Insights, News & Events

JUNE 2017: THE TOP 15 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. June 2017 was no different, with so many significant developments taking place during the month that we were forced to expand our monthly summary beyond the typical "Top 10" list. In order to make sure that you stay on top of the latest changes, here is a quick review of the Top 15 stories from last month that all employers need to know about:

1. DAWN OF A NEW DAY? LABOR DEPARTMENT WITHDRAWS OBAMA-ERA GUIDANCE ON MISCLASSIFICATION, JOINT EMPLOYMENT

In a welcome development for employers, Secretary of Labor Alexander Acosta announced on June 7 that the U.S. Department of Labor (USDOL) was immediately withdrawing guidance published during the Obama administration that had hampered businesses when it comes to independent contractor misclassification and joint employment standards. While the guidance letters did not carry the force of law, they were relied upon by USDOL investigators and courts when examining allegations of wrongdoing, and were often cited by plaintiffs' attorneys to support their demands.

Their withdrawal is one of the first concrete steps taken by the Trump Department of Labor to free up employers to conduct business in a less burdensome regulatory environment. Although employers still need to proceed with caution when developing policies and practices involving classification and joint employment principles, this

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development might signal the dawn of a new day (read more here).

2. SUPREME COURT PARTIALLY REVIVES PRESIDENT'S TRAVEL BAN, BUT IMPOSES LIMITATIONS

The U.S. Supreme Court announced on June 26 that portions of the controversial Executive Order No. 13780, "Protecting the Nation from Foreign Terrorist Entry Into the United States" (known informally as the "travel ban"), should no longer be blocked from taking effect and should instead be enforced by federal authorities. It issued a partial stay of the injunctions issued by the 4th and 9th Circuit Courts of Appeal that had blocked it from going into effect over the past month, and also announced that it would hear arguments on the case in the October 2017 Supreme Court term (*Trump v. International Refugee Assistance Project*) (read more here).

3. DEPARTMENT OF LABOR ANNOUNCES IT WILL NO LONGER DEFEND OBAMA-ERA OVERTIME RULES

The U.S. Department of Labor finally filed its Reply Brief supporting its request that the 5th Circuit U.S. Court of Appeals overturn last November's preliminary injunction that blocked the salary-related changes in the regulations defining the federal Fair Labor Standards Act's "white collar" exemptions (often referred to as the "overtime rules"). Not surprisingly, the agency argued that it has the authority to include a salary requirement in defining who qualifies for the executive, administrative, professional, and derivative exemptions.

The bigger news, however, was that the agency announced in its brief that it has "decided not to advocate for the specific salary level ($913 per week) set in the final rule at this time," and that it "intends to undertake further rulemaking to determine what the salary level should be" (read more here).

4. OSHA PROPOSES DELAY UNTIL DECEMBER 1 FOR ELECTRONIC RECORDKEEPING RULE

OSHA proposed to delay the compliance date of the electronic recordkeeping portion of the new recordkeeping

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regulation, known as "Improve Tracking of Workplace Injuries and Illnesses," from July 1, 2017 to December 1, 2017 in order to allow OSHA "the opportunity to further review and consider the rule." In its June 27 announcement, OSHA also invited the public to comment on the proposed deadline extension. OSHA had previously delayed the compliance date indefinitely. As a reminder, the anti-retaliation provisions of the new regulation became effective December 1, 2016 for federal OSHA, and have become effective in most state plan jurisdictions as well (read more here).

5. FEDERAL COURT DECISION APPROVES NEW CLASS OF "SURF-BY" LAWSUITS

A federal court in Florida issued a potentially groundbreaking decision that could open the floodgates when it comes to a new trend in litigation filed under Title III of the Americans with Disabilities Act (ADA): the "surf-by" lawsuit. While businesses have been forced to deal with so-called drive-by lawsuits for some time now – those claims filed by plaintiffs who spot technical ADA violations such as inaccessible entrances by simply driving down the street – recent years have seen an explosion when it comes to the digital equivalent of such suits. Surf-by lawsuits, on the other hand, are initiated when someone simply logs onto your company's website to search for possible accessibility violations, and if any are found, follows through by filing an ADA lawsuit against you, sometimes without prior warning.

The June 13 decision from the Southern District of Florida decision paves the way for a new type of surf-by lawsuit, where an enterprising plaintiff or plaintiffs' attorney searches for technical ADA violations on your website regardless of whether any sales are conducted on the site. The troubling decision should motivate you to review your digital presence to ensure you comply with the latest ADA standards no matter what kinds of business is transacted on your website, if any at all (*Gill v. Winn-Dixie Stores, Inc.*) (read more here).

6. DEPARTMENT OF LABOR TO REINSTATE OPINION-LETTER PROCESS

The U.S. Department of Labor announced on June 27 that its Wage and Hour Division will once again issue opinion letters interpreting the federal Fair Labor Standards Act (FLSA) and

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other federal wage and hour laws. Readers will recall Secretary Acosta's confirmation-hearing testimony in which he said that he was open to taking this step. This is a big development for employers who are seeking authoritative guidance on their pay practices under the FLSA and other federal wage and hour laws.

These letters have served as part of the Division's compliance function from the FLSA's earliest days. They have provided USDOL's official, written positions regarding the application of that law's requirements to specific circumstances presented by interested members of the public. USDOL's press release expressed Labor Secretary Acosta's view that opinion letters "will benefit employees and employers as they provide a means by which both can develop a clearer understanding of the Fair Labor Standards Act and other statutes" by providing guidance on specific issues at the request of employers, employees, advocacy groups, or others (read more here).

7. SUPREME COURT BLOCKS PLAINTIFFS FROM TAKING SHORTCUTS IN CLASS ACTION CASES

The Supreme Court unanimously held on June 12 that plaintiffs cannot immediately appeal a federal court's denial of class certification when the named plaintiffs voluntarily dismiss their claims following the denial of class certification, handing a victory to employers and others who face costly class action litigation. This decision maintains the status quo, and continues to deny the plaintiffs' bar the ability to do an end-run around the general prohibition barring provisional "interlocutory" appeals brought while the underlying litigation is still being maintained. While not an employment law decision, this ruling is welcome news for those employers facing class action lawsuits (*Microsoft Corp. v. Baker*) (read more here).

8. LABOR BOARD FINDS EMPLOYER GUILTY OF "TEXTUAL HARASSMENT"

In what appears to be a first-of-its kind decision, the National Labor Relations Board determined on June 7 that an employer committed an unfair labor practice when one of its managers asked a pointed question via text message to an employee about whether his loyalties lie with the company or with the union. While most employers know – or quickly learn – that they should avoid interrogating their employees

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about union matters, this decision demonstrates that the Labor Board could take a very broad approach when determining the contours of the law, and serves as an important lesson for management personnel dealing with a union drive (*RHCG Safety Corp. and Construction & General Building Laborers, Local 79*) (read more here).

9. "MARK OF THE BEAST" WORKPLACE CONCERNS LEAD TO HALF-MILLION DOLLAR VERDICT

Here's some advice you probably didn't think you needed, employers: you should avoid, at all costs, giving or threatening to give your employees the biblical Mark of the Beast. And if they think you are doing so, you should accommodate them if possible. An employer in West Virginia ignored this advice and will now have to write a $550,000 check to a former employee after the 4th Circuit Court of Appeals affirmed a whopping jury verdict on June 12. The case can teach you valuable lessons about religious accommodations in the workplace (*EEOC v. Consol Energy*) (read more here).

10. CHURCH-AFFILIATED EMPLOYERS GET WIN AS SCOTUS CLARIFIES ERISA EXEMPTION

In a unanimous 8-0 decision published on June 5, the U.S. Supreme Court ruled that employee benefit plans sponsored by church-affiliated organizations will qualify for the "church plan" exemption under the Employee Retirement Income Security Act (ERISA) regardless of whether the plan was originally adopted or established by a church. This decision is a huge win for those church-affiliated employers such as hospitals and schools which have historically relied on the exemption from ERISA in the design and administration of their benefit programs (*Advocate Health Care Network v. Stapleton*) (read more here).

11. NEW YORK UBER DRIVERS HELD TO BE EMPLOYEES

Back in October, we reported that there appeared to be the first crack in the wall when it came to classifying Uber drivers as employees instead of independent contractors. At that time, the New York State Department of Labor made the determination while granting the drivers unemployment benefits. We weren't sure how much of an impact these cases would have, however, and concluded by saying "it's

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unclear how far worker advocates will push these decisions. If they do go to their next levels of review, it is possible for New York's appellate courts to be called upon to step into the fray."

The next crack has now appeared in the wall. It wasn't the court of appeals, but an administrative law judge who agreed with the initial determination and on June 9 ruled that the three drivers were eligible to receive unemployment benefits. Again, the significance of this decision isn't really about the benefits themselves; the significance is the determination of employee status by yet another fact-finder. "The overriding evidence establishes that Uber exercised sufficient supervision, direction, and control over key aspects of the services rendered by claimants," wrote ALJ Michelle Burrowes, "such that an employer-employee relationship was created" (read more here).

12. FLORIDA LAWMAKERS PROVIDE MEDICAL MARIJUANA GUIDANCE FOR THE WORKPLACE

Florida Governor Rick Scott signed a medical marijuana bill into law on June 23 that provides guidelines on the implementation of the state's Constitutional Amendment regarding medical marijuana. The good news for employers: the bill provides additional guidance on the amendment's application in the workplace. The bad news for employers: the bill will almost certainly invite legal challenges and continue to cause uncertainty (read more here).

13. MISSOURI LEVELS THE PLAYING FIELD FOR DEFENDING BASELESS DISCRIMINATION LAWSUITS

Good news for Missouri employers: the days of the state arguably being considered the most dangerous place in America for baseless discrimination lawsuits are about to end. Governor Eric Greitens signed legislation on June 30 that, effective August 28, 2017, amends the Missouri Human Rights Act (MHRA) and mostly aligns Missouri with federal antidiscrimination law and the laws of most other states. The result will be a level playing field for all parties to a discrimination claim. Employees still will be protected against employment discrimination, and employers will be better able to defend baseless lawsuits (read more here).

14. EMPLOYERS STILL STUCK WITH NLRB'S WITNESS STATEMENT DISCLOSURE STANDARD

The U.S. Court of Appeals for the District of Columbia rejected the chance to revive long-held precedent which for many years had protected employer witness statements from disclosure to unions before an arbitration hearing. The court instead ruled that the employer in the center of the battle did not have standing to challenge the National Labor Relations Board's far-reaching 2015 decision in *American Baptist Homes of the West dba Piedmont Gardens*, snuffing out the current litigation and ending employer hopes of an ultimate victory. Although it did not affirmatively adopt the NLRB's standard, the court's ruling essentially leaves intact a new standard whereby witness statements might have to be turned over to unions before the witness testifies.

The June 6 ruling is a disappointing one for unionized employers. It leaves in place a troubling decision that changes the way employers conduct workplace investigations in a union environment and places management representatives in a tricky situation. While it is possible that a reformed Labor Board installed by the Trump administration will one day reverse the current standard and resurrect the decades-old precedent which had protected witness statements from disclosure, it is not possible at this time to predict whether and when such a day might arrive. In the meantime, there are some specific steps we recommend each employer take in order to comply with this standard, as outlined at the conclusion of our summary article (*American Baptist Homes of the West v. NLRB*) (read more here).

15. NEW LEGISLATION ALLOWS PHILADELPHIA TO SHUT DOWN BUSINESSES THAT VIOLATE ANTI-DISCRIMINATION LAWS

The City of Philadelphia will now have the authority to shut down a business within the city for an undefined "period of time" if the business severely or repeatedly violates Philadelphia's anti-discrimination laws, under a bill signed by Mayor Kenney on June 22, 2017. Bill No. 170334 amends the City's Fair Practices Ordinance, which covers unlawful employment practices. The Fair Practices Ordinance prohibits discrimination based on certain protected classes, such as age, ancestry, color, disability, ethnicity, gender identity, sexual orientation, national origin, race, religion, and sex and is enforced by the Philadelphia Commission on

Human Relations (PCHR), the City's primary civil rights and anti-discrimination agency.

The new ordinance, which became effective immediately, explicitly allows PCHR to use its enforcement authority to order a business to cease operations for a period of time if the business is found to have "engaged in severe or repeated violations" of the City's Fair Practices Ordinance and has not made "effective efforts" to remediate the violations (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.