

## JUNE 2016: EIGHT GREAT LABOR AND EMPLOYMENT LAW STORIES

Insights  
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The world of labor and employment law is always evolving at a rapid pace. 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. June 2016 was chock full of important stories, however, so we expanded the size of this article in order to accommodate all of the important changes. Without further ado, here is a summary of the eight greatest stories from last month that all employers need to know about:

### **1. Employers Enjoy First Round Victory As Persuader Rule Blocked**

Describing the federal government's controversial persuader rule as "defective to its core," the United States District Court for the Northern District of Texas blocked the rule in its entirety by issuing a nationwide injunction on June 27. Had it not been stopped, the new rule would have forced attorneys and their clients to report in open records the details of their confidential attorney-client relationships beginning on July 1, making it complicated for employers to seek legal counsel in opposing and dealing with unions.

We are not only pleased with the outcome, but are proud to report that a Fisher Phillips partner was designated as an expert witness by the court at the hearing whose testimony was noted repeatedly in the court's written ruling.

Because the United States Department of Labor (USDOL) still aims to boost union organizing efforts by any means possible, we expect the government will appeal this setback. Nevertheless, employers can celebrate a big victory, knowing they can conduct business as usual until

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**Richard R. Meneghello**

Chief Content Officer

503.205.8044

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further notice. Employers can seek and rely on the advice of outside attorneys without fear of reporting, provided the attorneys' advice can be accepted or rejected, and provided the attorneys do not communicate directly with rank and file workers (read more [here](#)).

## **2. EEOC To Revise Controversial Proposed Pay Data Collection Rules**

In another piece of positive news for employers, the U.S. Equal Employment Opportunity Commission (EEOC) announced on June 22 that it would revisit its controversial proposed pay data collection rules, essentially acknowledging that its initial proposal would have been unduly burdensome for businesses.

Fisher Phillips was one of the most vocal critics of the proposed rules, submitting public comments and pointing out the undue burden to be faced by employers, as well as the questionable utility of the data collection and the serious privacy concerns that accompany the gathering and production of this information. The firm is pleased that the agency appears to be prepared to address these concerns with a new set of proposed rules, expected sometime this summer (read more [here](#)).

## **3. Supreme Court Calls "Do Over" On FLSA Service Advisor Exemption Rule**

In a 6 to 2 decision, the U.S. Supreme Court continued the flip-flop-flip on determining whether an automobile dealership's service advisors are exempt from the Fair Labor Standard Act's (FLSA's) overtime requirements when it issued a helpful June 20 opinion. The Court vacated and remanded the case back to the 9th Circuit Court of Appeals for further proceedings, essentially calling a "do over." Fisher Phillips is proud to represent the auto dealership in this case.

The 9th Circuit has now been instructed to go it alone to determine whether service advisors are exempt from the FLSA overtime provisions without regard to troublesome USDOL regulations. At some point in the future, the appeals court will issue a new ruling following the SCOTUS guidance (*Encino Motorcars, LLC v. Navarro et al*).

For dealerships in the 9th Circuit – those in California, Washington, Nevada, Arizona, Oregon, Alaska, Hawaii, Idaho, and Montana – this case provides a hopeful reprieve. The good news is that the 9th Circuit's prior ruling is gone

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and has no binding effect. The bad news is that, until the 9th Circuit issues a new opinion, uncertainty remains as to whether the exemption applies. For dealerships outside of the 9th Circuit's reach, the good news is that there is no controlling authority preventing them from continuing to conduct business as usual (read more [here](#)).

#### **4. NLRB Rejects Permanent Replacement Workers In Groundbreaking Ruling**

It wasn't all good news for employers, however. In an unprecedented May 31 decision (sure, it wasn't June, but this one sneaked in right before the close of last month), the National Labor Relations Board (NLRB) held that a California continuing care facility violated the National Labor Relations Act (NLRA) by hiring permanent replacements during an economic strike to punish striking employees and to avoid future strikes.

In so holding, the Board overturned decades of precedent allowing employers to hire permanent replacements during an economic strike, regardless of motive (*American Baptist Homes of the West*). This decision could have a significant impact on your labor relations strategy – unless you navigate through this area carefully, you could also run afoul of the new Board standard (read more [here](#)).

#### **5. Union 'Quickie Election' Rule Survives Legal Challenge**

Employers suffered another labor loss on June 10 when a federal appeals court ruled that the NLRB's "quickie election" rule is permissible and does not violate the law, meaning that employers will continue to have to live under the new and challenging regime that stacks the deck in unions' favor.

Although several business groups filed a lawsuit arguing that the rule should be stricken for a variety of reasons, the 5th Circuit Court of Appeals rejected the challenge and kept the rule intact. Employers would be best served to adjust to the new normal, as there do not appear to be any viable challenges to the rule on the horizon (*Associated Builders and Contractors of Texas Inc. v. NLRB*) (read more [here](#)).

#### **6. OFCCP Releases Broad Gender Discrimination Rule**

Declaring that it is time to "bring these old guidelines from the 'Mad Men' era to the modern era," the Office of Federal Contract Compliance Programs (OFCCP) announced a final rule revising sex discrimination guidelines for federal contractors on June 14. It is the first substantive update to

the rules since 1970, and will expand contractors' obligations to ensure equal opportunity in employment based on gender.

The new rule will require contractors to ensure equal opportunity in employment in a number of different ways. It will expand the definition of the term "sex" to include pregnancy, childbirth, and related medical conditions; gender identity; transgender status; and sex stereotyping. It will also prohibit discriminatory treatment and policies or practices that have a disparate effect related to sex, while also addressing fair pay, fringe benefits, and sexual harassment. The effective date for the new rule is rapidly approaching – August 15, 2016 – so you will want to begin the process of ensuring compliance immediately (read more [here](#)).

### **7. Deadlocked SCOTUS Presents Another Roadblock For President's Immigration Actions**

In a 4-4 decision, the Supreme Court announced on June 23 that it could not reach a majority consensus on President Obama's Executive Action on immigration. As a result, the Executive Action remains subject to an injunction blocking its implementation. The case will now return to a Texas judge to decide how to proceed with the case on the merits of the argument (*United States v. Texas*).

While the case proceeds in a lower court, the undocumented workers, who would have benefited from the Executive Action, will not be able to seek protection from the threat of deportation and will remain ineligible for work authorization in the United States. Employers' obligations with respect to obtaining proper documentation will continue, however, so you should use this case as a reminder to ensure compliance with all applicable federal immigration laws (read more [here](#)).

### **8. What Does Brexit Mean For International Employers?**

On June 23, in a hotly contested referendum, British voters chose to leave the European Union in a contest dubbed "Brexit" (for "British exit"). It will take some time before the full implications of this decision become apparent to employers with operations in the UK. Thankfully, very little is likely to change in the short term, providing employers time to plan and adapt to changes as new information becomes available.

Exiting from the EU is governed by the Treaty on European Union Article 50, also known as the Lisbon Treaty. That Treaty provides a two year negotiation period (longer if agreed to by the parties) to determine the specifics of withdrawal. During the negotiation period, the UK will remain a member of the EU and continue to abide by EU laws and regulations. After Article 50 is triggered and during the ensuing negotiations, it is more likely that we will come to understand the long-term impacts of withdrawal (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.*