



## 2012 Employment Law Year In Review

Insights

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(Labor Letter, December 2012)

*The End of the World As We Know It?*

If you're reading this after December 20, that means the Mayans got it wrong and the world isn't going to end in 2012. That's the good news. The bad news is that you still have to go to work tomorrow, and you've been putting off dealing with all of those labor and employment problems in the hopes that the end of the world would have happened by now. (Oops!)

Or have you been hunkered down deep in an underground bunker for the better part of the last year ignoring your human resources duties, and now you feel out of the loop about what happened over the past 12 months?

Either way – fear not! Fisher Phillips once again presents you with our annual review of the last year in the world of labor and employment law. This time we're handing out awards based on one of the most popular genre of movie – the end-of-the-world variety.

The **“Deep Impact” Award** goes to the biggest employment law news story of the past year – and maybe the biggest story of the decade – the Supreme Court's decision upholding President Obama's **Affordable Care Act (ACA)** in June. Many employers have failed to invest much time or energy into analyzing how healthcare reform would impact their businesses, first anticipating that the Court would invalidate much or all of ACA, and then hoping for a Mitt Romney victory in November.

Now that the uncertainty has been lifted, it's time to get to work and focus on the many healthcare compliance obligations and possible economic impacts. While there are many issues to address immediately, the “big ticket” items won't go into effect until 2014, including the “pay or play” mandate, new nondiscrimination requirements, and automatic enrollment. Use 2013 to adequately plan for additional economic burdens and consider strategic plan design changes as necessary.

And speaking of President Obama's reelection, the **“Day After Tomorrow” Award** goes to the **Presidential reelection** and the implications for the next four years (and beyond). There are numerous ways in which the nation's employers will feel the impact – federal agencies will be given even more leeway to enforce regulations, enforcement priorities will continue to be pointed towards employment and labor matters, and several liberal members of the Supreme Court may choose to

retire in order to retain a seat for the employee-friendly wing of the Court (specifically Justices Ginsburg and Breyer).

The **“War of the Worlds” Award** goes to the **National Labor Relations Board (NLRB)** and their continued all-on assault on employers across the country. One year ago we were preparing to comply with an incredibly broad posting law and the specter of “quickie” elections, both of which threatened to change the landscape of labor law as we know it. Luckily for employers, both were struck down by courts for various reasons, but don’t be surprised if they spring up from the ground like Martian war ships hell bent on destruction in 2012 (the AFL-CIO President already predicted that the Employee Free Choice Act will be implemented in the coming 4 years).

The NLRB didn’t let those court setbacks stop them from attacking employer handbook procedures, at-will language, company social media policies, and arbitration agreements – all of which faced the board’s laser beam wrath in the past year. Although the agency published several advice memos on at-will disclaimers that offered some relief in late October 2012, don’t be surprised to see the war on employers continue in 2013.

Take your pick of your favorite zombie movie or TV show – our **“Walking Dead, Dawn of The Dead, Night of the Living Dead, Zombieland” Award** goes to the **Equal Employment Opportunity Commission (EEOC)**. You’ve seen the movies – wave upon wave of mindless, relentless attackers, with only one item on their agenda, who can’t be reasoned with, can’t be dissuaded from their ruthless pursuit, who can only be stopped by extreme measures – what better way to describe the agency that seems to invent new ways to make life miserable for employers each year?

In 2012, the EEOC released new guidance attempting to restrict the use of criminal background checks for new hires, and announced its intention to pursue new strategies against sexual orientation and pregnancy discrimination in the near future. Although the agency unleashed hundreds of discrimination lawsuits against employers in the past year, it has continued to vigorously pursue a strategy of filing high-impact “systemic cases” against employers, at times in concert with other federal agencies. Expect more of that in the coming year.

If the EEOC has its way in 2013, victims of domestic violence and stalking might end up being covered by Title VII (even if the statute doesn’t seem to mention these events), and employers might be on the hook for “beauty bias” claims if they hire too many attractive workers. Run for your lives!

The **“Independence Day” Award** goes to the battle between employers and unions that continues to be waged across the country, but especially across the Rust Belt, where **“right to work” laws** continue to be pushed, among other employer-friendly measures. Conservative legislators believe they need to secure the independence of employees to decide for themselves whether or not to join or financially support a union, and in 2012, Indiana became the 23<sup>rd</sup> state to pass such a law. Other GOP-backed measures have been adopted in Wisconsin, Ohio, and Tennessee in the recent past, further weakening the impact of Big Labor in the workplace.

Time for two awards at once – the **“Waterworld” and “Postman” Awards** go to the rise in FLSA lawsuits that continued in 2012. Employers can be excused for thinking they’ve seen this bad movie before (“Wait, Kevin Costner is in *this* awful end-of-the-world movie too?”), because it was just a year ago we were telling you that 2011 was a record year for Fair Labor Standards Act claims. And here we are again. 2012 was another record year for wage and hour lawsuits, thanks largely to the down economy. Let’s hope we don’t see another spike in 2013, but don’t hold your breath.

The **“Contagion” or “Outbreak” Award** goes to the proliferation of **social media password laws** that sprung up out of nowhere in 2012 and threaten to go viral in 2013. Three states (California, Illinois, and Maryland) passed laws preventing employers from accessing their employees’ Facebook accounts (and other social media sites). Never mind that there haven’t been many – if any – confirmed situations where an employer would actually even *want* to access someone’s Twitter feed or MySpace page. Most HR observers feel that this trend will continue in the new year, so expect the spread of this law like a deadly plague across the land in 2013.

It’s **“Armageddon”** for employers operating on tight labor margins as **minimum wage increases** go into effect for seven states on January 1, 2013. The West Coast will be hit especially hard, with Washington State rising to \$9.19, Oregon to \$8.95, and the city of San Francisco rising to \$10.55 (the highest in the country). Also increasing are Arizona, Florida, Montana, Ohio and Rhode Island, while Colorado, New Jersey, Missouri and Vermont have proposals pending. There are at least 18 states and other jurisdictions which require a wage higher than the federal minimum wage of \$7.25, and you can expect to see that number increase in 2013 if the economy gets on track.

Employers hope that the **“Mad Max – Beyond Thunderdome” Award** won’t be given to any of them in 2013 as a result of legislation allowing employees to bring **guns to work** (or at least company parking lots). No company wants to be associated with the post-apocalyptic *Thunderdome*, where no-holds-barred, kill-or-be-killed, rules apply – and some fear that’s the direction things could go if “bring your gun to work” laws (sometimes known as parking lot laws) continue to spread. At least 17 states and several local jurisdictions have passed such laws, which require diligence on the part of HR to ensure compliance does not lead to safety issues.

The **“2012” Award**, named after Roland Emmerich’s 2009 end-of-the-world film involving cataclysmic weather conditions, goes to employers responding to **natural disasters**. Our nation’s employers have lately been getting a lot of practice dealing with the human resources challenges posed by hurricanes, earthquakes, tornadoes, and winter storms, and in late 2012, Hurricane Sandy created the most havoc our country has seen since Hurricane Katrina in 2005.

Practiced HR professionals know that they need to address wage and hour matters, leave laws, WARN notices, benefits issues, disaster preparedness matters, and a host of other administrative concerns – let alone the human element of serving a traumatized workforce – when responding to a natural disaster. Although we all hope for the best for 2013, it is the savvy workplace team that puts together a disaster preparation plan well before the storm clouds roll in.

The **“Dr. Strangelove” Award** goes to the rise of **paid sick leave laws** that took effect in 2012. (Sure, I know Peter Sellers didn’t play a medical doctor in the movie, but stick with me here.) Many employers will feel like they are getting bombed from the sky with the passage of paid sick leave initiatives in various parts of the country, with Seattle, Philadelphia and Connecticut having joined San Francisco and Washington D.C. in 2012. What’s on tap for 2013? New York, Massachusetts, Miami, and Portland (OR) are just some of the jurisdictions considering passage in the new year.

Not all apocalyptic movies need to end badly. Some have hopeful endings about being thankful for what you have and looking forward to the future. The **“Wall-E” Award** goes to the **U.S. Supreme Court** for its decisions in employers’ favor in 2012. All of the employment cases on its docket went in favor of employers (the healthcare and immigration decisions were mixed bags depending on your philosophical bent) – on the topics of Title VII’s ministerial exception, the overtime exempt provisions of the FLSA, and three public sector issues. So chin up, employers – maybe there’s good news on the horizon for the 2012-13 Supreme Court term.

Who does the **“Day the Earth Stood Still” Award** go to? In the 1951 movie (ignore the Keanu Reeves clunker), some believed the visitor does not belong here, while others welcomed him with open arms and wanted him to stay. The movie ends with a note of uncertainty, as we realize the future lies in our own hands. That’s a good way to think about the **immigration decision** from the Supreme Court in June, which struck down parts of Arizona’s strict law while retaining others. It’s anyone’s guess as to what 2013 holds, but now that the President has secured a second term, many expect comprehensive national legislation to be debated in the near future.

Is *The Matrix* an end of the world movie? What if the world had already ended but you didn’t even know it? It’s a mindbender, for sure, which is why the **“Matrix Award”** goes to **unemployment discrimination laws** which went into effect in 2012. What if someone can sue you because you failed to hire them because they didn’t have a job in the first place? (What?) It stretches logic, and you might have to watch it a few times to get it, and that’s just how some employers might feel dealing with these laws.

Following New Jersey’s lead, Oregon and Washington D.C. passed laws prohibiting some forms of unemployment discrimination in 2012; California’s legislature enacted a law but it was vetoed by the Governor. All in all, seventeen states considered this type of law in 2012, so you can expect the list to grow in 2013.

Continuing our theme of confusing premises, the **“Terminator” Award** goes to the **OFCCP**. In the 1984 movie, the villain comes from the future to try to change the past, but what he’s trying to change hasn’t even happened yet, so it could also be considered the future. Until you see Terminator Salvation (2009), and then it becomes the past.

And just what did the OFCCP do in 2012 to earn this honor? The federal agency attempted to cite numerous contractors for violations of regulations that hadn’t yet even been finalized, attempting to change the future by altering the past (or is it the other way around?). The agency also proposed

change the future by altering the past (or is it the other way around?). The agency also proposed regulations that would require statistical analyses of disabled job applicants and those who are veterans, while also ratcheting up enforcement activities. No doubt that in 2013, the OFCCP will say to employers, "I'll be back."

Remember *Soylent Green*, the 1973 movie set in a dystopian future where you don't want to know what's going on behind the scenes? (Spoiler: it's made of people.) The "**Soylent Green**" Award goes to the new set of laws restricting what employers can find out behind the scenes about their applicants and employees during **credit report background checks**, making the decision for you. Vermont became the eighth state to pass such a law in 2012, joining California, Connecticut, Hawaii, Illinois, Maryland, Oregon, and Washington.

In the horror movie *28 Days Later*, society was exposed to a dangerous spreading infection that lead to catastrophic results. So the "**28 Days Later**" Award goes to **OSHA**, as this federal agency announced its intentions in February 2012 to focus on workplace safety issues caused by exposure to dangerous material (certain chemicals) and conditions (winter weather).

"**The Road**" Award goes to new and proposed **ADA access regulations** impacting those who traverse difficult conditions to arrive at their destination. In 2012, places of public accommodation were required to come into compliance with a new set of access rules which require higher standards of accessibility. In 2013, you can expect to see a new set of rules addressing equipment and furniture, and also tackling website accessibility for those with hearing or vision impairments.

Our final award pays homage to *Invasion of the Body Snatchers*, where the problems all begin in San Francisco with a strain of plant that grows quickly and seemingly spreads everywhere before you know it. The "**Body Snatchers**" Award goes to the continued growth of **medical marijuana laws** spreading across the country, adding Connecticut and Massachusetts in 2012. There are now 18 states with some form of legislation allowing medicinal pot, and while most employers are offered some level of protection through rule or court decision, the laws create some sticky situations. Expect to see more states added to this list in 2013 – that is, if we survive through the end of the year...

*For more information (or to mention apocalyptic movies he may have overlooked) contact the author at [RMeneghello@laborlawyers.com](mailto:RMeneghello@laborlawyers.com) or (503) 242-4262.*

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## ***Related People***

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