2018 Employment Law Developments: What to Expect & What to Do

By John Vering and John Neyens

1. Expect more sexual harassment claims. In light of the #MeToo movement, expect that your employees could be more willing to make sexual and other harassment claims than they have in the past. What to do: ensure that your policies against sexual and other harassment and discrimination and your anti-retaliation policies are up-to-date and ensure that your personnel receive required and appropriate training regarding those policies. If you need help with updating those policies or training, let us know.
2. Missouri employers can expect some potential relief from discrimination claims now that the Missouri Human Rights Act has been amended to bring its requirements more in line with federal law in terms of burden of proof, limits on damages and restrictions on suing supervisors and managers individually. We expect Missouri court rulings to clarify to what extent these employer-friendly amendments apply to lawsuits filed prior to and alleged discriminatory acts occurring prior to the August 28, 2017 effective date of these amendments. However, although Missouri law has changed, continue to be diligent in enforcing your anti-discrimination, anti-harassment and anti-retaliation policies.
3. Most Missouri employers need to pay non-exempt employees a minimum wage of at least $7.85 per hour. Tipped employees in Missouri must be paid half of the minimum wage rate (i.e., $3.925 per hour) and their wages plus tips must total at least $7.85 per hour. Kansas and federal minimum wage remains at $7.25 per hour. Tipped employees in Kansas must be paid a minimum cash wage of at least $2.13 per hour, and their wages plus tips must total at least $7.25 per hour.
4. Expect the National Labor Relations Board during the Trump administration to continue to reverse the pro-union and pro-worker interpretations of the National Labor Relations Act (NLRA) made during President Obama's administration. The reversals have already started:
    1. In Hy-Brand Industrial Contractors Ltd the NLRB reversed the NLRB decision in Browning-Ferris that found joint employment if one employer had "indirect" or "reserved" control over the other's workers, and returned the law to the pre-Obama NLRB standard that required proof of "direct and immediate control" before there could be joint employment.
    2. In The Boeing Co. and Society of Professional Engineering Employees in Aerospace IFPTE Local 2001, the NLRB reversed the decision in Lutheran Heritage which ruled that businesses could not maintain workplace policies that workers could "reasonably construe" to block them from exercising their rights to take joint or concerted actions under the NLRA, which had resulted in rulings against companies finding violations of the NLRA for various handbook and social media policies even for non-union employers. Under the Boeing Co. ruling, the NLRB will balance the nature and extent of a challenged rule's potential impact on NLRA rights and the legitimate justifications associated with the rule. This is a very complex area – but a welcome change for employers.
    3. It is anticipated that the NLRB will also consider reversing the recent NLRB decision in Purple Communications allowing workers to use company email systems for union business, and that other Obama era NLRB rulings will likely be reversed as well.
5. Expect a ruling from the U.S. Supreme Court on whether class action waivers in arbitration agreements are legal or not. This ruling will affect employers with arbitration agreements with their employees that prohibit the arbitration of class action claims.
6. Expect a ruling from the U.S. Supreme Court on whether sexual orientation bias is covered by Title

VII, the principal federal law prohibiting discrimination based on sex and prohibiting sexual harassment. Neither Missouri nor Kansas state laws prohibit discrimination based on sexual orientation, but some cities in both states have ordinances that prohibit discrimination based on sexual orientation and/or gender identity, including but not limited to Kansas City, St. Louis and Columbia, Missouri and Lawrence, Manhattan and Roeland Park, Kansas. Moreover, Missouri employers should note that there is a recent Missouri Court of Appeals ruling that permitted an employee to proceed with litigation under the Missouri Human Rights Act on a claim that he was discriminated against because of unlawful sexual stereotyping because his behavior and appearance contradicted the stereotypes of maleness held by his employer and managers.

7. Expect a ruling from the U.S. Supreme Court clarifying when there is joint employment. For example, when is an employee of an independent contractor/subcontractor considered jointly employed by both the independent contractor and the company that subcontracts the work to the independent contractor under federal wage and hour laws? This ruling could potentially also impact the issue of joint employment in the context of union negotiations and in the context of franchisor/franchisee employment lawsuits.
8. Expect more class action wage and hour lawsuits. The U.S. Department of Labor may increase the salary level required to be exempt from overtime, but if there is an increase, it is unlikely to be any sum close to the amount proposed by the Obama administration and held to be unlawful by the Courts in late 2016. Continue to be vigilant in making sure that employees are not working off the clock and that overtime is paid for hours worked over 40 hours in a week – except for employees who meet all the tests for being exempt from overtime under applicable federal and state wage and hour laws.

***This article is general in nature and does not constitute legal advice. Readers with legal questions should consult the authors John Vering and John Neyens, any other shareholders in the Employment Law Group at the firm including Rachel Baker, Brenda Hamilton, Shannon Johnson, or Mark Opara or your regular contact at Seigfreid Bingham at 816-421-4460.*