

AUGUST 2017: THE TOP 11 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 the law always seems to evolve at a rapid pace, there have been an unprecedented number of changes each month in 2017. August 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 11 stories from last month that all employers need to know about:

1. **Next Nail In The Coffin: Overtime Rule Struck Down By Federal Judge**

In the biggest news from the past month, a federal judge in Texas struck down the controversial Obama-era change to the federal Fair Labor Standards Act (FLSA) that was intended to substantially raise the minimum salary threshold required for employees to qualify for the "white collar" exemptions. The August 31 decision signifies another nail in the coffin for the so-called "overtime rule," which was originally blocked in late November 2016, and has since faced a very uncertain future given the subsequent change in White House leadership. While the decision is favorable to employers, whether it is the "final" nail for the minimum salary threshold originally proposed (\$913 per week) remains to be seen. In any event, it is likely the U.S. Department of Labor (USDOL) will propose another version of the rule in the coming months, so employers should be prepared for more changes (read more [here](#)).

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2. White House Blocks Revised EEO-1 Report

The Office of Management and Budget (OMB) announced on August 29 that it was implementing an immediate stay of the revised EEO-1 Report, putting a halt to long-awaited pay data reporting requirements. In issuing the stay, the OMB articulated its own concerns with the revised reporting requirements: "Among other things, OMB is concerned that some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues." The stay creates much needed relief for employers, but is expected to further refocus pay equity discussions on a statewide and local level (read more [here](#)).



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3. Hurricane Harvey Slams Texas, Leaving Employers With Many Questions In Its Wake

In late August, Hurricane Harvey became the first major hurricane (Category 3 or stronger) to make direct landfall in the United States since 2005, dumping record-setting amounts of rain over Texas over a period of several days. The catastrophic impact of the hurricane led to many questions from employers, on topics such as military and family leave, unemployment claims, workplace safety, employee benefits and charitable giving, wage and hour compliance, labor relations, workers' compensation coverage, immigration, and plant closing laws. Fisher Phillips updated its comprehensive series of FAQs to aid employers through this natural disaster; it can be accessed [here](#).



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4. Another Federal Appeals Court Rejects Workplace Recording Bans

The 5th Circuit Court of Appeals recently became the second federal appeals court this year to hold that an employer's rule prohibiting recording in the workplace violates the National Labor Relations Act (NLRA). The court agreed with the National Labor Relations Board (NLRB) that such a rule could discourage unionizing or other protected activity. The *T-Mobile USA, Incorporated v. NLRB* decision is yet another reminder that employers need to tread carefully when it comes to personnel policies restricting audio and video recording (read more [here](#)).



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5. Court Decisions Mean We're One Step Closer To A Unionized Gig Economy

The battle over organizing workers in the on-demand

economy continues to heat up, with two significant court rulings coming down in favor of unionization this past month. On August 1, a federal court in Washington dismissed a lawsuit filed by the U.S. Chamber of Commerce and others challenging the City of Seattle's landmark ordinance that essentially authorizes ride-hailing drivers to unionize (read more [here](#)). And on August 24, the same judge ruled that Seattle's Ordinance should stand, dismissed an additional series of challenges pending against the law. Although the order gave the law the green light to proceed, the 9th Circuit Court of Appeals quickly blocked the Ordinance from taking effect while an appeal against the ruling plays out (read more [here](#)).

6. Back To The Drawing Board? Court Tells EEOC To Reconsider Wellness Program Rules

A federal court in the District of Columbia told the Equal Employment Opportunity Commission (EEOC) to reconsider two of its recent regulations surrounding incentivizing participation in employer-sponsored wellness programs. Despite the August 22 decision against the EEOC, employers should be aware that the rules will be kept in place for the time being to avoid "disruption and confusion." While you should keep the status quo for now, this situation bears monitoring in the near future to see whether a wholesale change takes place at some point in the near future (read more [here](#)).

7. Trump Creates New Hurdles For Employment-Based Green Card Applicants

The United States Citizenship and Immigration Services (USCIS) announced on August 28 that it will start phasing in the requirement for an in-person interview for anyone obtaining employment-based permanent residency. For almost the past 20 years, interviews of employment-based applications were generally waived as there was little value that local adjudication added to the process, but beginning October 1, 2017, all that will change.

The administration stated that this shift is part of an "extreme vetting" plan, and could add more than 200,000 in-person interviews per year in USCIS offices throughout the country. It will no doubt cause backlogs, long waits for green card approvals, and additional cost and frustration for foreign nationals and employers. While the USCIS has confirmed that this will be a program rolled in



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in various phases, it will eventually mandate in-person interviews across several other types of immigration benefits (read more [here](#)).

8. Heightened Risk Of Future Identity Theft Enough For Standing In Data Breach Class Action, Rules D.C. Circuit Court

Much to the dismay of employers, the U.S. Court of Appeals for the D.C. Circuit made it easier for plaintiffs and their attorneys to bring class action data breach cases against businesses. In the *Attias v. CareFirst, Inc.* decision, issued August 1, the court concluded that the plaintiffs' heightened risk of future identity theft was sufficient to show standing at the pleading stage. The D.C. Circuit thus becomes the second federal court of appeals to reach this conclusion, joining the 2nd Circuit.

This decision represents a further evolution of the U.S. Supreme Court's 2016 opinion in *Spokeo, Inc. v. Robins*, where the Court held that plaintiffs must allege more than a speculative harm to proceed with their cases; instead, the harm must be "actual or imminent." Demonstrating "actual or imminent" harm at the pleading stage often proves difficult in data breach cases if the breached information has not yet been used to harm plaintiffs. Companies have successfully used this fact, along with the reasoning in *Spokeo*, to challenge standing to bring data breach claims early in the litigation. This decision, however, gives plaintiffs a path to defeating such challenges (read more [here](#)).

9. Labor Board Dunks On Employer's Contractor Classification Attempt

In a ruling sure to leave businesses and gig economy companies crying foul, the NLRB concluded that workers producing electronic video display content for the NBA's Minnesota Timberwolves were misclassified as independent contractors and are actually employees. The Board's 2-1 decision in the case of *In re Minnesota Timberwolves Basketball LP*, announced on August 18, is a setback for businesses seeking certainty in their classification decisions, and is a reminder that the current roster of Labor Board members remains decidedly pro-worker and pro-union. Until the Board is comprised of a majority of Republican appointees, businesses need to be



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wary in their approach to classification situations (read more [here](#)).

10. NLRB Fires Another Shot At The Gig Economy

The NLRB issued a complaint against gig economy mainstay Handy on August 28, alleging that the on-demand workers who provide home cleaning services through its online platform are actually employees and not independent contractors. The complaint was issued out of the NLRB's Boston office, but could spell trouble for on-demand companies everywhere (read more [here](#)).

11. Affirmative Action Bombshell: Justice Department Announces New College Admissions Project

Higher education institutions felt seismic shockwaves on August 1 as the New York Times reported that the Trump administration would soon redirect Justice Department resources toward investigating – and possibly suing – colleges and universities over their affirmative action admissions policies. Although the state of affirmative action policies has evolved over the past several decades, never before has such a stark and dramatic shift in the landscape been proposed (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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