



Was It A Good Year Or Bad Year? The 2013 Employment Law Year In Review

Insights
12.03.13

(Labor Letter, December 2013)

It's pretty common each December to take stock and look back at the year that is ending, whether it's recounting the happy times and counting one's blessings, or reliving the disappointments and ruing over the regrets (and sometimes a bit of both). The world of employment law is no different. Now that 2013 is all but wrapped up, let's take a look back at the preceding 12 months and see who had a good year and who had a bad year.

Healthcare Advocates – SICKENINGLY BAD YEAR

The crown jewel of the Obama Administration has been the passage of the Affordable Care Act, and 2012 saw the healthcare law upheld by the Supreme Court. So we entered 2013 knowing that this was the year to get to work with implementation and compliance, as January 1, 2014 was to be the effective date for much of the law's requirements.

Much of that work was thrown off when the Treasury Department announced in July that enforcement of the employer "pay or play" mandate penalties – and also the coverage obligations to avoid such penalties – would be delayed until 2015. This setback was compounded in October when the federal government's healthcare website rolled out in disastrous fashion, preventing an untold number of Americans from enrolling in new health-insurance exchanges. The prognosis for 2014 is bound to be better, if only because it's hard to imagine a year going more poorly.

LGBT Workers – REALLY GOOD YEAR

One of the biggest news stories of the year was the Supreme Court's rebuke of the Defense of Marriage Act in the June *U.S. v. Windsor* decision, which overturned the federal prohibition of same-sex marriages. This ruling largely knocked down the walls for same-sex marriage and has led to a flood of lawsuits and legislative action seeking to expand its scope across the country. As of the time of publication, 15 states and Washington D.C. allow gay marriage, and several more teeter on the edge through litigation or lawmaking. Meanwhile, several branches of the federal government have acted in the wake of *Windsor*, announcing the extension of FMLA rights, tax recognition, and the application of benefits for same-sex couples and their families.

Another victory for LGBT workers occurred in November, when the U.S. Senate passed the Employment Non-Discrimination Act (ENDA), which would make it illegal to discriminate against

LGBT workers across the country (at least 21 states have mini-ENDAs in effect already), although the prospects in the House look uncertain. President Obama has already signaled his intent to sign the bill if it reaches his desk, and if the House blocks passage, it is possible that the President will issue some form of Executive Order advancing this cause in 2014.

EEOC – REALLY BAD YEAR

The Equal Employment Opportunity Commission flexed its muscle over the past several years, exerting its authority over all sorts of workplace issues, and now the federal agency is facing the consequences.

In late 2013, the State of Texas filed a lawsuit against the EEOC in an effort to preserve its absolute ban on hiring felons for certain state positions, claiming that the EEOC's guidelines on the subject unreasonably limit employers from excluding convicted felons from the workplace. And in August, a Maryland District Court judge made a mockery of the EEOC's criminal-background check guidance while ruling it unenforceable, lambasting it as "laughable, distorted, worthless, and dishonest." Not to mention the nine state attorneys general who collectively protested the EEOC's stance on the issue as "gross federal overreaching." No doubt the EEOC will continue in its efforts to push its agenda in 2014, but it certainly took some knocks over the past year.

Felons In The workplace – GOOD YEAR

That being said, some felons can take heart and look back at 2013 as a good year for their workplace prospects. A growing national trend has seen many jurisdictions pass "ban the box" pieces of legislation prohibiting companies from seeking information about job applicants' criminal histories. At least 10 states and 51 cities and counties across America are limiting the use of criminal background checks, and several prominent employers announced in 2013 that they would end the practice of seeking such information on certain job applications.

Arbitrators – VERY GOOD YEAR

One group of Americans with solid job security are those who arbitrate legal cases for a living. The U.S. Supreme Court once again sent a message to the country's employers that it is very much in favor of cost-effective and business-friendly arbitration proceedings in lieu of jury trials, issuing two more decisions upholding arbitration provisions.

In a 10-day span in June, the Court upheld the tenets of the Federal Arbitration Act (*American Express v. Italian Colors Restaurant*) and then upheld the power of arbitrators as dictated by the specific arbitration agreements at issue (*Oxford Health Plans LLC v. Sutter*). These decisions will no doubt further enforce the popularity of arbitration agreements in the employment context, and with at least one more arbitration case on the Court's docket for 2014, look for that trend to continue.

Class-Action Lawyers – BAD YEAR

While the Supreme Court made life a little easier for those who have chosen the profession of arbitrator, it has made life a little tougher for those kids who want to be class-action lawyers when they grow up. With another pair of decisions issued in March and April of 2013, the Court provided a

welcome respite to employers from the seemingly never-ending onslaught of costly class-action claims.

In *Genesis Health Care Corp. v. Symczyk*, the Supreme Court ruled that wage-hour collective actions brought under the Fair Labor Standards Act can be defeated if the lead plaintiff is “picked off” by being paid what he claims to be owed, a procedural maneuver which might work wonders to stem the tide. And in *Comcast Corp. v. Behrend*, the Court held that plaintiffs who want to bring class actions must prove early on in the litigation that the damages they seek can be measurable on a class-wide basis, raising the bar one notch higher in favor of employers. Don't feel too bad for the class action lawyers, however. We're sure they'll find something else to do with their time in 2014.

Minimum-Wage Earners – GOOD YEAR

This past election day saw a minimum wage hike passed by New Jersey voters, as the state will become the 20th state in the country to require minimum wages higher than the national level of \$7.25/hr with a new rate of \$8.25/hr effective January 1, 2014. Also this year, California lawmakers passed a \$10/hr wage minimum, Washington's jumped to \$9.32/hr, Oregon's rose to \$9.10/hr, and both New York and Connecticut saw their minimum wages rise to \$9/hr.

But nothing compares to the Seattle suburb of SeaTac, whose voters passed a measure requiring hospitality and transportation workers to be paid a minimum of \$15/hr, by far the highest in the country (the results of the vote are likely headed to a recount due to the razor-thin margin of passage). It appears that several states – Massachusetts, Idaho, and South Dakota, to name a few – will consider minimum wage-hikes in the coming year.

Facebookers, Instagrammers, And Tweeters – GOOD YEAR :)

If you needed to recap the year for social-media users, you could simply type a quick smiley face and be done with it well short of 140 characters. 2013 was a particularly good year for those who want to keep their social-media life separate from their work life. At least 10 states (Arkansas, Colorado, Illinois, Nevada, New Jersey, New Mexico, Oregon, Utah, Vermont and Washington) enacted legislation in the past year preventing employers from poking around and requesting social-media passwords at the application or employment stage, and legislation has been introduced or is pending in at least 36 states. This list will no doubt grow in 2014, leading many to “like” this status.

NLRB – BAD YEAR (AND COULD BE WORSE IN 2014)

It's been a tough year for the National Labor Relations Board. In January, the Board took a blow when a federal appeals court ruled that President Obama's recess appointments of three members to the Board were invalid, which calls into question the legitimacy of over 200 cases made without a clear quorum. The Supreme Court has taken up the matter and will issue an opinion in 2014 (*NLRB v. Noel Canning*), so the Board sits on pins and needles until then wondering whether it will see hundreds of decisions overturned.

Then in May, another federal appeals court decision invalidated the NLRB's controversial notice-posting mandate which would have forced nearly six million employers to post notices informing

posting mandate which would have forced nearly six million employers to post notices informing employees of their rights under the NLRA. The court held this was an unconstitutional infringement on employer free speech rights and struck it down. Yet another court weighed in with a June decision that went even further, ruling that the Board didn't even have the authority to enact the poster rule in the first place. No doubt the Board will continue to push its agenda in 2014, so stay tuned.

Workplace Bullies And Cursers – BAD YEAR

This was a bad year for those workplaces that might be considered a little rough around the edges. In April 2013, the federal government announced a lawsuit against a construction company under OSHA's safe workplace requirement, but rather than taking aim against faulty scaffolding or other dangerous hazards, the culprit was the dirty mouth of the business owner.

And in November 2013, the NFL's Miami Dolphins were caught in the crosshairs of a bullying scandal that led to the suspension of one of its players for alleged verbal and cyber-bullying of a teammate. Several states are considering proposals which would outlaw workplace bullying (New York, Connecticut, Illinois, Washington, etc.) and these news stories will no doubt aid the efforts of the proponents.

Unpaid Interns – NOT TOO BAD OF A YEAR

2013 saw a tidal wave of lawsuits filed by unpaid interns against their employers, claiming that they were improperly denied pay for the work they were performing. Much of this activity was no doubt triggered by the June court decision which held that two unpaid production interns for the movie *Black Swan* should have been paid for their work manning phones and fetching coffee.

Since then, dozens of lawsuits have been filed by disgruntled interns who claim their workplaces did not follow the Department of Labor guidelines for unpaid internships. But it's not all good news for those seeking valuable experience in their chosen professional field, as many companies have severely restricted or cut their internship programs altogether in the wake of this troubling trend.

IT Professionals – BAD YEAR

With the proliferation of personal smartphones, tablets and other computing devices, employers are grappling with the pros and cons of "BYOD" policies for their workforce – short for "Bring Your Own Device" policies. On the one hand, why not allow employees to use their own devices to get company business done and take advantage of the lower costs of software and hardware? For employees it is a boon, too, as they see greater efficiency, fewer devices to manage (and a corresponding drop in headaches), and the flexibility to work with their own personally preferred technology.

On the other hand, BYOD practices leave companies vulnerable to security risks, privacy concerns, cyber-harassment liability, evidence-recovery challenges, and wage & hour claims – so prudent employers will develop thorough written policies to address these and other issues. But pity the poor IT professional at your company who has to juggle all of the technology and provide support for different devices across multiple platforms...make sure to remember him or her when you make your next Starbucks run.

Whistleblowers – GOOD YEAR

In October, the SEC announced that it had awarded more than \$14 million to a whistleblower whose information led to a government enforcement action that saw the recovery of significant investor funds, the largest award ever made by the government whistleblower program. No doubt many employees saw this news and started dreaming about possible newfound riches of their own.

Even if your company is not subject to the SEC's reach, take this opportunity to tighten up your internal compliance procedures to ensure you don't give your own workers a reason to blow the whistle. The Supreme Court has taken on a significant whistleblower case to be decided in 2014, *Lawson v. FMR LLC*, which may open the door for more whistleblower retaliation claims to be filed under the Sarbanes-Oxley Act in the coming years.

People With The Sniffles – PRETTY GOOD YEAR

The list keeps growing. In the past year, several more jurisdictions passed laws requiring employers to provide paid sick leave to their employees. Workplaces in New York City, Seattle, Portland (OR), Jersey City, San Francisco, the District of Columbia, and Connecticut are now on the hook for this mandatory benefit. While it was undoubtedly a good year for people with the common cold or flu, who will now be able to stay home in bed and still collect a paycheck, it will be a bad year for all of the human resources professionals who will have to administer this paid-leave entitlement. Look for this list of states and cities to grow even longer in 2014.

Foreign Talent In The Office – BAD YEAR

As the global economy continues its recovery, this country has seen an increased demand for foreign professional workers with degrees. But there is a limit to the number of H-1B visas that the government issues, and 2013 saw this cap of 65,000 hit in record time – within the first week of the filing period in April. This means that the system is almost to the point of being a lottery with employees selected at random for these coveted spots. Unless the allotment is increased in number or revised in some other way, employers will be hard pressed to make any definitive plans for their workforce due to the uncertainty of selection, and will need to develop solid backup plans in case the foreign talent they seek is barred from our shores.

Working Members Of The Family – GOOD YEAR

It was a good year for those who have to balance the home-workplace dynamic, as mandatory flextime laws were passed in the city of San Francisco and the state of Vermont. Although these are seen as somewhat vague and hard to enforce, they continue the trend of forcing workplaces to take into consideration the family life of workers. This appears to be the tip of the iceberg, and several other lawmaking bodies are already teeing up similar proposals for the new year.

Federal Contractors – MIXED YEAR

It was a bit of both good news and bad news for federal contractors subject to the OFCCP in 2013. This past year saw the agency issue a new directive on how it will determine compensation disparity, along with a new Compliance Manual which includes a checklist used by federal investigators during workplace audits. This provides some much-needed clarity for employers and is a welcome

relief. But the agency also issued new regulations requiring the collection of data when it comes to veterans and disabled applicants and workers, offering yet another administrative compliance challenge.

Socially Awkward People – GOOD YEAR

Imagine one of your workers bombs during a critical customer presentation, but before you can fire him, he brings you a doctor's note with the diagnosis of "Social (Pragmatic) Communication Disorder" seeking an accommodation of never having to present in public again. Far fetched? Think again. Thanks to the release of the 5th edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (called the DSM-5) in May, those who might otherwise be considered painfully shy or socially awkward might be classified as disabled under the ADA.

The new DSM-5 also categorizes those with "Mild Neurocognitive Disorder" as being covered – this is simply a mild decline in attention or memory often seen in people over the age of 50. In other words, you might see doctors now classifying what we call "senior moments" as being events that you have to reasonably accommodate in the workplace. There was something else I was going to say about this topic, but I forgot.

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Related People



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