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[Podcast]: Looking Back: Highlights in Labor and Employment Law from 2018

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In this episode of The Proskauer Brief, partner Steven Hurd and partner Adam Lupion discuss developments from some of the key cases in labor and employment law in 2018. We will discuss notable cases from the United States Supreme Court and the lower courts, as well as legislative and regulatory developments that affect the workplace. Be sure to tune in for this 2018 recap of some highlights in Labor and Employment Law.

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Steven Hurd: Welcome to the Proskauer Brief: Significant developments in employment law for 2018. I am Steven Hurd and today I am joined by my partner Adam Lupion. We are going to discuss some significant case law developments in labor and employment law from 2018 and then we will also discuss the more significant National Labor Relations Board (NLRB) and legislative developments in 2018. Adam, what is the most significant case law development in 2018 in your view?

Adam Lupion: In my view, I think the Supreme Court's decision in *Epic Systems Corp. v. Lewis* was undoubtedly the most significant development in employment law this year. In that case, the Supreme Court upheld the use of class action waivers in arbitration agreements, paving the way for employers to require their employees to arbitrate claims individually rather than on a class or collective-wide basis, but that wasn't the only Supreme Court decision of note.

Steven Hurd: I think there were two others: *The Janus v. AFSCME* decision on June 27, 2018 in which the United States Supreme Court held that it is a violation of the First Amendment to require public sector employees who are not members of the union to pay any union dues. Notably, this ruling applies only to public sector unions, and therefore unions operating in the private sector may still collect agency fees from non-members. I think the other one was probably the *Masterpiece Cakeshop Limited Case v. Colorado Civil Rights Commission* on June 4, 2018, in which the Supreme Court ruled 7-2 that a baker's free exercise clause rights under the United States Constitution were not properly considered by the Colorado Civil Rights Commission when it required that he was legally required to bake and sell a wedding cake for same-sex couples. Notably, the Supreme Court justices are scheduled to consider, on January 18th, whether to grant review in 3 cases that could decide whether employers can discriminate against LGBT employees without violating federal law. Now I know that the Supreme Court has some important decisions but there are also some significant decisions in 2018 in the lower courts. Adam, which one of those did you think was the most important?

Adam Lupion: Outside of the United States Supreme Court decisions, the California Supreme Court issued a decision in a case called Dynamex that has wide-reaching implications for employers in California. And in that case, the California Supreme Court really made it more difficult for employers to establish that individuals who work for them are independent contractors rather than employees. Really shifting the burden on the employer to meet the burden of independent-contractor status, essentially overturning 30 years of precedent in California. In response to the Dynamex decision, there are competing bills at the legislative level in California. One bill proposed by the Republicans would seek to revert to the pre-Dynamex standard that makes it a little slightly easier for employers to satisfy the independent-contractor status and one bill proposed by the Democrats that would seek to codify the standard annunciated by the Supreme Court in Dynamex.

Steven Hurd: So beyond the case law that we've been discussing, there are also some major developments, both with respect to the National Labor Relations Board's impact in 2018 and also legislative developments. Adam, what has the NLRB been up to?

Adam Lupion: In September the National Labor Relations Board announced a proposed rule on the joint-employer standard under the National Labor Relations Act. Our audience might recall the Board's decision in Browning-Ferris that really expanded the definition of a joint employer under the National Labor Relations Act. The NLRB, under the current administration, is attempting to scale that back and revert to the pre-Browning-Ferris standard in which an employer will be considered a joint employer of another employer's employee only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment.

Steven Hurd: The NLRB also had some rules on handbooks. The NLRB office of the General Counsel issued a memo on June 6, 2018 addressing updated standards for language in employee manuals policies on a number of subjects. Essentially, the new standard establishes that when you are creating a new policy or revising an old policy, you should keep in mind the nature and extent of the potential impact those policies and rules may have on NLRA rights, and you should also have legitimate justifications associated with that rule. So any employers who are thinking about revising their handbooks or implementing a handbook for the first time should be familiar with that GC memo when drafting their workplace rules. Now, there was also some significant legislation in 2018. Adam, what were the states up to?

Adam Lupion: Well, by now we are all familiar with the 'MeToo' movement and sexual harassment; and not only has it pervaded the pop culture phenomenon, but it also had a wide-ranging implication in the workplace. For example, a number of states have enacted laws that limit the enforceability of non-disclosure and confidentiality agreements in settlement agreements, which are common and routine provisions that we are all accustomed to. In addition, a number of states, including New York, have enacted laws that limit the enforceability of Arbitration Agreements in the context of sexual harassment claims, and, in addition, several states, including New York, and California, have enacted more expansive sexual harassment policies and training requirements that they are requiring of their in-state employers. There have also been a number of state legislative developments with regard to family and sick leave. Steven, can you tell us about those?

Steven Hurd: There have been several states that have implemented family and sick-leave laws. For example, New York Family Leave Law went into effect January 1, 2018, and it requires employers to provide eligible employees with partially paid job-protected leave to care for a new child or for a family member with a serious medical condition as well as when family members are called to active military service. Looking ahead, Massachusetts Paid Family and Medical Leave law will take effect on July 1 2019; and the District of Columbia's Paid Family Leave Act will take effect on July 1, 2020. Additionally, several states enacted Paid Safe and Sick-Leave laws, including New York City, Rhode Island, Washington, Maryland, New Jersey and the City of Duluth, Minnesota.

Adam Lupion: On top of those developments, there have been a number of jurisdictions that have restricted an employer's ability to ask about certain information during the hiring process. For example, states such as California, Connecticut, Delaware and Massachusetts and cities such as Philadelphia, New York City and San Francisco restrict an employer's ability to ask about prior compensation during the application process. And a trend that we've noticed over the past several years is that a number of jurisdictions have expanded their "ban the box" laws, which prohibit employers from enquiring about an applicant's conviction history during the application process. Employers should review their current onboarding documents of practices, and in addition, provide information, and training to Human Resources professionals and other personnel regarding these prohibitions. That it is particularly important given the number of different state and local jurisdictions that have competing and sometimes conflicting laws in this regard.

Steven Hurd: Thank you Adam for your insights on this; and thank all of you for joining us on the Proskauer Brief today. Please stay tuned for more insight on the latest hot topics in Labor and Employment law, and be sure to follow us on i-Tunes.

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