March 2017: The 15 Biggest 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 it always seems to evolve at a rapid pace, the last few months have seen an unprecedented number of changes. March 2017 was another month that saw an above-average number of dramatic developments, leading us to once again expand our summary even beyond a typical "top 10" list. In order to make sure that you stay on top of the latest developments, here is a quick review of the 15 biggest stories from last month that all employers need to know about:

1. **Blacklisting Rules Blocked By Trump's Signature**
   President Trump signed his approval to a joint resolution passed by Congress disapproving of Executive Order 13673, better known as the "Fair Pay and Safe Workplaces" executive order, and more commonly referred to as the "blacklisting" rules (a term which includes regulations and guidance issued in conjunction therewith). President Trump's March 27 signature set ablaze yet another piece of the Obama administration's legacy, permanently blocking rules which would have required federal contractors to disclose violations of numerous workplace laws when bidding for work with the government (read more here).
2. **Déjà Vu All Over Again? Federal Court Blocks Trump's Second Travel Ban**
   This story is getting familiar: the president issues an executive order creating a travel ban, and a court steps in and blocks it. It happened in February, and it happened again in March.

   In his second attempt to pass legal muster, President Trump signed another controversial executive order on March 6 with an aim of altering the initial travel ban blocked by federal courts. The executive order, which was scheduled to take effect on March 16, would have created a 90-day freeze on all entry for individuals from Syria, Iran, Libya, Somalia, Yemen, and Sudan who were outside the U.S. on March 16, did not have a valid visa at 5:00 p.m. EST on January 27, 2017, and did not have a valid visa on March 16. This new executive order, titled "Protecting the Nation from Foreign Terrorist Entry Into The United States," targeted six of the same Muslim-majority countries as the original order, but excluded Iraq (read more here).

   But hours before the ban was to take effect, a federal judge in Hawaii ordered the president's second travel ban be temporarily blocked on a national basis. Characterizing the second travel ban as plainly motivated by religious discriminatory animus against Muslims, District Court Judge Derrick K. Watson granted the state of Hawaii's request for a temporary restraining order,

and set into motion the latest chapter of the continuing legal battle over the president's immigration policies (read more here).

3. **Uber Court Victory A Win For Sharing Economy Companies Everywhere**
   Sure, this case was technically decided in late February, but it didn't hit the news until March, so we're counting it. A California court quietly granted ride-sharing giant Uber a significant victory in the ongoing misclassification battle over whether its drivers are properly classified as independent contractors. Although this ruling received scant attention due to the procedural quirks surrounding the decision, its significance cannot be overstated.

   Sharing economy companies everywhere could – and should – cite this ruling if their classification structures are challenged by plaintiffs' attorneys or government agencies, but should also proactively apply the lessons taught by this case to reduce the chances of being caught in a misclassification trap to begin with (read more here).

4. **President's Budget Plan Requests $15 Million to Support Mandatory E-Verify**
   On March 17, 2017, the Office of Management and Budget (OMB) published the first installment of the Trump administration's FY 2018 Budget plan: "America First: A Budget Blueprint to Make America Great Again." The president's budget plan allocates $44.1 billion to the Department of Homeland Security (DHS), much of which is targeted for enhancement of border security and strengthening of interior immigration enforcement.

   However, included in the proposal is a specific $15 million allocation to "begin implementation of mandatory nationwide use of the E-Verify Program." The requested funds appear to be earmarked for DHS to make the necessary internal improvements to the E-Verify system to support a future rollout of a nationwide E-Verify mandate (read more here).

5. **Appeals Court Refuses To Extend Title VII Coverage To Sexual Orientation**
   The 11th Circuit Court of Appeals declined to extend Title VII's protections to sexual orientation discrimination, but reinforced that employees may allege sex discrimination claims when they face workplace discrimination for failing to conform to gender norms. In a March 10 decision, the court confirmed that employees, regardless of sexual orientation, can sue under the flagship federal civil rights statute to seek relief for harassment, discrimination, and retaliation, but only if the discrimination is related to alleged gender nonconformity (*Evans v. Georgia Regional Hospital*).

   While the decision does not signal a significant change in the law and leaves workers waiting for a groundbreaking decision, it stands as a reminder to employers that sex discrimination claims can manifest in various ways (read more here).

6. **The ACA Survives…Again**
   We feel like a broken record, because we've said it before: the Affordable Care Act is still here. We said the same thing after each of two Supreme Court challenges to central portions of the law, both of which (in 2012 and 2015) fell flat. After campaigning on a promise to swiftly

repeal the landmark healthcare law, and signing an executive order stating the new administration's priority was to repeal and replace the Affordable Care Act (ACA), the president was unsuccessful in convincing Congress to begin dismantling the law, as the House of Representative's legislative proposal was pulled from consideration on March 27. So, we can say it once again: the ACA survives another day, and employers need to continue to operate as if it will be here to stay (read more here).

7. **Employers Grapple With 'Day Without A Woman' Protests**
   After the Women's March on Washington earlier this year, organizers arranged for a worldwide protest on March 8 – fittingly to take place on International Women's Day, a day historically known for protests advocating for gender equality. Those organizing the protest encouraged women to take the day off from paid and unpaid work, avoid shopping for one day (with exceptions for small, women- and minority-owned businesses), and wear red in solidarity with A Day Without A Woman.

   Because the organizers encouraged all people to join in A Day Without A Woman, which could have included absences from work or conversations with workplace decision about promoting family-friendly policies like paid leave or flexible scheduling, employers needed to know where they could draw the line and where they needed to allow protest activity (read more here).

8. **Latest Misclassification Settlement Fails To Lyft Sharing Economy Companies**
   A federal court judge in California approved a settlement agreement whereby ride-sharing company Lyft agreed to pay $27 million to approximately 95,000 California drivers who alleged they were misclassified as independent contractors. Unfortunately, the March 16 settlement fails to advance the cause of gig economy companies.

   Many had been hoping the settlement agreement would provide a structure to help prevent future misclassification claims in the industry, or at least develop some tangible guidelines to help companies navigate the complex and dangerous legal minefield surrounding the employee v. independent contractor debate. Instead, the agreement resolves the existing litigation but keeps the bigger question over misclassification alive (read more here).

9. **Supreme Court Uses Labor Case To Again Stifle Presidential Power**
   A 6 to 2 majority of the Supreme Court (SCOTUS) restricted the president's power to fill high-level administrative positions without the Senate's advice and consent in the March 21 *National Labor Relations Board v. SW General* decision, handing a victory to an employer in a labor dispute. The decision has wide-ranging implications for this and future presidents' ability to choose nominees for important positions in administrative agencies such as the National Labor Relations Board (NLRB), and continues a recent trend of limiting presidential power recently seen in the Court's June 2016 immigration decision.

   While the decision will have an immediate impact on the litigants in this case and the president's prerogative to appoint administrative officials, the long-term effects of the Court's decision on employers are probably limited (read more here).

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10. **Department Of Labor Nominee Appears Before Senate Committee**
U.S. Labor Secretary candidate Alexander Acosta appeared before the Senate's Health, Education, Labor & Pensions Committee on March 22 as part of his confirmation process. The hearing produced some interesting interchanges having to do with matters relating to the federal Fair Labor Standards Act (FLSA) and other federal wage-hour provisions, including Mr. Acosta's view on the controversial Overtime Rule and the resurrection of opinion letters (read more here).

11. **EEOC Launches New Five-City Trial For Online Employee Inquiries**
The Equal Employment Opportunity Commission (EEOC) added a fourth option for employees to initiate charges against their employers – an online portal. On March 13, the agency announced the Online Inquiry and Appointment System (OIAS), another step forward in its cyber-presence, and another avenue for individuals to initiate employment discrimination claims against their employers.

    Although the EEOC will still vet claims before they reach an employer's desk to ensure frivolous or non-viable charges are weeded out, it is unclear whether we can expect to see any sort of increase in the number of claims filed as a result of this new program. Increased access to the ability to initiate the claims process could lead to a slightly higher number of charges filed, although we do not expect a dramatic surge during the initial period of the pilot program or once it is rolled out nationally (read more here).

12. **New York's Far-Reaching Cybersecurity Law Takes Effect**
New York's Department of Financial Services Cybersecurity regulation, intended to require banks, insurance companies, and "covered entities" to "establish and maintain a cybersecurity program designed to protect consumers' private data and ensure the safety and soundness of New York State's financial services industry," went into effect in March 1. This regulation is the first of its kind in the U.S. Because it will likely serve as a model for other states looking to address cybersecurity, all employers should be aware of the rule with an eye toward future compliance responsibilities (read more here).

13. **Educational Institutions Get A Double Dose From The Supreme Court**
The U.S. Supreme Court handed educational institutions a pair of decisions in March that could lead to further compliance confusion. On March 6, the Court announced that it would not entertain arguments in *GG v. Gloucester County School Board*, a case that would have been the Court's first significant opportunity to weigh in on gender identity issues. Instead, the Court remanded the matter back to the 4th Circuit Court of Appeals for further consideration in light of the Trump Administration's recent decision to withdraw federal guidance that instructed public schools to allow students to use the bathroom that corresponds to their gender identity (read more here).

    Then, on March 22, in a unanimous decision crafted by Chief Justice John Roberts, the Supreme Court decided that the Individuals with Disabilities Education Act (IDEA) requires public schools to provide a heightened level of educational benefits for children with disabilities. This new and heightened standard will impact the crafting of individualized education programs (IEPs) for

heightened standard will impact the crafting of individualized education programs (IEPs) for those students (*Endrew F. v. Douglas County School District*).

Although a lower appeals court believed that school districts would satisfy the IDEA if they offered the student an IEP that provides a benefit that is "merely more than de minimis," the Supreme Court rejected this standard in favor of a "markedly more demanding" standard holding that IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." The decision is likely to require a rethinking of the benefits to disabled students provided by public school districts across the country, and is expected to lead to increased litigation challenging the provision of disability benefits provided by those schools (read more here).

14. **SCOTUS Gives WARN-ing To Companies In Bankruptcy: Don't Ignore Wage Claims**
The U.S. Supreme Court held in a 6 to 2 decision that "structured dismissals" resolving Chapter 11 bankruptcy proceedings cannot deviate from the Bankruptcy Code's priority scheme without the consent of the affected parties – which means that businesses must ensure workers receive their unpaid wages as part of any such resolution (*Czyzewski v. Jevic Holding Corporation*). Specifically, the Court rejected a structured dismissal that left a group of WARN Act plaintiffs without any compensation, telling employers, essentially, that they must squeeze blood from a stone to compensate their workers.

The court's March 22 ruling means that a company in Chapter 11 bankruptcy must ensure that all of its creditors and potential creditors with priority under the Bankruptcy Code, which could include current or former employees, agree to settlement terms in order for a structured settlement to be approved. By expanding the requirements for reorganization or liquidation plans to apply to structured settlements, this holding will significantly change how most companies in Chapter 11 will approach settlements by reducing their flexibility and providing affected workers with more leverage at the settlement table (read more here).

15. **Congress Votes To Kill OSHA's "Volks" Rule**
On March 22, Congress passed a resolution killing the new OSHA rule, informally called the "Volks" Rule, which permitted OSHA to cite employers for record-keeping violations up to five years old, rather than the six-month look back applicable to other violations.

The controversial rule was implemented in response to a 2012 US Court of Appeals decision holding that OSHA could not cite employers for failing to record on-the-job illnesses or injuries if the violation took place more than six months before the citation was issued. The rule incensed businesses because it was passed at the proverbial midnight hour in December 2016, four years after the court decision. This was one of the few new regulations that could be struck down by the much touted but seldom used Congressional Review Act (CRA), which gives Congress 60 legislative days to vote down certain new rules. The president is expected to sign the law into effect in the near future (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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