A Timely Analysis of Legal Developments

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Dynamic Year Expected in Labor and Employment Law

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President Obama's re-election, a newly active NLRB, and important decisions pending before the Supreme Court promise to make 2013 an interesting year in labor and employment law — domestically and internationally. Here is a summary of key issues we will see in the new year.

Hostile Environment Harassment

One case before the Supreme Court, *Vance v. Ball State University*,[1] may resolve a circuit split concerning how to identify which employees qualify as supervisors whose actions can result in vicarious Title VII liability for a hostile environment, including sexual harassment.

Under established precedent, an employer is vicariously liable for severe or pervasive workplace harassment by a supervisor of the victim. If the supervisor took a tangible adverse employment action against the victim, the employer may be held strictly liable, but, if the supervisor did not take a tangible adverse employment action, the employer may be vicariously liable. Under the latter scenario, the employer may avoid liability *if* it can prove it exercised reasonable care to prevent and correct harassing behavior, and the employee claiming harm unreasonably failed to take advantage of any preventive or corrective opportunities that could have avoided or reduced the harm.

The Second, Fourth, and Ninth Circuits have held that the "supervisor" liability rule applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work. The First, Seventh, and Eighth Circuits have articulated a "bright-line" rule, finding supervisor liability limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim.

If the Supreme Court decides to adopt the broader definition of "supervisor" used by the Second, Fourth, and Ninth Circuits, employers could find those employees whom they place in charge of a project, however minor, or deputize to dole out shift assignments for the day, deemed supervisors. Employers would favor a bright-line definition, meaning that only individuals who have the power to hire, fire, demote, promote, transfer, or discipline are supervisors.

1 No. 11-556.

Affirmative Action

Also pending before the Supreme Court is *Fisher v. University of Texas*,[2] an affirmative action case with the potential to upend thinking about affirmative action and employer diversity initiatives. In *Fisher*, a white female student denied admission to the University of Texas at Austin alleges that the university discriminated against her on the basis of her race in violation of the Equal Protection Clause of the Fourteenth Amendment. The question presented is whether public universities may use affirmative action policies that take a student's race into consideration in admissions decisions.

In *Grutter v. Bollinger*,[3] the Supreme Court rejected an equal protection challenge to the University of Michigan's use of race as a factor in student admissions. *Grutter* was a 5-4 decision, with Justice Sandra Day O'Connor writing for the majority; Justices Rehnquist, Kennedy, Scalia, and Thomas dissented. If the Supreme Court rules against the university, it may overturn *Grutter* and hinder affirmative action policies at public universities.

While it has never been lawful for an employer to make decisions concerning the terms and conditions of employment solely on the basis of minority status, employers have implemented employment practices aimed at increasing their racial and ethnic diversity in the belief that doing so strengthens their business. While not an employment case, *Fisher* could reshape the perception of affirmative action, even in private industry.

Mandatory Arbitration

Mandatory arbitration of Fair Labor Standards Act collective actions came under fire in a big way by the National Labor Relations Board (NLRB or "the Board") in 2012. In *D.R. Horton, Inc.*,[4] the Board held that an arbitration agreement requiring "as a condition of employment" all employees to agree to waive the right to bring class or collective actions in any forum violated Section 8(a)(1) of the National Labor Relations Act (NLRA), which protects the rights of employees to engage in protected concerted activity. An appeal is pending before the U.S. Court of Appeals for the Fifth Circuit. Meanwhile, the tension between the NLRB and federal courts is increasing.

A few recent cases have followed and expanded *D.R. Horton*. In *Advanced Services, Inc.*,[5] an administrative law judge (ALJ) invalidated an arbitration procedure requiring all employees to waive the right to bring class/collective actions unless both the employee and employer agreed to the class/collective action, even though this procedure allowed employees to "act concertedly to challenge the terms of the arbitration policy and class waiver itself."

In *24 Hour Fitness*,[6] an ALJ ruled that the arbitration policy of 24 Hour Fitness violated the NLRA, despite the fact that its arbitration policy expressly allows employees to opt out of the agreement to arbitrate. 24 Hour Fitness argued that the arbitration was not a condition of employment since employees could opt out if they wanted to preserve their right to engage in concerted, collective action. The ALJ disagreed and found the opt-out provision "illusory" because the policy prohibited non opt-out employees from disclosing "the existence, content or results of any arbitration" to opt-outs, and therefore effectively prevented concerted employee activity between opt-outs and non-opt outs.

An ALJ extended *D.R. Horton* to a class action waiver in an employment application in *Convergys Corp.*[7]

However, a majority of federal district courts[8] have refused to follow *D.R. Horton* (most recently in *Owen v. Bristol Care, Inc.*[9]), ruling that it

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2 No. 11-345.

3 539 U.S. 306 (2003).

4 357 NLRB No. 184 (Jan.3, 2012). *See* Henry Lederman, Gavin Appleby, and William Emanuel, *NLRB Strikes Down Arbitral Class Action Waiver*, Littler ASAP (Jan. 9, 2012).

5 No. CA-63184-71805 (Nov. 12, 2012).

6 No. 20-CA-35419 (Nov. 7, 2012).

7 No. 14-CA-075249 (Oct. 25, 2012).

8 *See LaVoice v. UBS Fin. Servs.*, 2012 U.S. Dist. LEXIS 5277 (S.D.N.Y. Jan. 13, 2012); *see also Tenet Healthsystem Phila., Inc. v. Rooney*, 2012 U.S. Dist. LEXIS 116280 (E.D. Pa. Aug. 14, 2012); *see also Brown v. Trueblue, Inc.*, 2012 U.S. Dist. LEXIS 52811 (M.D. Pa. Apr. 16, 2012); *Spears v. Mid-America Waffles, Inc.*, 2012 U.S. Dist. LEXIS 90902 (D. Kan. July 2, 2012); *Luciana De Oliveira v. Citicorp N. Am., Inc.*, 2012 U.S. Dist. LEXIS 69573 (M.D. Fla. May 18, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 834 (N.D. Cal. 2012); *Delock v. Securitas Sec. Servs. USA*, 2012 U.S. Dist. LEXIS 107117 (E.D. Ark. Aug. 1, 2012).

9 No. 12-1719 (8th Cir. Jan. 7, 2013).

conflicts with Supreme Court precedents, including the Supreme Court's recent decision in *AT&T Mobility v. Concepcion*.[10] This year should bring more guidance on the impact of *D.R. Horton*, particularly once the Fifth Circuit issues its opinion in the appeal of the NLRB's ruling.

Social Media

With the increasing use of social media by employees, employers often adopt social media policies to guide and regulate employees' personal social media usage. In *Costco Wholesale Corp.*,[11] the NLRB found that the employer's policies violated Section 8(a)(1) of the NLRA. The Board found unlawful a policy prohibiting employees from posting statements which "damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the [Company] Employee Agreement . . . ."

The NLRB also found unlawful provisions that prohibited employees from discussing private matters of other employees (such as sick calls, leaves of absence, workers' compensation injuries, and personal health information), sharing, transmitting, or storing for personal or public use, without prior management approval, sensitive information (such as membership, payroll, confidential financial, and Social Security numbers), and sharing confidential information (such as employees' names, addresses, telephone numbers, and email addresses).

However, the NLRB indicated in the Costco decision that "curing" language, which includes examples clarifying that a policy does not relate to Section 7 activity, may save an otherwise unlawful policy.

The NLRB recently ruled that comments posted on Facebook are protected in the same manner and to the same extent as comments made at the "water cooler." In *Hispanics United of Buffalo*,[12] five employees posted messages, while off duty, on a Facebook page to express their strong discontent with the criticism of their job performance by one of their coworkers. The employer investigated and then terminated the five employees for their violation of the company's "zero tolerance" policy against "bullying and harassment." The NLRB found that the termination was a violation of the NLRA and awarded the employees full reinstatement and back pay.

In 2013, there will likely be additional rulings from both courts and the NLRB tribunals that continue to shape this important new issue (Neither *Costco* nor *Hispanics United* has been appealed).

Whistleblowers

Last year was marked by a number of favorable developments for whistleblowers. The U.S. Department of Justice had a record year in False Claims Act collections, and the Whistleblower Offices of the U.S. Securities and Exchange Commission and Internal Revenue Service (IRS) issued significant and record awards.

Under President Obama, the U.S. Department of Labor (DOL) has dramatically strengthened whistleblower protection available under the Sarbanes-Oxley Act of 2002 (SOX) and the Dodd-Frank Wall Street Reform and Consumer Protection Act, reversing many years of prior rulings which limited those rights. The DOL's Administrative Review Board (ARB) has been ruling in favor of SOX whistleblowers and interpreting that law in a manner that is far more claimant-oriented than in the decade after SOX became law.

With a full complement of Democratic appointees, the ARB appears committed to expanding SOX coverage, broadening the concept of protected activity, restricting employer defenses, and generally making the DOL a friendlier place for whistleblowers.

Interpretations of critical aspects of SOX will likely be in flux for a time as the solidly Democratic ARB moves to broaden both the scope of SOX and the remedies available to a claimant. President Obama can be expected to move forward a pro-whistleblower agenda, further strengthen the hand of the NLRB, and look for other ways to counter the resistance of businesses (whether in the financial services industry or elsewhere) to what they view as unreasonable government regulation of their employment practices.

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10 131 S. Ct. 1740 (2011).

11 358 NLRB No. 106 (Sept. 7, 2012). *See* Chip McWilliams, Philip Gordon, and Kathryn Siegel, *Social Media Policies in the NLRB's Crosshairs*, Littler ASAP (Oct. 9, 2012).

12 359 NLRB No. 37 (Dec. 14, 2012). *See* Alan Levins, *NLRB Rules Employer's Termination of Non-Union Employees for Facebook Posts Violated NLRA*, Littler ASAP (Dec. 27, 2012).

Health Care Reform

President Obama's victory secures the political future of the Affordable Care Act (ACA) for at least the next four years and brings renewed focus on and urgency to employers' preparations for implementing the law.

With the effective date of the "play-or-pay"[13] provision coming in 2014, employers must carefully consider whether they will continue to provide health care coverage to employees, and, if so, to whom it will be offered and how it will be structured. The calculation involves much more than a simple comparison of the cost of health coverage versus the cost of the "play-or-pay" penalty. Those employers taking a broader and longer-term approach to this analysis will be better positioned.

The absence of regulatory direction on key aspects of the "play-or-pay" penalty leaves many important questions unanswered at this time. The agencies are expected to issue a slew of ACA regulations in the coming year, hopefully giving much-needed clarity to employers' obligations under health care reform.

Independent Contractors

President Obama's re-election may bring the re-introduction of the Employee Misclassification Prevention Act, which would require employers to keep records of all workers performing labor or services for them and to notify each worker of his or her classification and exemption status.

As reaffirmed by Solicitor of Labor M. Patricia Smith at the ABA Labor and Employment Law Conference in early November 2012, investigating independent contractor misclassification remains a top priority of the agency, and the DOL will continue to work with other federal agencies (such as the IRS) and state agencies to share information and collaborate on investigating worker misclassification claims.

Cloud Computing

A new tend is employer use of "cloud computing" to give them access worldwide to personnel records of employees who may be on the other side of the world. This practice threatens to expose employers on many levels – to privacy claims, as well as to potential liability as a *de facto* employer to the extent that the entity with access to the records (perhaps the foreign parent of a U.S. subsidiary) makes use of those records and imposes personnel-related decisions on the subsidiary.

Fiduciary Liability

Last year was momentous in terms of potential fiduciary liability of employers as against employees and former employees who receive various benefits. In *Cigna Corp. v. Amara*,[14] the Supreme Court expanded the right of the courts to fashion equitable remedies for beneficiaries that go well beyond the mere terms of the governing plan, including possible reformation of the contract, estoppel, and monetary compensation. 2013 will likely see additional lawsuits pursuing these cases, with courts continuing to delineate the boundaries of these remedies.

Other 2012 developments included multi-million dollar awards in class action fiduciary liability cases involving excessive fees in administering 401(k) plans – most significantly, in *George v. Kraft Foods Global, Inc.*[15] and *Tussey v. ABB, Inc.*[16] In George, the court approved a $9.5 million settlement. In Tussey, the court awarded nearly $37 million for the employer's failures to monitor recordkeeping fees and negotiate for rebates, and for a decision to switch from a Vanguard fund to a Fidelity fund without good reason for the decision. These cases effectively mandate that employers put in place comprehensive fiduciary training to help prevent these liabilities.

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13 *See* Ilyse Schuman and David Weiner, *IRS Issues Proposed Rule on ACA Play or Pay Requirements*, Littler ASAP (Jan. 4, 2013).

14 131 S. Ct. 1866 (2011). *See* Margaret Clemens, *U.S. Supreme Court Rules on Available ERISA Remedies for Misrepresentations About Benefit Plan Changes*, Littler ASAP (May 27, 2011).

15 641 F.3d 786 (7th Cir. 2011).

16 2010 U.S. Dist. LEXIS 45240 (W.D. Mo. Mar. 31, 2012). *See* Daniel Wille, *Retirement Plan Fiduciaries Take Heed: Complying with DOL Regulations Was Not Enough to Avoid a $35 Million Judgment*, Littler ASAP (Aug. 24, 2012).

Mexico's Growing Economy

With labor costs increasing in China, many multinational companies are realizing that the savings of manufacturing in Asia can be illusory because of the distance between the company and the manufacturing process. Because of its increasing level of security, many companies are transferring manufacturing to Mexico. Indeed, even the famous Taiwan-based Foxconn, which builds Apple products, and other high-tech firms, have taken root there.

With economic growth, Mexico's labor law is also evolving. The country recently enacted its first substantial modifications to federal labor law since 1970.[17] In short, the new laws (among other things): permit new, more flexible employment agreements; permit employers to terminate "for cause" employees who engage in bullying or sexual harassment, and simplify the dismissal requirements; limit damages for back wages in labor trials; establish new rules on mandatory training; impose new rules on promotions, requiring that a worker's capacity and productivity be considered above seniority; establish a new National Productivity Committee; and impose new requirements regarding union democracy, transparency, and accountability.

It will be interesting to see how business changes in Mexico in 2013. The market will likely become even more attractive for multinationals doing business there.

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17 *See* Oscar De la Vega, Mónica Schiaffino, Eduardo Arrocha, and Liliana Hernandez, *Mexico Enacts Important Reforms to the Federal Labor Law*, Littler ASAP (Nov. 30, 2012).