EEOC filed the second-lowest number of merits lawsuits against employers in over two decades. We analyzed the detailed report and provided our top five takeaways for employers.

17. **Questions Remain After California Voters Pass Landmark Gig Economy Law**
The dust is beginning to settle after California voters overwhelmingly approved a new test for determining whether app-based rideshare and delivery drivers are considered employees or independent contractors on Election Day, essentially overturning the "ABC Test" as it applies to a wide swath of the gig economy. The election results also seemingly render several critical court decisions ordering major gig economy companies to reclassify their workers as employees irrelevant. But now that Proposition 22 proved to be wildly successful, what's next? As we head into 2021, we examined the five biggest questions – and some answers – that remain in light of this groundbreaking development.

18. **Time To Reassess International Data Transfers After Court Declares EU-U.S. Privacy Shield Invalid: A 4-Step Action Plan**
Our list of the biggest workplace law developments from 2020 isn't restricted to issues that arose in the United States – it also includes one foreign development that will have a major impact on American employers. The Court of Justice of the European Union ruled on July 16 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 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. We developed a summary of the situation and a four-step action plan to address business concerns.

19. **Labor Gets Wishlist Bill Passed In House**
The proposed law didn't get much attention when it cleared its first significant hurdle, but the election of Joe Biden gave it renewed significance. The U.S. House of Representatives passed a bill on February 6 that would tilt the scales of labor law unequivocally in favor of organized labor. While the Protecting the Right to Organize (PRO) Act stood no chance of being passed by the Senate or signed into law by President Trump in 2020, it could get a new lease on life in 2021 thanks to the shifting dynamics in Washington, D.C. If passed, the PRO Act would bring about a radical shift in labor relations and could even reverse the steady decline of unionization seen in this country since the 1950s. To reach this goal, the bill takes aim at virtually every pro-employer right, outlawing and replacing them with a collection of pro-labor protections. What could the

right, outlawing and replacing them with a collection of pro-labor protections. What could the future hold? Read our summary here.

20. **Employers Get Mixed Bag Of Results In Other SCOTUS Cases**
In a unanimous March 23 decision, the U.S. Supreme Court 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. The decision 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.

Meanwhile, on February 26, the Court unanimously declined to limit the timeframe in which disgruntled employees could bring suit challenging the investment decisions made by plan fiduciaries, which may open the floodgates for increased lawsuits. While the Employee Retirement Income Security Act (ERISA) provides a shrunken three-year statute of limitations when workers have "actual knowledge" of an alleged breach or violation, the Court concluded that this shorter period is not triggered when the employee in question chose not to read or did not recall having read all the relevant information about the investments provided by the plan. In such situations, the Court ruled, a longer six-year statute of limitations applies. This development opens employers and retirement plan fiduciaries up to an increased risk of legal challenges, while heightening the standard for evaluating breach claims and class action certifications.

We can't imagine that 2021 will be as tumultuous as the year that is now wrapping up, but then again, who could have predicted 2020? Regardless of the type of year we're about to experience, we can predict one thing about the new year with absolute certainty: our attorneys will be standing by ready to summarize all of the key workplace law developments, creating practical alerts to help you navigate the changing times. Feel free to sign up for our Legal Alerts so that you can stay up to speed and get the latest news as it happens.