

# MAY 2016: TEN BIGGEST LABOR AND EMPLOYMENT LAW STORIES

Insights

Jun 2, 2016

The world of labor and employment law is always rapidly evolving. In order to make sure that you stay on top of the latest developments, we typically bring you a review of the five biggest stories from previous month. May 2016 was so momentous, however, that we had double the size of this article in order to accommodate all of the important changes. Without further ado, here is a summary of the ten biggest stories from last month that all employers need to know about:

## 1. **New Overtime Rules Finally Arrive: Employers Should Prepare For The Impact**

On May 18, the U.S Labor Department (USDOL) finally released the anxiously awaited revised regulations affecting certain kinds of employees who may be treated as exempt from the federal Fair Labor Standards Act's (FLSA) overtime and minimum-wage requirements. Starting December 1, 2016, the minimum salary threshold is increasing to \$913 per week, which annualizes to \$47,476 (up from \$455 per week, or \$23,660 per year), and this amount will now be "updated" every three years (meaning that it will likely increase with each "update") beginning on January 1, 2020.

By the effective date, you must have done what is necessary to continue to rely upon one or more of these exemptions (or another exemption) as to each affected employee, or you must forgo exempt status as to any employee who no longer satisfies all of the requirements. Fisher Phillips has developed a Resource Center to help you understand and comply with the new rules, which

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**Richard R. Meneghello**

Chief Content Officer

503.205.8044

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can be accessed [here](#).

## 2. OSHA Greatly Increases Workplace Injury Reporting Requirements

The USDOL's Occupational Safety and Health Administration (OSHA) issued a final rule on May 11 that greatly enhances injury and illness data collection from employers. The new rule will require many employers to electronically submit information about workplace injuries and illnesses to the government, and OSHA has announced it intends to post this data on its public website.

Although OSHA has stated that it will remove any personally identifiable information before the data is released to the public, this publication opens the door for unprecedented opportunities for significant OSHA citations and penalties, as well as negative consequences from other third parties utilizing this data. The business community believes that this new requirement will force companies to publicly reveal confidential business details which had in the past been considered privileged and confidential, and provide undo access to business processes to competitors, plaintiffs' lawyers, community activists, and union organizers for use against the company (read more [here](#)).

## 3. EEOC Issues Employer Wellness Program Regulations

The U.S. Equal Employment Opportunity Commission (EEOC) published the final versions of two new rules regulating employer-sponsored wellness programs on May 16. The rules, which will go into effect in 2017, allow employers to offer incentives for programs that ask questions about their employees' health or include medical exams and also permit employers to provide incentives in exchange for information about their employees' spouses' current or past medical conditions, so long as the information is not used to discriminate.

These rules should come as welcome news for employers who have spent the past several years in limbo due to the EEOC's radio silence on these questions, particularly those who found themselves in the EEOC's crosshairs when it began aggressively targeting wellness programs

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back in 2014 (read more [here](#)).

#### **4. SCOTUS Gives Boost To Employee Constructive Discharge Claims**

On May 23, the U.S. Supreme Court ruled that the statute of limitations for Title VII constructive discharge claim begins on the date of the employee's notice of resignation, not on the date of the last alleged discriminatory act by the employer. The *Green v. Brennan* decision is a bad one for employers and will likely lead to an uptick in legal claims filed by disgruntled former workers. It opens the door for former employees to file constructive discharge claims long after the alleged discriminatory conduct occurred by simply delaying their resignation indefinitely (read more [here](#)).

#### **5. Federal Appeals Court Declares Class Waivers Unenforceable**

For the first time, a federal appeals court has dealt a serious blow to class and collective action waivers in arbitration agreements. In the May 26 *Lewis v. Epic Systems Corporation* decision, the 7th Circuit Court of Appeals held that a mandatory arbitration agreement prohibiting employees from bringing claims against their employer on a class or collective basis violates the National Labor Relations Act (NLRA). While the decision itself only directly impacts employers in Illinois, Indiana, and Wisconsin, the court's reasoning could be adopted by other circuits, or perhaps by the U.S. Supreme Court, causing even more headaches for employers around the country (read more [here](#)).

#### **6. President Signs Defense Of Trade Secrets Act Into Law**

On May 11, President Obama signed the Defense of Trade Secrets Act (DTSA) into law. Businesses immediately welcomed the many benefits the statute brings, including federal jurisdiction, robust equitable relief, and the ability to recover compensatory damages, punitive damages, and attorneys' fees. However, in the midst of celebrating this new federal cause of action, many employers are overlooking a requirement embedded deep within the statute.

Namely, employers are required to provide employees with notice that they are entitled to immunity if they

disclose a trade secret for the purpose of reporting suspected illegal conduct. If employers fail to give notice in the manner required by the DTSA, they will not be able to recover punitive damages or attorneys' fees. Consequently, employers must pay careful attention to the DTSA notification requirements, which are not as straightforward as many believe (read more [here](#)).

## **7. EEOC Publishes New Resource On Leave As ADA Reasonable Accommodation**

On May 9, the EEOC published "*Employer-Provided Leave and the Americans with Disabilities Act*," a much-needed guidance on the complex issue of leave as a reasonable accommodation for employees with disabilities. The publication seeks to address the "troubling trend" of employment policies that deny or restrict leave as a reasonable accommodation for employees with disabilities by providing clarification on a number of specific situations.

The publication confirms that employers must consider leave as an accommodation even if the employee is not eligible for leave under another statutory scheme (such as FMLA) or the employer's PTO program. There is good news for employers, however. The document also reminds employers that they have a right to request medical information when necessary, and can use the "undue hardship" defense in certain circumstances (such as if the request for leave is indefinite in length) (read more [here](#)).

## **8. High Court Leaves Massive Fee Award Against EEOC Unresolved**

The May 19 Supreme Court decision in *CRST Van Expedited, Inc. v. EEOC* declined to determine whether an employer is entitled to recover nearly \$5 million dollars in attorney's fees and costs from the EEOC after the employer prevailed in a sexual harassment lawsuit brought by the agency. The Court remanded the case back to the 8th Circuit Court of Appeals to determine, among other things, whether the EEOC's conduct in the litigation was "frivolous, unreasonable, or groundless" such to support the fee award. However, the Court did rule that employers could be considered prevailing parties and entitled to fees even if they do not win "on the merits," which could prove to be a useful ruling (read

more [here](#)).

## 9. Supreme Court Punts On Two Employment Cases

The Supreme Court sidestepped ruling on two employment cases in May, which means that employer uncertainty will continue for the foreseeable future. On May 16, the SCOTUS declined to decide whether religiously affiliated nonprofits can be required to affirmatively “opt out” of providing contraceptive coverage to their employees in the *Zubik v. Burwell* case, which would have triggered separate contraceptive coverage directly from their issuers. Instead of publishing a decision, the Court took the unusual approach of suggesting the parties work out a compromise (read more [here](#)).

And on the same day, the Court issued a “no decision” decision on an issue important to employers facing class action litigation in *Spokeo, Inc. v. Robins*. The SCOTUS decided that the 9th Circuit Court of Appeals needed to review again a question of whether plaintiffs have standing to pursue class action claims on behalf of themselves, and others similarly situated, if they cannot show that they have suffered actual harm. By failing to decide the question one way or the other, the Court effectively delayed a determination of whether employers will have another tool to help curtail costly class action claims, or whether they will face a substantial increase in the number of such claims (read more [here](#)).

## 10. Employers Can Learn From School Guidance On Transgender Students

On May 13, the U.S. Department of Education and U.S. Department of Justice published a guidance document for elementary and secondary schools that summarizes emerging practices for supporting transgender students. While intended for K-12 schools, the document provides excellent insight for every employer confronting the transgender issue. Issues addressed include how to determine a person’s gender identity, how to comply with privacy rights, and how to manage the issues related to bathroom and locker room access (read more [here](#)).

If you have any questions about these developments or how they may affect your business, please contact your Fisher Phillips attorney.

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*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.*