

AUGUST 2016: THE TOP 7 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, here is a quick review of the seven biggest stories from last month that all employers need to know about:

1. NLRB RULES STUDENT EMPLOYEES CAN UNIONIZE

In a game-changing decision reversing clear legal precedent, the National Labor Relations Board (NLRB) ruled by a 3-1 margin that university students who work as teaching and research assistants at private universities are “statutory employees” under the National Labor Relations Act (NLRA) and can organize to form unions (*Columbia University*). The August 23 ruling applies to both graduate and undergraduate students who perform work, at the direction of the university, for which they are compensated. It will require private universities to immediately conform their practices to adjust to this new era of labor law (read more [here](#)).

2. MANDATORY CLASS WAIVERS STRUCK DOWN BY 9TH CIRCUIT

Employers received their most bruising loss in the ongoing war involving class action waivers on August 22, as the 9th Circuit Court of Appeals became the second federal circuit to strike them down as illegal. When the 7th Circuit issued [an opinion earlier this year](#) and became the first appeals court to make such a ruling, employers could view the decision as an anomaly and take comfort in the fact that all other courts reaching a decision had upheld class waivers.

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Richard R. Meneghello

Chief Content Officer

503.205.8044

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But this latest decision changes the national legal landscape (*Morris v. Ernst & Young*).

The 9th Circuit covers a wide swath across the western U.S. – California, Washington, Arizona, Nevada, Oregon, Hawaii, Idaho, Montana, and Alaska – and this decision will immediately impact tens of millions of workers. It also could mark the beginning of a trend, as employers should be concerned that the NLRB’s sustained attack against class waivers has now gained significant momentum (read more [here](#)).

3. SEC CRACKS DOWN ON ANTI-WHISTLEBLOWER SEVERANCE AGREEMENTS

The federal Securities and Exchange Commission (SEC) issued six-figure fines to two different employers in the month of August, claiming that each crafted restrictive severance agreements that violated agency rules aimed at preventing companies from discouraging whistleblowing by current and former employees. By levying over \$600,000 in fines in the span of two weeks, the SEC sent a strong message to corporate America that severance agreements cannot unduly limit workers from reporting possible whistleblower tips.

This surge in enforcement may require you to revise your current template settlement agreements to remove offending language, and might also encourage you to revisit past agreements and make retroactive amends (read more [here](#)).

4. GOVERNMENT RELEASES FINAL RULE IMPLEMENTING “BLACKLISTING” LAW

The final rule and guidance implementing the Fair Pay and Safe Workplaces Executive Order, published on August 25, 2016, remain almost as burdensome and problematic as they were when originally proposed in 2014. They will impact many federal contractors and require immediate attention to ensure full compliance, which for some will be required as soon as October 2016.

Often referred to as the “blacklisting” law, the executive order requires prospective and existing contractors to disclose violations of 14 federal labor laws plus state

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equivalents, requires them to provide certain information each pay period to enable workers to verify the accuracy of their pay, and prohibits certain contractors from using predispute arbitration agreements to address sexual assault and civil rights claims. The final rule and guidance remain burdensome and problematic for several reasons, and contractors will need to adjust their practices accordingly (read more [here](#)).

5. TIME TO UPDATE YOUR WORKPLACE POSTERS

Employers returning from their summer vacations might have a rude awakening when they realize that new workplace posters are now required as of August 1, 2016. While you and your workers might have been busy hitting the beach or your favorite vacation spot, the U.S. Department of Labor (USDOL) was busy updating two mandatory posters and announcing that the revised versions need to be posted at once.

The updated Fair Labor Standards Act (FLSA) poster contains wholesale revisions, and the Employee Polygraph Protection Act (EPPA) poster contains minor changes. This serves as a good time to also ensure you have the new Family and Medical Leave Act (FMLA) poster, released in April 2016, on display as well (read more [here](#)).

6. UBER'S \$100 MILLION SETTLEMENT FALLS APART

In a surprising development, a federal court judge rejected a proposed settlement on August 18 which would have seen gig economy giant Uber pay up to \$100 million to resolve a series of legal claims challenging its classification model, characterizing the proposed settlement as “not fair, adequate, and reasonable.” While the shelved deal might end up actually helping Uber in the long run pending the outcome of a federal appeal on an arbitration agreement issue, the latest chapter in this long-running class action battle means that all gig companies will continue to live in a world of uncertainty when it comes to the thorny issue of misclassification (read more [here](#)).

7. EEOC RELEASES NEW ENFORCEMENT GUIDANCE ON RETALIATION

On August 29, 2016, the Equal Employment Opportunity Commission (EEOC) released its Enforcement Guidance on

Retaliation and Related Issues. The document is a helpful tool for employers when navigating the often-treacherous retaliation road, and will be used by agency investigators, plaintiffs' attorneys, and courts as a guidepost when examining employer actions. Not only does the document provide a summary of relevant controlling law on the areas of protected activity, adverse conduct, and the necessary element of causation, but it also includes a list of recommended "promising practices" that employers should consider employing to avoid retaliation liability (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.