October 2016: The 8 Greatest 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 eight greatest stories from last month that all employers need to know about:

1. OSHA's Post-Accident Drug Testing Rule Delayed Until December 1
On October 12, OSHA announced that it would further delay enforcement of the anti-retaliation provisions of its Electronic Recordkeeping Rule until December 1, 2016. This delay provides you with a good opportunity to become educated about our current understanding of these impending obligations, especially when it comes to the rules which seemingly restrict employers from sending employees to a post-accident drug test. With so much uncertainty, however, you should not eliminate or meaningfully revise your drug testing policies until the courts or OSHA provide more definitive direction – hopefully by December 1 (read more here).

2. EEOC Announces New Enforcement Priorities In Strategic Enforcement Plan
The Equal Employment Opportunity Commission (EEOC) announced a new series of enforcement priorities on October 17, providing a summary of the areas on which it will focus over the next five years. By releasing its second-ever Strategic Enforcement Plan, the EEOC provided a clear message to employers regarding the areas that will occupy a considerable amount of attention when it comes to investigations, enforcement actions, and litigation from 2017 to 2021.

Although the 23-page document contains a number of themes, four of them appear to be of particular concern to the agency: 21st century employment relationships; the discriminatory backlash against those of Middle Eastern descent and those who practice associated religions; the use of data-centered hiring mechanisms by the high-tech industry; and the concept of equal pay (read more here).

3. EEOC Unveils New EEO-1 Report To Capture 2017 Pay Data
In furtherance of its commitment to combating pay discrimination, the EEOC recently finalized its proposed changes to the Employer Information Report, commonly known as the EEO-1 Report. While the EEOC annually collects information about the number of employees by job category and by sex, race, and ethnicity, employers will also be required to provide summary pay data about their employees as of March 31, 2018.

This means that employers must report significant information about their pay practices to the EEOC, who in turn will use the information to identify disparities and areas of potential pay discrimination to determine where it will take enforcement action. While March 2018 seems far in the distant future, it is important to realize that this EEO-1 Report will capture compensation data for 2017, meaning that your pay practices will be under scrutiny in just a few short months (read more here).

4. Workplace Law Discussed During Final Presidential Debate

Workplace law was once again a topic of discussion during the third and final presidential debate between Hillary Clinton and Donald Trump on October 19. While not covered as extensively as during the first debate on September 26, there were several points during the evening where issues were raised that should be of interest to employers, especially as they relate to the Supreme Court, immigration, and economic issues (read more here).

5. NLRB Assumes Gig Workers Are Misclassified

The Chicago regional office of the National Labor Relations Board (NLRB) filed a complaint for unfair labor practices against an on-demand delivery service, according to an October 12 report. The NLRB alleges that Postmates violated the National Labor Relations Act (NLRA) by prohibiting delivery workers from discussing the terms and conditions of their supposed "employment," and by requiring the workers enter into arbitration agreements. It is worth noting that all employers are subject to the NLRA, whether they are unionized or not. Therefore, this situation warrants the attention of all companies, especially those in the sharing economy.

The NLRB's case against Postmates is especially significant because the NLRB's jurisdiction to enforce the NLRA does not extend to independent contractors. In fact, the NLRA specifically exempts independent contractors from its definition of "employee." And just earlier this year, the Court of Appeals for the 11th Circuit overturned an NLRB decision that was predicated upon a finding that the workers at issue had been improperly classified as independent contractors, rather than as employees (read more here).

6. Court Puts Blacklisting Rules On Hold

In a somewhat surprising development, a federal court in Texas blocked the government from implementing most of the federal contractor "blacklisting" rules that were slated to go into effect on October 25, 2016. The final rules and guidance implementing the Fair Pay and Safe Workplaces Executive Order, signed by President Obama in July 2014 and published in August 2016, would have required contractors to disclose violations of numerous workplace laws, such as Title VII and the FLSA, when bidding for work with the government. But by virtue of Judge Marcia Crone's October 24 order, contractors can carry on and proceed without present concern about most of the blacklisting rules (read more here).

7. Feds Issue Antitrust Guidance For Employers, Threatening Criminal Prosecution

On October 20, the federal government sent a strong message to employers condemning alleged

antitrust behaviors and warning HR professionals about possible criminal prosecution. The Department of Justice and Federal Trade Commission cautioned employers that they should not enter into agreements with competitors involving certain employment terms, including wage-fixing and solicitation. Stay tuned for our December "On The Front Lines" newsletter for an in-depth discussion of this subject.

8. New York's High Court Issues Pro-Employer Ruling In Misclassification Case

On October 25, the New York Court of Appeals – New York's highest court – ruled that non-staff instructors at a yoga studio were properly classified as independent contractors, and were not employees. The case is a boon to New York employers who utilize independent contractors, as you can now point to a recent decision from New York's highest court in support of your classification decisions (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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