October 2017: The Top 11 Labor And Employment Law Stories

Insights
11.02.17

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. October 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. California Employers Face Significant New Requirements
California employers will soon need to adjust themselves to a new reality once again as a number of new workplace restrictions were passed by the state legislature and signed into law by Governor Jerry Brown on or before the October 15 deadline (read more here). The seven most important developments are:

- The state has now "banned the box" and will soon prohibit public and private employers from inquiring about criminal history with applicants;
- California has joined the ranks of a growing number of jurisdictions to prevent employers from asking about salary history information, soon prohibiting public and private employers from seeking or relying upon the salary history of applicants for employment;
- The "New Parent Leave Act" will provide up to 12 weeks of job-protected parental leave for employers with 20 or more employees;
- Another new law will prohibit employers from voluntary consenting to Immigration and Customs Enforcement (ICE) access to the worksite without a judicial warrant, require employers to provide their workers with notice of certain immigration enforcement actions, and impose new statutory penalties for violations of the law;
- Another bill signed into law will dramatically tilt the scales in favor of employees when it comes to retaliation and whistleblower claims; and
- Soon, employers completing their biennial sexual harassment training to supervisory employees will also have to provide training on harassment based on gender identity, gender expression, and sexual orientation.

2. Blockbuster SCOTUS Term Kicks Off

If you are the kind of person who gets excited by hot-button legal topics and monumental court decisions, this is the Supreme Court term for you. The SCOTUS kicked off their 2017-2018 term on October 2 by hearing arguments in a critical workplace law case, and the hits will keep coming for the remainder of the term. After a rather boring session in 2016-2017, the Court has teed up a variety of juicy labor and employment cases that, once decided, promise to reshape the way you interact with your employees in the future (read more here).

3. Trump's Third Travel Ban Blocked By Federal Court (Oct 17)

For the third time this year, a federal district court has blocked a presidential travel ban from taking effect. Judge Derrick K. Watson, from the District of Hawaii, granted a motion for a temporary restraining order on October 17 that bars the federal government from enforcing President Trump's September 24 travel ban (Travel Ban 3.0) on a national level, once again setting up a showdown at the 9th Circuit Court of Appeals and possibly the U.S. Supreme Court (read more here).

4. Is This The Beginning Of The End Of The NLRB's War On Employer Rules?

Employers who have been keeping up with the National Labor Relations Board's (NLRB) decisions over the past eight years may be pleasantly shocked to learn that an Administrative Law Judge (ALJ) upheld an employer's seemingly broad rule providing that "all documents are considered confidential" and are not to be "taken off the premises." They also will be shocked to learn that the same ALJ upheld the employer's blanket rule prohibiting texting anywhere.

The October 19, 2017 decision in the *Green Apple Supermarket of Jamaica, Inc.* case is a hopeful sign that employers will soon be able to impose reasonable measures over their workers without fear of reprisal from the Labor Board. But take this victory with a grain of salt; it is just an initial step in a conflict that will almost certainly take additional twists and turns along the way (read more here).

5. Labor Department Appeals Ruling Against Its Overtime Rule

The U.S. Department of Labor (USDOL) filed a notice on October 30 that it is appealing September's summary judgment ruling against the compensation-related changes the agency sought to make in regulations defining the federal Fair Labor Standards Act's "white collar" exemptions, also known as the "overtime rule." The notice contains no indication of what USDOL's motivations are or of what its substantive arguments might be. However, the agency probably wants to keep the case alive pending its ongoing, independent review of and eventual action to be taken in conjunction with the public's recent responses to USDOL's Request for Information regarding these regulations. And judging from USDOL's positions previously expressed in the litigation, it seems likely that the agency will not defend the $913-a-week figure chosen by President Obama's USDOL but instead simply argue that a salary test is legally permissible under the white-collar exemptions (read more here).

6. NYC Salary History Ban Goes Into Effect

New York City employers are now prohibited from asking job applicants about their salary history. As a measure to address gender-based wage gaps, the New York City Council passed legislation

As a measure to address gender-based wage gaps, the New York City Council passed legislation earlier this year which prohibits employers from making inquiries about the salary history of a job applicant or relying on the salary history of an applicant in determining compensation. The law took effect on October 31, 2017. You can read a summary of the law here, and find seven tips for how to comply with the new law here.

7. Grubhub Misclassification Trial Wraps Up

The parties in the Grubhub misclassification case were back in a California federal court on October 30, delivering their final closing arguments to the judge. A former delivery driver for Grubhub claims he was misclassified as an independent contractor, and seeks to advance his claims on behalf of a whole class full of other drivers. Raising the stakes dramatically is the fact that this could very well be the first independent contractor misclassification claim for the gig economy that has reached a judicial merits determination. Although the ultimate decision by the judge will not necessarily make or break the gig economy as a whole, this is an important milestone. You can read a summary of the post-trial briefing filed here, and a summary of the October 30 oral arguments here.

8. White House Narrows ACA Contraception Mandate

The Department of Health and Human Services (HHS) issued new rules on October 6 which will limit the contraception coverage mandate covering employers under the Affordable Care Act (ACA). The new rules expand the range of employers and insurers that can invoke religious or moral beliefs to avoid the ACA's requirement that birth control pills and other contraceptives be covered by insurance as part of preventive care (read more here).

9. Feds Say Title VII Doesn't Cover Transgender Workers

Attorney General Jeff Sessions formally reversed the federal government's position on whether transgender workers are covered by Title VII of the Civil Rights Act, informing all U.S. Attorneys and heads of all federal agencies that the Department of Justice (DOJ) no longer believes that the anti-discrimination statute provides such coverage. The October 4 memo indicates that, according to the DOJ, "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status" (read more here).

10. State Street Corp. To Pay $5 Million To Settle Unequal Pay Allegations

A conciliation agreement released by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) on October 4 revealed that State Street Corp. has agreed to pay $5 million to settle allegations that the company discriminated against more than 300 female executives by paying them less than their male counterparts. The settlement also resolves allegations by the OFCCP that State Street paid 15 black vice presidents less than white vice presidents.

The OFCCP, which audits government contractors for compliance with workplace affirmative action and non-discrimination requirements, conducted an audit of State Street's corporate headquarters in Boston in 2012. According to the OFCCP, that audit revealed pay disparities between men and women holding similar senior vice president, vice president, and managing director positions, and

women holding similar senior vice president, vice president, and managing director positions, and also between blacks and whites holding vice president positions. According to the audit findings, the inequalities existed even when legitimate factors for pay differences were taken into account, such as performance, experience, and education (read more here).

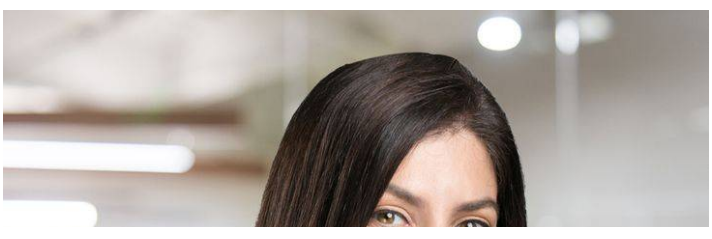
11. USDOL's Proposed Tip-Pooling Modification Takes Next Step

The USDOL has taken the next step toward rescinding the prior administration's 2011 regulatory position that an employer may not retain any of an employee's tips even if management takes no tip-credit under the federal FLSA and instead pays the employee not less than the full FLSA minimum wage in direct wages (plus any FLSA overtime compensation due). The federal Office of Management and Budget (OMB) reported on October 24 that the USDOL has now submitted a proposed rule in this respect for OMB's review, although neither the OMB nor the USDOL has elaborated upon what this proposal actually says (read more here).

If you have any questions about these developments or how they may affect your business, please contact your Fisher Phillips attorney.

Related People

Cheryl L. Behymer
Partner
803.255.0000
Email



Melissa (Osipoff) Camire
Partner
212.899.9965
Email

Jessica T. Cook
Partner
404.240.4151
Email

Benjamin M. Ebbink
Partner
916.210.0400
Email

Reyburn W. Lominack, III
Partner
803.255.0000
Email

Richard R. Meneghello
Chief Content Officer
503.205.8044
Email

Cheryl Pinarchick
Regional Managing Partner
617.532.8215
Email

Service Focus

Affirmative Action and Federal Contract Compliance

Class and Collective Actions

Employee Benefits and Tax

Employee Leaves and Accommodations

Employment Discrimination and Harassment

Immigration

Labor Relations

Litigation and Trials

Pay Equity

Counseling and Advice

Wage and Hour

Industry Focus

Automotive Dealership

Gig Economy

Hospitality