Insights, News & Events

JULY 2017: THE TOP 12 LABOR AND EMPLOYMENT LAW STORIES

Insights
Aug 1, 2017

It's hard to keep up with all the recent changes to labor and employment law. While the law always seems to evolve at a rapid pace, there have been an unprecedented number of changes each month in 2017. July 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 12 stories from last month that all employers need to know about:

1. JOINT EMPLOYMENT GAME CHANGER? PROPOSED LAW WOULD RADICALLY ALTER DEFINITION IN EMPLOYERS' FAVOR

Employers across the country should collectively cross their fingers and hope that HR 3441, also known as the "Save Local Business Act," becomes law in the near future. The bill, introduced in the House of Representatives on July 27, would significantly narrow the definition of "joint employment" to eliminate existing workplace law headaches when it comes to federal wage and hour law and traditional labor law. If passed, it would significantly reduce the risk of unexpected and unwarranted legal claims in any business model where a claim of joint employment is a possibility (read more here).

2. MASSACHUSETTS EMPLOYERS SEE MEDICAL MARIJUANA DEFENSE GO UP IN SMOKE

The highest state court in the Commonwealth of Massachusetts issued a decision on July 17 announcing that

Related People

Davis C. Bae
Partner
206.693.5060

Jason A. Geller
Regional Managing Partner
415.490.9020

handicapped employees who have been prescribed medical marijuana may be entitled to a reasonable accommodation under the state's handicap discrimination law, while requiring employers to engage in an interactive process to assist in making this determination. In *Barbuto v. Advantage Sales & Marketing, LLC*, the Supreme Judicial Court (SJC) reversed the dismissal of the employee's handicap discrimination claim, finding that a "qualifying patient who has been terminated from her employment because she tested positive for marijuana as a result of her lawful medical use of marijuana" states an actionable claim of handicap discrimination under Massachusetts's anti-discrimination law.

The holding in this case is quite significant. It now calls into question the validity of zero-tolerance drug policies for employers in the state when medical marijuana is concerned. Unlike decisions of other state supreme courts across the country, this case also permits an employee to go forward with a private right of action against their employer. Businesses with operations in Massachusetts will want to review this decision and determine whether they need to adjust their policies and practices (read more here).

3. DEPARTMENT OF LABOR SEEKS INPUT ON "OVERTIME" RULE

A U.S. Department of Labor (USDOL) Request for Information was published on July 26 to seek additional public comment regarding the 2016 compensation revisions in the regulations defining the federal Fair Labor Standards Act's so-called white collar exemptions (also known as the "overtime" rule). The USDOL is undertaking this initiative while at the same time moving forward with a partial defense in the litigation that prompted a nationwide federal court preliminary injunction last November. The request contains eleven broad questions, touching on a variety of subjects, and signals that the agency could very well present a revised version of the rule in the near future (read more here).

4. EMPLOYERS MUST SOON USE YET ANOTHER NEW I-9 FORM

It might seem like just yesterday that employers were told that they needed to use a new version of the Form I-9, the document verifying the identity of new hires to ensure they are authorized to work in the United States. Yet just eight

Todd B. Logsdon

Partner

502.561.3971

Richard R. Meneghello

Chief Content Officer

503.205.8044

Joshua D. Nadreau

Regional Managing Partner and Vice Chair, Labor Relations Group

617.722.0044

months after the release of the most recent version, the United States Citizenship and Immigration Services (USCIS) released an updated Form I-9 on July 17. Employers will need to adapt to the change and use the new form by no later than September 18, 2017 or face the possibility of large fines (read more here).

5. TIP-POOLING RESTRICTIONS SLATED TO BE RESCINDED, LABOR DEPARTMENT ANNOUNCES

The USDOL plans to propose a full rescission of the controversial tip-pooling restrictions impacting employers who pay tipped employees the full minimum wage directly sometime in August, according to a regulatory agenda published on July 20. This news should come as a welcome relief to employers in the hospitality industry, especially those operating in the 9th Circuit – which includes the states of California, Nevada, Washington, Arizona, Oregon, Idaho, Montana, Hawaii, and Alaska – where a divisive 2016 appellate court decision has operated the last several years to handcuff a substantial number of businesses. While the announcement does not immediately change existing law, it sets into motion regulatory action that could aid hospitality employers across the country (read more here).

6. COURT SAYS UBER DRIVERS CAN PROCEED WITH NATIONAL MISCLASSIFICATION CLASS ACTION

A federal court judge in North Carolina granted permission to a group of Uber drivers challenging the company's classification structure to band together and proceed with a class action lawsuit against the ride-hailing company. The drivers claim they are improperly labeled as independent contractors and should be entitled to minimum wage, overtime, and other wage and hour protections under the federal Fair Labor Standards Act (FLSA). According to the attorneys representing the drivers, the July 12 ruling is the first time a court has tentatively allowed a nationwide FLSA case to proceed against Uber on this theory. This decision means that those drivers who opted out of arbitration agreements – some 15,000 to 19,000 workers – will now have the opportunity to join the case and bring their claims against Uber (read more here).

John M. Polson

Chairman & Managing Partner

949.798.2130

Ashton M. Riley

Partner

949.798.2186

Susan M. Schaecher

Senior Counsel

303.218.3650

7. GRUBHUB COULD FACE FIRST TRIAL IN NATION OVER MISCLASSIFICATION QUESTION FOR GIG WORKERS

Gig employers returning from the Fourth of July holiday were in for a rude awakening when they learned about the fireworks that went down in a California federal court right before the holiday weekend. Judge Jacqueline Scott Corley denied GrubHub's request to have a misclassification case tossed from court. She has now scheduled it for a bench trial to begin September 5. At stake: a decision from a federal judge about whether those who perform work for one of the largest on-demand companies are independent contractors or employees. To be certain, this is not the first time a court has considered this question. Cases against Uber and Lyft are just two of those that have been filed on a misclassification theory, but none of these have been litigated to a final resolution. They have either been settled or just haven't gotten to a final trial phase yet, which means the GrubHub trial could be the first time a federal judge actually renders a final decision on this issues (read more here and here).

8. OSHA ANNOUNCES PORTAL FOR ELECTRONIC RECORDKEEPING REPORTING TO OPEN AUGUST 1

The Occupational Safety and Health Administration (OSHA) announced the portal for electronic recordkeeping reporting will become available on OSHA's website beginning August 1, 2017. The July 14 announcement comes one day after the public comment period ended. OSHA previously issued a notice of proposed rulemaking that delayed the initial deadline for electronic reporting from July 1 to December 1, 2017. These events have combined to create some uncertainty for employers about whether and when they may be required to electronically submit recordkeeping data. At this time, employers should wait until the proposed rulemaking is finalized, and it is likely that electronic recordkeeping will not be required until December 1, 2017, if at all. The proposed rulemaking indicated that "OSHA also intends to issue a separate proposal to reconsider, revise, or remove other provisions of the prior final rule" (read more here).

9. SAN FRANCISCO EMPLOYERS FACE NEW GENDER EQUALITY LAWS

Joseph P. Shelton

Regional Managing Partner

615.488.2901

Service Focus

- Counseling and Advice
- Employee Leaves and Accommodations
- Employment Discrimination and Harassment
- Immigration
- Labor Relations
- Litigation and Trials
- Pay Equity and Transparency
- Privacy and Cyber
- Wage and Hour

Industry Focus

- Hospitality
- PEO

The San Francisco Board of Supervisors has just added two new employment ordinances to the burgeoning list of employment-related ordinances in the City by the Bay. First, the Parity in Pay Ordinance, signed into effect on July 19, prohibits employers from inquiring about an applicant's salary history. The second ordinance, the Lactation in the Workplace Ordinance, requires employers to provide accommodations to nursing mothers (read more here).

10. ASHLEY MADISON DATA BREACH RESULTS IN $11.2 MILLION SETTLEMENT

Users of the "married dating" website, ashleymadison.com, received preliminary approval of an $11.2 million class action settlement that sought to resolve a number of consolidated lawsuits against Avid Life Media. This July 21 settlement will conclude all the civil claims against Avid Life Media and a number of individually named owners and operators of the business arising from the data breach that brought the website to heightened notoriety in 2015 (read more here).

11. MASSACHUSETTS FINALIZES NEW PREGNANCY WORKPLACE LAW: WHAT TO EXPECT WHEN YOUR EMPLOYEES ARE EXPECTING

Massachusetts joined 21 other states and the District of Columbia by enacting a comprehensive pregnancy workplace law with unanimous support from the legislature, employee advocates, and the Massachusetts business community. On July 27, Governor Charlie Baker signed the Pregnant Workers Fairness Act (PWFA), which will take effect (appropriately enough) in about nine months – on April 1, 2018. At its heart, the PWFA adds "pregnancy or a condition related to said pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child" to the list of protected classes under the Commonwealth's anti-discrimination act, but the law goes further than that – it also requires employers to provide reasonable accommodations when appropriate (read more here).

12. EMPLOYERS LITIGATING PAGA ACTIONS TAKE HIT FROM CALIFORNIA SUPREME COURT

In a unanimous decision, the California Supreme Court ruled that plaintiffs in lawsuits brought pursuant to the California

Private Attorneys General Act (PAGA) can seek the contact information for their fellow "aggrieved employees" at the outset of their lawsuit, without a showing of good cause for the potentially private information. As any employer who has faced a PAGA action knows, a list of contact information for all employees can be a treasure trove of information that should be protected from disclosure at all costs, so this decision could have serious repercussions. The court's July 13 decision in *Williams v. Superior Court (Marshalls)* paves the way for litigation costs in PAGA litigation to grow exponentially at the outset of a case. It will likely embolden plaintiffs (and their attorneys) to make aggressive discovery demands on employers without making any factual showing that the employer has a companywide policy or practice that violated, or likely violated, the Labor Code (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.