January 2021: The Top 18 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 18 stories from last month that all employers need to know about:

1. **What Employers Need To Know As Marty Walsh Tapped To Head Labor Department** – President Biden nominated Boston Mayor Marty Walsh to be the next Secretary of Labor – the first union member to fill this role in nearly 50 years. The January 7 announcement is significant for the employment community given that the head of the Labor Department wields tremendous influence over workplace policy. Naturally, most employers are curious about what this transition will mean for them. To answer that question, we've once again assembled the opinions of some of our firm's foremost thought leaders to help provide a glimpse into what you should expect from the U.S. Department of Labor for the foreseeable future. The consensus opinion? Get ready for a pendulum swing back toward worker-centered policy that employers last experienced during the eight-year Obama administration (read more here).
2. **Biden's Proposed COVID-19 Economic Rescue Plan Would Lead To Dramatic Workplace Changes** – President Biden unveiled an ambitious legislative package that would serve to not only provide a third wave of economic stimulus relief to address the impacts of the COVID-19 pandemic but also transform the American workplace. His January 14 announcement of the $1.9 trillion "American Rescue Plan" was met with initial support from many Democratic lawmakers and worker advocates – and an announcement of welcome by the U.S. Chamber of Commerce – but skepticism and objections from some Republicans. The bill will be an early test of Biden's promise to seek bipartisan support for his legislative proposals, especially with no room for error in a 50-50 Senate. What would the American Rescue Plan mean for employers and the workplace in general? (read more here)
3. **What Will A Federal OSHA COVID-19 Emergency Temporary Standard Likely Require?** – As predicted, the new administration announced soon after taking the reins of the federal government that it has directed the federal Occupational Safety and Health Administration (OSHA) to consider whether emergency temporary standards concerning the COVID-19

(OSHA) to consider whether emergency temporary standards concerning the COVID-19 pandemic are necessary. The White House asked OSHA to issue any such standards by March 15. If OSHA finds that the workers "are in grave danger due to exposure to toxic substances or agents…and that an emergency standard is needed to protect them," the agency can adopt a temporary standard that will be effective immediately and won't require many of the procedural requirements needed for a permanent standard. Any adopted temporary standard will be in place for at least six months and may eventually become permanent. Given the administration's focus on keeping workers safe during the remainder of the pandemic (and beyond) and the streamlined procedural process for emergency temporary OSHA standards, you should begin to prepare now for the mandates that OSHA will include in a temporary COVID-19 standard (read more here).

4. **DOL's New Independent Contractor Rule Could Be DOA** – In one of the last acts of the Trump administration, the Labor Department finalized a new rule on January 7 that aims to make it easier for businesses to classify workers as independent contractors – but the rule faces a very uncertain future given that the Biden administration took the reins of the federal government before it is scheduled to take effect and the incoming administration has signaled its opposition to this change. Businesses that use independent contractors to carry out critical work roles – especially gig economy companies and those using gig-economy-like strategies for components of their workforce – have long awaited this rule in the hopes that it would lend certainty to modern business models and reduce litigation brought by workers claiming to be misclassified as employees. But celebrations need to be put on hold for now, as President Biden temporarily stalled implementation past its planned March 8 effective date while worker advocacy groups and state attorneys general line up to file legal challenges in the hopes of permanently killing the rule (read more here).
5. **Second Time's A Charm? EEOC Offers New Wellness Program Rules For Employers** – The U.S. Equal Employment Opportunity Commission (EEOC) revealed two new proposed rules concerning how employers can encourage employees to participate in employer-sponsored wellness programs without violating federal law. Unlike the 2016 final rule iterations, these two new rules, released on January 7 and slated to be finalized in March 2021, provide that employers must offer much smaller incentives than previously permitted in order to comply with the Americans with Disabilities Act (ADA) and the Genetic Information Non-Discrimination Act (GINA). On the one hand, this should be welcome news for employers. Indeed, employers have been left without any guidance for how to incentivize employee participation in wellness programs without rendering them involuntary under the ADA and GINA since the 2016 final rules were nixed by a federal court order. On the other hand, as is commonplace when a new administration takes over, President Biden froze all pending regulations for review before they are implemented, which furthered this limbo period for employers. Nonetheless, what should employers know about these new rules? (read more here)
6. **President Biden Releases National COVID-19 Response Strategy** – The new administration wasted no time in announcing its plan for tackling the COVID-19 pandemic, releasing a roadmap on January 21 on how it plans to address the crisis. The plan includes 12 initial executive actions,

many of which have already been issued, and several of which could impact the workplace. What do employers need to know about this development? (read more here)

7. **President Biden Focuses On Vaccine Distribution – What Employers Need To Know To Help Employees Roll Up Their Sleeves** – President Biden's National Strategy for the COVID-19 Response and Pandemic Preparedness, released on January 21, contains an initiative to "jumpstart" the vaccination process. The administration has stated that it will "spare no effort" in aggressively ramping up the national vaccination program, and President Biden has promised a target of 100 million shots by the end of his first 100 days in office. We anticipate that employers will play an important role in achieving this goal (read more here).
8. **That Didn't Take Long: What Employers Need To Know As Biden Fires NLRB's Top Sheriff – And His Deputy** – Within hours of being sworn in on January 20, President Biden took the unprecedented step of firing the NLRB's chief prosecutor, General Counsel Peter Robb. Robb's abrupt termination represents the first time in the agency's 85-year history that an incumbent General Counsel has been fired before the end of their term (although President Truman did seek and receive the resignation of the NLRB's General Counsel in 1950, which is the closest the agency has ever come to a scenario like this). The move was prompted by Robb's refusal to voluntarily resign as requested. Shortly thereafter, the new administration issued additional walking papers to Robb's second in command, Deputy General Counsel Alice Stock. The next step will presumably be to appoint an acting General Counsel more sympathetic to union interests, as Biden's team ponders potential candidates to submit to a Senate confirmation process that is not subject to filibuster. Businesses large and small will soon feel the impact of these moves as the new administration fulfills prior campaign pledges to organized labor (read more here).
9. **Biden Administration Orders OSHA To Increase Enforcement Efforts** – President Joe Biden signed several Executive Orders in the first two days of his presidency, and one is an Executive Order on Protecting Worker Health and Safetythat directs the Occupational Safety and Health Administration (OSHA) to increase enforcement of existing agency standards and investigate whether a new standard for COVID-19 mitigation is needed. Given that President Biden has nominated Boston Mayor Marty Walsh to be the next Secretary of Labor – the first union member to fill this role in nearly 50 years and soon to be in charge of the agency that oversees OSHA – employers should be aware of the key provisions of this executive order ahead of an increase in inspections. Here is what employers need to know (read more here).
10. **The Undoing Of Trump's Immigration Agenda: Biden Unveils Series Of Immigration Reforms** – One day is all it took for the Biden-Harris administration to repudiate the Trump-era crackdown on immigration. By issuing a series of Executive Actions, Presidential Memoranda, and Proclamations on January 20 and the days thereafter, President Biden demonstrated his administration's commitment to undoing much of what his predecessor did over the past four years while also modernizing our country's immigration system. He also unveiled his administration's attempt to address the long-standing goal of comprehensive immigration reform through a detailed legislative proposal that will soon be taken up in Congress. What do

employers need to know about these actions and what steps should employers take now as a result? (read more here)

11. **Democratic Congress Seeks To "Raise the Wage" To $15 Per Hour — Is Your Business Ready?** – On the heels of an early Executive Order by President Biden calling for an immediate increase in the minimum wage for federal government employees and federal contractors, Democratic lawmakers in Congress have proposed a more than two-fold increase in the federal minimum wage from the current $7.25 per hour to $15 per hour by 2025 – and a gradual elimination of the tip credit by 2027. While it remains to be seen whether the *Raise the Wage Act of 2021*, introduced in Congress on January 26, will ultimately be passed and signed into law, employers should expect that there could very well be an increase in the minimum wage on the horizon and prepare accordingly. What should you do to get ready? (read more here)
12. **Washington, D.C. Passes Legislation Banning Non-Compete Agreements: A 5-Step Action Plan For Employers** – Washington, D.C. Mayor Muriel Bowser just signed into law one of the most restrictive pieces of legislation in the nation relating to employers' use of non-compete agreements to prevent employees from working for competitors. The Act not only completely bans non-compete agreements for District employees, but also goes beyond the restrictions commonly contained in many other non-compete statutes by imposing strict notice and other requirements that differ from other existing laws. For example, employers will be required to provide employees with notice of the new law regardless of whether they use non-compete agreements, and are banned from preventing employees from being "simultaneously" employed elsewhere, effectively calling into question the viability of relatively common "moonlighting" prohibitions. The legislation, titled "Ban on Non-Compete Agreements Amendment Act of 2020" and approved by the mayor on January 11, now moves to Congress for a 30-day review period, during which time federal lawmakers have the ability to adopt a joint resolution disapproving of the Act. In such an unlikely event, the Act would be sent to President Biden to sign off on the resolution. Having already stated his intention to take an aggressive stance toward minimizing employers' use of non-compete agreements, it is highly unlikely that he would agree to overturn the Act – meaning D.C. employers should begin to prepare immediately for this potentially seismic shift by reviewing our five-step action plan (read more here).
13. **New Guidance Significantly Expands NY COVID-19 Sick Leave** – Approximately 10 months after New York state enacted a law providing paid leave for New York workers who have been quarantined or isolated as a result of COVID-19(COVID-19 Sick Leave), the New York State Department of Labor issued new guidance on January 20 that significantly expands on employers' obligations set forth in the statue. What do New York employers need to know about this latest development? (read more here)
14. **California's New Guidance On Emergency COVID-19 Standard Answers Some Questions But Leaves Employer Uncertainty** – California Occupational Safety and Health (Cal/OSHA) further updated its COVID-19 Emergency Temporary Standards Frequently Asked Questions in an attempt to provide more clarification and answer questions the agency has received about the COVID-19 Emergency Temporary Standard (ETS) that went into effect November 30. The update,

released on January 8, provides some important clarifications but also leaves some questions unanswered. Below is an overview of some of the important updates and clarifications that all California employers should review (read more here).

15. **Ohio Employers Need To Prepare For Welcomed New Discrimination Law Process** – Ohio Governor Mike DeWine recently signed the Employment Law Uniformity Act into law, which will soon eliminate many administrative burdens and uncertainties for employers and human resources professionals while still providing Ohio employees with the same robust protections they currently enjoy. The legislation, signed by the governor on January 12 and taking effect on April 15, 2021, aims to resolve discrimination claims in a more timely, fair, and efficient manner for both Ohio employers and employees. At the same time, it will provide for more predictability in these kinds of actions, which will in turn allow for reasonable resolutions and a more economical use of resources. What do Ohio employers need to know about this impending new law – and what are the three steps you should take in preparation for it taking effect? (read more here)
16. **SCOTUS Punts Question Of Who Decides Arbitrability, Leaving 5th Circuit Decision To Stand** – The U.S. Supreme Court refused to address the question of whether a carve-out in an arbitration agreement exempting certain claims from arbitration also exempts those claims from the agreement's delegation of arbitrability to an arbitrator, dismissing a case it had originally agreed to rule upon. In the January 25 one-sentence order in *Henry Schein Inc. v. Archer and White Sales Inc.*, the Court dismissed the case as improvidently granted, declining to substantively opine on the matter and letting the 5th Circuit Court of Appeals holding stand. The upshot for employers? For now, employers may look to the 5th Circuit's decision for guidance on their ability to craft the scope of arbitration agreements in view of the presumption for arbitrability. Employers in the 5th Circuit (Texas, Louisiana, and Mississippi) should familiarize themselves with the ruling in order to ensure that the organization's arbitration agreements reflect the employer's choice of "who decides" whether a case is arbitrable (read more here).
17. **Vulnerabilities In Federal Court's E-Filing System Serves As Stark Data Security Warning For Employers** – Overshadowed by the dramatic events in Washington, D.C. was the news that the electronic filing and case management system used in federal courts across the country may have been compromised by a serious security breach – serious enough that users have been advised to avoid submitting "highly sensitive" documents through the digital service. The Administrative Office of the U.S. Courts (AO) announced on January 6 that it is working with the Department of Homeland Security (DHS) to perform a security audit to identify a potential compromise to its Case Management/Electronic Case Files system (CM/ECF). What do employers need to know about this possible breach – and what lessons can you learn to avoid similar harm in your organization? (read more here)
18. **Federal Appeals Court Strikes Down Contractual Time Limits On Bringing Age And Disability Discrimination Claims** – The 6th Circuit Court of Appeals recently held that employers cannot contractually shorten the statute of limitations for filing suit under the Americans with Disabilities Act (ADA) or the Age Discrimination in Employment Act (ADEA). The court's January

15 holding in *Thompson v. Fresh Products, LLC*, extended a prior ruling from 2019 that prohibited enforcement of abbreviated claims period provisions on Title VII claims (outside of maybe arbitration agreements). The upshot? The *Thompson* decision has further blunted Kentucky, Michigan, Ohio, and Tennessee employers' ability to reduce employment discrimination liability exposure through abbreviated claims period provisions. This article addresses the court's logic in *Thompson*, what the decision means for employers in the 6th Circuit's jurisdiction, and what those employers can do in response to this ruling (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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