

Fisher Phillips

What's Going On? Growing Trends in Employment Law

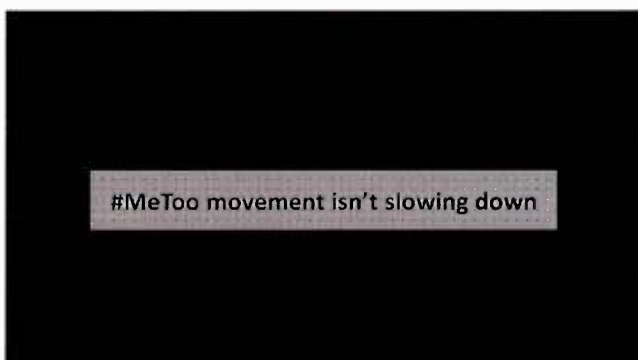


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fisherphillips.com ON THE FRONT LINES OF WORKPLACE LAW



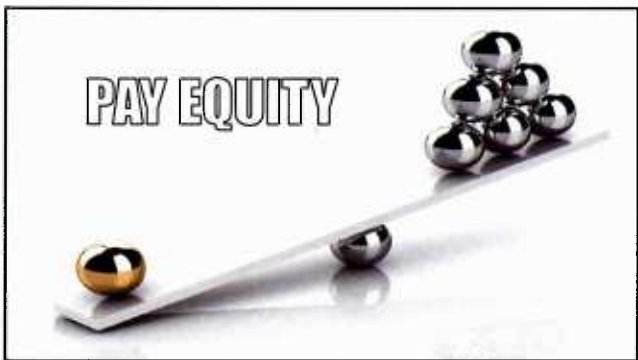
HARASSMENT & DISCRIMINATION



#MeToo movement isn't slowing down









Trends At State And Local Level

- **Equal pay** laws prevent unequal pay for comparable work
 - Focus is on what is "comparable"
 - Can't lower wage rates to even up salaries
- **Wage transparency** laws prevent employers from barring talk about salaries among workers
 - Apply to supervisors
 - Permit civil lawsuits
- **Previous pay history** often can't be used to determine salary
 - Sometimes even bar inquiries during application period



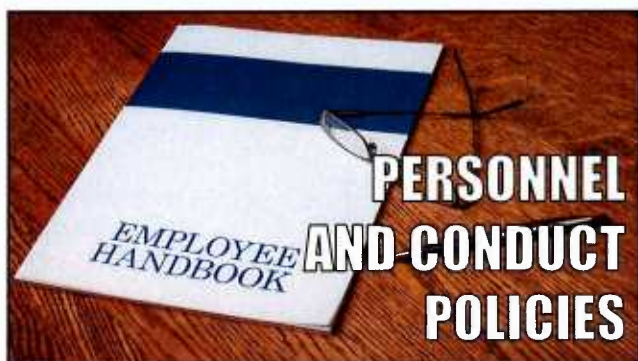


RECENT LEGAL DEVELOPMENTS

- January 2018: National class action lawsuit refiled against Google
- January 2018: \$300 million national class action lawsuit filed against employment law firm
- October 2017: \$4 million settlement in NY pay equity claim against pharmaceutical company
- October 2017: \$5 million settlement in MA pay equity claim against financial services company

What Should You Do?

1. Revise application to remove salary history questions
 - Ask about **salary expectations** instead
2. Adjust hiring materials (interview templates, etc.)
3. Train managers on hiring and interviewing
4. Conduct **privileged** pay audit
 - Some laws create a safe harbor for employers who conduct an internal audit and make adjustments
 - Getting counsel involved early could be important







Lutheran Heritage (2004)
 A seemingly neutral work rule was nevertheless unlawful if employees would “reasonably construe” the rule to prevent them from exercising their rights to engage in union or protected concerted activity.

- ✓ Civility
- ✓ Confidentiality
- ✓ Use of logos
- ✓ Interactions with third parties
- ✓ Recordings and photos in workplace

Boeing Co. (Dec. 14, 2017)
 When examining a neutral workplace rule, look to (1) the nature and extent of the potential impact of NLRA rights, and (2) legitimate justifications of the rule.
“This test will ensure a meaningful balancing of employee rights and employer interests”

- ✓ Work with counsel to review and revise current handbook
- ✓ Recognize there is still uncertainty, and not all rules will be automatically upheld

Company Email

Purple Communications (NLRB 2014)
Employers – whether unionized or not – generally must allow employees to use corporate email systems during non-work time to engage in concerted and protected activity





What Happened?

Trump administration has impacted flow of immigrants into the U.S.

- Southern border crossings have decreased
- H1-B visa annual cap case filings declined, 1st time in 5 years
199,000 received in 2017, 15.7% decrease from 2016
- Confusion over several travel bans; country-specific travel ban in place (for now)



Where Are We Now?

- New I-9 form required as of **September 18, 2017**
- Increased chances of ICE raid or I-9 scrutiny as evidenced by **7-11 raids** on January 10, 2018
- Ramped-up enforcement activity



Takeaway: Self-audit of immigration forms and processes now more important than ever

What's Next?



- **Mandatory E-Verify** on the horizon in the near future?
- **"Extreme Vetting"** of certain visa applicants coming to the U.S.
- **RAISE Act** could see drastic reduction in immigration
- **Travel ban** litigation at SCOTUS
- **DACA** resolution uncertain?



What Happened?

May 2016: OSHA released broad new rules

- Mandatory electronic filing of injury and illness data
- Anti-retaliation provisions that targeted:
 - *Mandatory post-accident drug testing policies*
 - *"Immediate" injury reporting policies*
 - *Safety incentive programs*



Where Are We Now?

Electronic reporting requirements took effect on 12/31/17



- Only **300A forms** currently required (annual summary of 300 logs numbers)
- **300 logs** (which include log of recordable injuries and illnesses with employee names and some detail) and **301 logs** (incident reports) not yet required to be reported

Anti-retaliation provisions in effect as of December 1, 2016

Mandatory post-accident drug testing


- OSHA says blanket policies are illegal, as they deter accident and injury reporting
- Now need "reasonable basis" to believe incident likely caused by drug or alcohol impairment, and that a drug test will determine whether the employee was impaired at the time of the incident



Takeaway: Implement and enforce reasonable suspicion testing policy and train your managers


Immediate reporting of injuries

- OSHA does not permit “immediate” reporting requirements in your policy
- **Takeaway:** Revise policy to provide a reasonable amount of time (end of shift, 8 hours, etc.)



Safety incentive programs


- No incentive programs based on number of injuries reported; might deter reports
- **Takeaway:** Encourage and incentivize workers to take part in safety-related causes (safety committees, reporting near-misses, etc.)



EstimateHub.com

What's Next?

- Detailed electronic reporting requirements are still being considered; stay tuned
- Anti-retaliation provisions might survive; proceed as if they will remain in effect for the time being



EstimateHub.com



RECREATIONAL & MEDICAL MARIJUANA

Medical Marijuana



Each state law varies regarding employer obligations and worker rights

29 states plus D.C. – and growing

Marijuana In The Workplace

- Employers do not need to allow use or possession at work
- But what about offsite use and positive drug tests?
- Employers won decisions in California (2008), Oregon (2010), Washington (2011), Montana (2012), Colorado (2015), and New Mexico (2016) –do not have to accommodate medical marijuana use



!! Barbuto v. Advantage Sales & Marketing
(Massachusetts July 27, 2017)

- **Employees might be entitled to accommodations**
- **Employers must engage in interactive process**

Recreational Marijuana

- 7 states and D.C. now permit recreational marijuana (Colorado, Washington, Oregon, Alaska, California, Massachusetts, and Nevada)
- Zero-tolerance policies and practices may still be permitted
- How to handle inquiries from employees?
- What if you want to have a more relaxed standard?
 - *Consider safety-sensitive positions and federal obligations before acting*







What's On Tap For 2017-2018 Term

- ★ Class Action Waivers – Argued on October 2, 2017
- ★ Can states force union members to pay agency shop fees?
- ★ Same-Sex Wedding Cake
- ★ President's Travel Ban – Version 3.0 to be decided soon
stay tuned...?
- ★ Does Title VII cover sexual orientation?

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Why The Confusion?

- Different tests applied in different situations
IRS, state taxing authorities, NLRB, state employment departments, workers' comp boards, state & federal courts
- Generally, tests boil down to one factor: **CONTROL**
Some parts of analysis could be subjective in interpretation
- 20th-century laws governing 21st-century issues

A photograph showing several wooden blocks and cylinders of various sizes and shapes arranged on a wooden surface. The blocks are light-colored wood, and the cylinders are also light-colored wood.

What Happened?

- **September 2011:** USDOL announces "Misclassification Initiative" to target companies and ICs
- **July 2015:** USDOL issues interpretive guidance, labels misclassification as a "problematic trend"
- **Result:** Government would more likely than not conclude your worker is an employee and not an IC

A photograph of a group of people, mostly men in business suits, holding up large white question marks on sticks. They are standing in a line, and the question marks are held up in front of their faces.

Where Are We Now?

June 2017: Trump administration withdraws IC Guidance

- USDOL will focus fewer resources on IC misclassification
- Courts/attys/investigators can no longer look to Guidance
- States and private attorneys can still proceed with claims
- Inherent confusion and uncertainty still exists

What's Next?

- Possible legislation to further clarify distinction
- Development of hybrid third category?
- Continued growth of "gig" economy, and increased use of freelancers and independent contractors

Traditional model

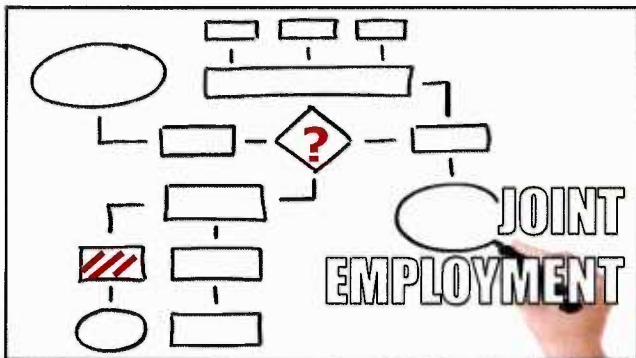
Project-based model

now
86%

2026
60%

now
19%

2026
66%



What Happened?

August 2015: NLRB creates broad new standard

Joint employment exists even where one company only has the **right** to exert **indirect or potential control** over the terms and conditions of another company's employees (**Browning-Ferris Industries of California, Inc.**).



What Happened?

January 2016: USDOL issues Joint Employment Guidance

Expansive interpretation of the principles governing joint employment standards for wage and hour matters, along with a new and aggressive agency enforcement posture.





June 2017: Trump administration withdraws Joint Employment Guidance




July 2017: Bill introduced in Congress to narrow joint employment definition

- Would apply to NLRA and FLSA
- Only if business "directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment" of a worker

HOME RUN

Dec. 14, 2017: NLRB Overrules Unworkable Test

- To find joint employment, need proof that one entity has exercised **control** over essential employment terms of another entity's employees (rather than merely having reserved *the right* to exercise control); and
- has done so **directly and immediately** (rather than indirectly) in a manner that is *not limited and routine*



Final Questions

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