November 2018: The Top 12 Labor And Employment Law Stories

Insights
12.04.18

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 for the past few years—and this past month was no exception.

In fact, there were so many significant developments taking place during the past month that we were once again forced to expand our monthly summary well 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. 1. **Top 10 Things Employers Need To Know About Midterm Election Results** – As many predicted, Democrats recaptured the House for the first time in eight years in the November midterm elections, while Republicans retained and strengthened their grip on the Senate. That will lead to a dynamic in Washington, D.C. that the Trump administration has yet to face: a fractured legislature and a tug-of-war at the federal level. What does this development mean for employers? Here are the top 10 things to expect in the labor and employment law arena given the results in this year's historic elections (read more here).
   2. **Supreme Court: Small Public Employers Now Subject To ADEA** – In a unanimous 8-0 decision, the United States Supreme Court issued its first ruling of the new term on November 6 and delivered a blow to small public-sector employers fending off age discrimination lawsuits. The Court ruled that the Age Discrimination in Employment Act (ADEA) applies to all states and political subdivisions regardless of the number of people the public entity employs. The Court's ruling in *Mount Lemmon Fire District v. Guido* has implications for small public employers—who must now comply with the ADEA—but also raises the serious specter for individual liability under the ADEA for all employers (read more here).
   3. **Appeals Court Rejects Retaliation Claim Based On Religious Accommodation Request** – In a case of first impression, a federal appeals court just found that an applicant's request for a religious accommodation did not constitute protected activity under Title VII for the purpose of establishing a retaliation claim. Under the 8th Circuit's November 13 ruling, the appropriate avenue to challenge an employer's denial of a religious accommodation request under Title VII is by filing a disparate treatment claim, not through a retaliation cause of action. What can employers take from the *EEOC v. North Memorial Health Care* decision? (read more here)

(read more here).

4. **What Will A Governor Newsom Mean for California Employers?** – While much of the attention this midterm election has been focused on Congress and federal issues - the "blue wave" and a "referendum" on the Trump presidency - California employers know all too well that employment and labor policy is largely being driven at the state and local level. The split in Congress between the Republican-led Senate and the Democrat-controlled House means that we can expect continued gridlock and lack of significant federal legislation on employment issues. Here in California, though, we have a new governor-elect in the form of former Lieutenant Governor and former San Francisco Mayor Gavin Newsom. Continued overwhelming Democrat majorities in both the State Senate and the State Assembly will help ensure that labor and worker advocates will have little trouble getting measures through the legislature and onto the new governor's desk. What will this new administration mean for California employers—more of the same, or a fresh voice? It's pretty clear that labor will continue to have a friendly voice in the governor's office in Sacramento, so we're not looking at monumental change on the horizon. But previous comments and campaign statementsby Newsom may shed some light on the course he may forge on labor and employment issues once he officially takes office (read more here).
5. **Missouri Voters Pass Minimum Wage Increase** – As predicted, Missouri voters turned out in record numbers for the 2018 general election on November 6 and overwhelmingly voted to pass Proposition B: The $12 Minimum Wage Initiative. As a result, beginning January 1, 2019, the hourly minimum wage in Missouri will increase from $7.85 to $8.60, and will gradually increase by 85 cents per year until it reaches $12.00 per hour in 2023:
    - 2020 – $9.45/hour
    - 2021 – $10.30/hour
    - 2022 – $11.15/hour
    - 2023 – $12.00/hour

    The initiative comes on the heels of Missouri voters rejecting Missouri's "right-to-work" proposition in the 2018 August primary. Although the federal minimum wage remains at $7.25 per hour, private employers with workers in Missouri must comply with the new law beginning January 1, 2019. Employers who fail to comply with the new law will be penalized and will be required to pay an underpaid employee not only the full amount of wages owed, but also additional amount equal to twice the unpaid wages (read more here).
6. **Medical Marijuana In Missouri: New Law Brings New Questions For Employers** –Missouri voters approved Amendment 2 on Election Day 2018, one of the three medical marijuana measures appearing on the state's ballot. Amendment 2 adds an article to the Missouri Constitution legalizing medical use of marijuana for qualifying patients and allowing people who qualify to grow their own plants. With a new law comes new questions about how this development will affect workplaces across the state. Here are a series of the most common questions Missouri employers may have while adjusting to this new reality (read more here).

7. **Kentucky's Right-To-Work Law Upheld By State Supreme Court** – A bitterly divided state Supreme Court upheld Kentucky's right-to-work law by a 4-3 vote on November 15, cementing Kentucky's status as one of 27 states in the country to have such a law on the books. Although the law was originally signed in January 2017 and immediately took effect, unions in Kentucky resisted accepting the reality of right-to-work and were banking on this litigation to overturn law. Now that the legal challenges have been denied, employers should ensure they are familiar with right-to-work, as the law could have an impact on your workplace (read more here).
8. **Newly Created Massachusetts Agency Issues First Guidance On Paid Leave Law** – As the ramp-up towards Massachusetts' paid family and medical leave continues, the newly created Department of Family and Medical Leave (DFML) just launched its website and issued its first guidance documents in November. As discussed previously, the July 1, 2019 date for starting contributions looms in the not-too-distant future, while benefits under the paid leave programs will begin in January 2021. What do employers need to know about this development? (read more here)
9. **Top 10 Non-Monetary Terms In Uber's $10M Discrimination Settlement** – Sure, the monetary portion of the settlement—$10 million to a class of approximately 400 Uber software engineers and over $2.6M in attorneys' fees—is pretty eye-opening. But perhaps the more significant part of the settlement agreement that was just agreed toby a federal court judge on November 14 were all of the non-monetary terms. The case began in October 2017 as a group of female, black, Hispanic, Native American, Alaskan Native, and other multiracial software employees filed a class claim against Uber in federal district court in northern California. As Bloomberg's Patrick Dorrian reported, the case included allegations that Uber "discriminated on the basis of sex, race, and national origin by hiring female software engineers and engineers of color at lower job levels than their credentials justified and paying them less than white and Asian software engineers for the same work. It also was alleged that the performance reviews of female software engineers and engineers of color at Uber were infected by systematic bias, resulting in their being promoted at a slower rate than their white and Asian counterparts."

   By March 2018, the parties had reached a tentative agreement—with Uber expressly stating that it was not admitting to the validity of the claims alleged in the Complaint—and approached Judge Yvonne Gonzalez Rodriguez for her necessary approval on the deal. After several months of hearings and further briefing, Judge Rodriguez provided her final approval of the deal on November 14, wrapping up the case. The order, drafted by the parties, runs some 45 pages and includes reams of detailed, technical provisions. We've reviewed the deal and plucked the most interesting 10 items of note from the agreement (read more here).
10. **Cyber Monday And Beyond: 3 Things Employers Need To Know** – This year's Cyber Monday —the first work day back after the Thanksgiving break—was once again expected to be the largest online shopping day in history. Last year, 81 millionAmerican consumers spent

over $6.5 billion on digital transactions on Cyber Monday, easily the busiest online shopping day of the year, and an increase of close to 17 percent from the previous year. And it's starting to even edge out Black Friday in popularity—it was reported that 71 percent of consumers said they planned on shopping on last year's Cyber Monday, while only 69 percent said they planned to do so on the day after Thanksgiving. No doubt some of your employees (or most of your employees) spent part of the day (or most of the day) hunting for online deals as they realized the holiday shopping season kicked off and they didn't want to be left behind. So what should employers know about the day and the next few weeks of frenetic online shopping? Here are three things you should consider (read more here).

11. **3 Takeaways From Grubhub Plaintiff's Opening Appeals Brief** – The first-ever trial on the gig economy misclassification to reach a judicial merits determination has now turned into the first-ever appeal on gig economy misclassification. And on November 9, the plaintiff seeking to overturn the ruling filed his opening appeals brief with the 9th Circuit Court of Appeals. We've covered the *Lawson v. Grubhub*decision in detail over the past year; if you want to refresh your memory, feel free to catch up by reading any of our posts. In sum, a federal trial court ruled in February 2018 that Grubhub correctly classified plaintiff Raef Lawson as an independent contractor and rejected his misclassification claim, but then the California Supreme Court changed the game a few months later by adopting the strict ABC test for misclassification in the now infamous *Dynamex* case. How will the *Dynamex* decision impact the *GrubHub* appeal? We're not sure, but we know how the plaintiff feels about it. We digested the 61-page appeals brief and can give you the three most important takeaways from the filing (read more here).
12. **NYC Council Passes 6 More Bills Protecting Ride-Sharing Drivers** – On the heels of the NYC Council passing (and the mayor signing into law) a bill requiring minimum payments for ride-sharing drivers and a one-year freeze on the number of ride-sharing vehicle licenses issued, the NYC Council just passed another six new billsaimed at protecting both taxi drivers and ride-sharing drivers. The bills, approved by the Council on November 14 and expected to soon be signed into law by Mayor DeBlasio, are focused not only on drivers' pay, but also on the financial and mental well-being of drivers in the wake of a spate of recent driver suicides and some of the more macro-economic issues facing the taxi and ride-sharing industries in NYC (read more here).

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

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