

# Preparing for 2014: A Look Back at Significant Labor Over the Past Year and What to Expect in the New Year

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EXPAND YOUR EXPECTATIONS™

# Agenda

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- 2013: A Review of What Happened in the Legislature
- 2013: A Review of What Happened in Executive Action
- 2013: A Review of What Happened in the Judiciary
- Gazing into the Crystal Ball: What to Expect in 2014
- Is Time to Consider Alternative Dispute Resolution (ADR)?

# 2013: A Review of What Happened in the Legislature

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- Congress: Government Shutdown –16 days of no government
  - E-Verify went down
  - No Affirmative Action Plan Analysis

# 2013: A Review of Executive Action

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- The Equal Employment Opportunity Commission
- The Department of Labor
- The National Labor Relations Board

## What's New at the EEOC?

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- FY 2011 – 99,947
- FY 2012 – 99,632
- **FY 2013 – preliminary numbers – 93,727**
  - Resolved 97,252 charges; 14,000 fewer than FY 2012
  - Pending inventory: 70,781 (average pending time is 267 days)
- EEOC secured more than \$372.1 million in monetary benefits for individuals – the highest level of relief obtained through administrative enforcement in the EEOC's history (\$6.7 million increase).
- Good news for Employers: Fewer Charges
- Bad news for Employers: You are paying more money to resolve them.

# Strategic Enforcement Plan

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The SEP identifies six national priorities as the focus of this integrated enforcement effort. These are:

- Enforcing equal pay laws;
- Eliminating barriers in recruitment and hiring;
- Protecting immigrant, migrant and other vulnerable workers;
- Addressing emerging and developing employment discrimination issues;
- Preserving access to the legal system; and
- Preventing harassment through systemic enforcement and targeted outreach.

# Systemic Enforcement Program

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- According to the EEOC, “harassment claims based on race, ethnicity, religion, age and disability combined significantly outnumber even sexual harassment claims in the private and public sectors.”
- FY 2013 – “The agency continued to build a strong national systemic enforcement program. At the end of the fiscal year, there were 300 systemic investigations resulting in 63 settlements or conciliation agreements that recovered approximately \$40 million.”
- Systemic suits comprised 16 percent of all merits filings, and by the end of the year, represented 23.4 percent of all active merit suits – the largest proportion since tracking started in fiscal year 2006.

# Protection for Sexual Orientation

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Title VII does not prohibit discrimination on the basis of sexual orientation. The EEOC and private parties have, and continue to, press federal courts to recognize such protection by arguing theories of discrimination based upon gender-stereotyping.

EEOC recognizes “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions” is an “emerging issue.”

Currently, 21 states prohibit sexual orientation discrimination under state anti-discrimination statutes, while 16 also protect gender identity. EDNA passed the Senate but died in the House.

*EEOC v. Boh Brothers* – 5th Circuit case



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## What's New with the Department of Labor?

# FMLA Changes: What Changed?

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- Effective March 8, 2013
- The DOL clarified that the increment of FMLA leave time remains the same as the time increment used by the employer for other types of leave.
- The DOL also changed the rule that allowed employers to delay a worker's reinstatement from FMLA only when it is physically impossible for the employee to return to work in the middle of his or her shift.
  - Per the DOL, delaying a worker's reinstatement will only be permitted when it is, in fact, physically impossible to allow a worker to return to work in his/her position — or an equivalent position.

## FMLA Changes: What Changed? (continued)

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- The new rules also make major changes to military family leave, including:
  - (a) expanding caregiver leave so it can be taken to care for veterans discharged within the past five years (excluding Oct. 18, 2009 to Mar. 8, 2013 from the five year look-back);
  - (b) allowing caregiver leave to be taken for a pre-existing injury or illness that was aggravated in the line of duty;
  - (c) expanding the definition of a serious injury or illness of a covered veteran;
  - (d) extending exigency leave to family members of the Regular Armed forces when deployed to a foreign country;

## FMLA Changes: What Changed? (continued)

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- (e) extending the amount of time an employee can take during a military family member's "rest and recuperation" period from 5 to 15 days, and
- (f) adding a new exigency leave category - to care for a covered military member's parent who is incapable of self-care when the care is necessitated by the member's covered active duty, including to arrange for alternate care, to provide care on an immediate need basis, to admit or to transfer the parent to a care facility, or to attend meeting with staff at a care facility.

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## What's New with the National Labor Relations Board?



## National Labor Relations Board

- Enforces the National Labor Relations Act
- National Labor Relations Act
  - Section 7 – Empowers Employees to Organize
  - Section 8 – Prohibits Unfair Labor Practices

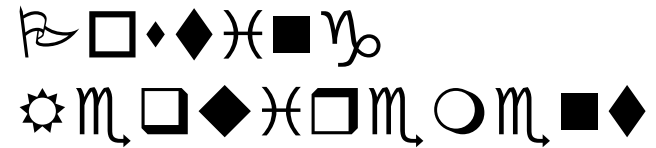
Confidentiality Policies

*Noel Canning*

Written Policies

Social Media

HANDBOOKS



# National Labor Relations Board

Concerted Activity

Photos in the Workplace

iPhone App

ONLINE PRESENCE

**At-Will Disclaimers**

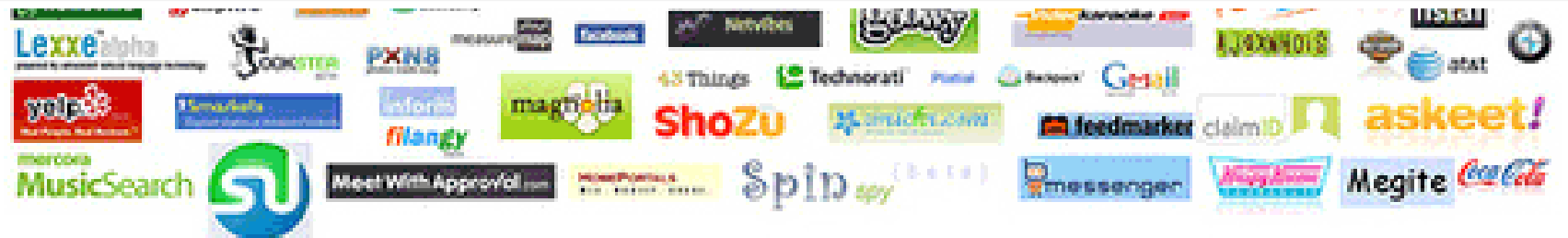


# **NON-UNION WORKPLACES**



# What is Social Media?

A type of online media where information is uploaded primarily through user submission. **Web surfers are no longer simply consumers of content, but active content publishers.** Many different forms of social media exist including more established formats like Forum and Blogs, and newer formats like Wikis, podcasts, Social Networking, image and video sharing, and virtual reality.



# Everyone's Doing it . . .

- Social media accounts for **16 minutes** out of every **1 hour** spent online.
- Instagram acquired a user base of **4.25 Million** in only **7 months** – **42 Million** photos posted every **day**.
- Businesses are paying **Twitter \$120,000** to **sponsor** or **trend** an **account** or **topic**.
- **Facebook** has over **1.1 Billion** users and **Google** handles over **100 Billion queries** per **month (37K / sec.)**
- Every **two** days there is **more information** created than between the **dawn** of **civilization** and **2003**.

FTC Guidelines on Advertising

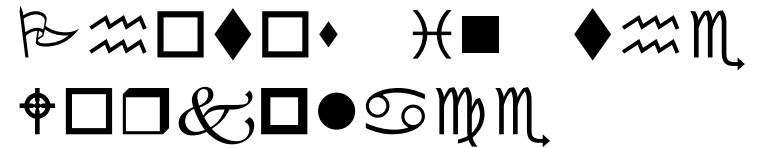
Cyberbullying

Written Policies

Wearable Tech

FLSA

Free Speech



# Social Media in 2014

Title VII

FMLA

ADA

NLRA

Pre-Hire e-Searches

Privacy, Privacy, Privacy

E-DISCOVERY

**WIRETAP ACT**

*Stored Communications Act*

# 2013: A Review of What Happened with the Supreme Court.

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**They were busy and so were we!**

## Defense of Marriage Act (DOMA)

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In 1996, Congress enacted the Defense of Marriage Act. This law made two changes to federal law:

1. DOMA provides that no state, territory, possession, or Indian tribe is required to recognize another state, territory, possession, or Indian tribe's recognition of a same-sex relationship as a marriage.
2. DOMA provides that for purposes of all federal laws, “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or wife.

# Constitutional Challenge

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- *Windsor v. United States of America*
  - Same-sex couple married in Canada
  - Surviving spouse denied benefit of spousal deduction
  - Entitled to a \$363,053.00 refund
- DOJ argued constitutional; 2011 argued unconstitutional
- Bipartisan Legal Advisory Group of the House of Representatives
- District Court of the Southern District of NY – DOMA unconstitutional
- 2<sup>nd</sup> Circuit Court of Appeals – Unconstitutional (2-1)

# DOMA Held Unconstitutional

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- 5-4 Decision
- What are the effects on other laws?
  - Health Benefits
  - FMLA
  - Taxes



# Retaliation: *University of Texas v. Nasaar*

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# Retaliation on the Rise

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The number of retaliation claims filed with the EEOC has gone from 16k in 1997 to 31k in 2012.

- In 2012, 38% of all charges filed with the EEOC included a retaliation claim.
- Retaliation claims are now the second most asserted claim behind only race discrimination.

# Retaliation on the Rise

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- How does it arise in the workplace?



# Good News

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- In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court held that a more stringent standard applies.
- Previous standard
  - Could arguably prove retaliation by proving the protected activity was a “motivating factor” or a “substantial contributing cause”

Not anymore...

# Nasser – “But For” Causation

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- Facts
  - Middle Eastern physician – proved retaliation at trial
- Standard
  - Title VII retaliation claims must be proven according to the traditional principles of but-for causation, which requires “proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”
  - Based on text of 1991 amendments “because” and potential abuse of retaliation claims

# Avoiding and Defending Retaliation Claims

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- Strong policies that prohibit retaliation
- Train decision makers
- Document employment actions
- Investigate complaints
- Consider independent investigation
- Confirm legit, non-discrimination reason before taking action
- Wall off retaliatory actor from decision
- Have witness at second action
- Document *everything*

## ***Gross v. FBL Financial Services***

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- 5-4 Decision
- Adopts “but-for” causation standard for age claims.

# Who is a Supervisor?

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- Supreme Court Clarified in *Vance v. Ball State University*
- Must have Hiring and Firing Authority



# Gazing into The Crystal Ball: 2014?

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- Legislatively – For Congress, watch the mid-term elections.
- Will the Senate swing Republican?
- If it does, what happens to:
  - OBAMACARE
  - EDNA
  - IMMIGRATION REFORM
  - TAX REFORM

# Senate Outlook

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Democrats	Republicans
Baucus, Max (D-MT) (Retiring)	Alexander, Lamar (R-TN)
Begich, Mark (D-AK)	Chambliss, Saxby (R-GA) (Retiring)
Booker, Cory A. (D-NJ)	Cochran, Thad (R-MS)
Coons, Christopher A. (D-DE)	Collins, Susan M. (R-ME)*
Durbin, Richard J. (D-IL)	Cornyn, John (R-TX)
Franken, Al (D-MN)	Enzi, Michael B. (R-WY)
Hagan, Kay R. (D-NC)	Graham, Lindsey (R-SC)
Harkin, Tom (D-IA) (Retiring)	Inhofe, James M. (R-OK)
Johnson, Tim (D-SD) (Retiring)	Johanns, Mike (R-NE) (Retiring)
Landrieu, Mary L. (D-LA)	McConnell, Mitch (R-KY)
Levin, Carl (D-MI) (Retiring)	Risch, James E. (R-ID)
Markey, Edward J. (D-MA)	Roberts, Pat (R-KS)
Merkley, Jeff (D-OR)	Sessions, Jeff (R-AL)
Pryor, Mark L. (D-AR)	
Reed, Jack (D-RI)	
Rockefeller, John D., IV (D-WV) (Retiring)	
Shaheen, Jeanne (D-NH)	
Udall, Mark (D-CO)	
Udall, Tom (D-NM)	
Warner, Mark R. (D-VA)	

\* Maine voted for Obama in 2012

## What to Expect in 2014 from the Executive Branch?

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- Unions and the NLRB will try to move forward with the posting rule.
- Expect further efforts to revise the NLRB's election rules.
- Continued aggressive enforcement by federal agencies in President Obama's second term.
- Continued focus by the EEOC on large-scale, systemic cases.
- The EEOC's tactics in litigation will continue.

# What to Expect in 2014 for the Executive Branch?

(continued)

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- The DOL will continue to focus on misclassification issues.
- The DOL also may move forward with “Right to Know” regulations, which would require employers to prepare a classification analysis explaining why a worker is classified as an employee or an independent contractor.

# What to Expect in 2014 from the Judicial Branch?

(continued)

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- There will be continuing challenges to the ACA.
- There is split in the circuits as to whether a district court can review the EEOC's conciliation efforts.
- There will be challenges to state laws banning same sex marriages/benefits.

## What to Expect in 2014 under State Law

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- 14 States increased minimum wage for their workers (Arizona, California, Colorado, Connecticut, Florida, Missouri, Montana, New Jersey, New York, Ohio, Oregon, Rhode Island, Vermont, Washington); others may follow
- Ban the Box will increase.

**Is it Time to Consider ADR?**

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# The Art & Science of Alternative Dispute Resolution

*The Science of  
Arbitration*



# Arbitration

AN IMPOSITION OF JUDGMENT FROM A NEUTRAL ARBITRATOR WHO, AFTER BEING SELECTED BY THE PARTIES, HEARS EVIDENCE, WEIGHS FACTS AND RENDERS AN AWARD IN THE DISPUTE. SUCH AWARDS ARE GENERALLY SUBJECT TO APPEAL ONLY IN THE CASE OF FRAUD, EXCEEDING THE AUTHORITY OF THE ARBITRATOR, OR GROSS INATTENTION TO THE FACTS.

# Why Arbitration?

- May contract for it!
- Judges love it!
- Courts compel it!

# Why Arbitration?

- May be efficient
- May be less expensive than litigation
- May reduce risk of large verdicts

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- **May be efficient** – usually faster track than in court. But, discovery is typically in line with a standard case in federal court.
- **May be less expensive than litigation** – maybe, but probably not. Remember the Arbitrator doesn't work for free.
- **May reduce risk of large verdicts** – Yes, but also probably eliminates any chance of winning with an early dispositive motion.

## How Arbitration Works...

- Select the arbitrator
- Conduct discovery
- Consider dispositive motions
- Schedule the hearing
- Try the case
- Accept the results
- Close the file



# Mediation

# Mediation

THE INTERVENTION OF A THIRD PARTY NEUTRAL WHO, INTERVENING WITH THE PERMISSION OF THE PARTIES, *ASSISTS THEM* IN FINDING A MUTUALLY ACCEPTABLE, NON-COERCIVE AND CONSCIONABLE EXIT FROM THEIR CONFLICT THAT IS DEFINITE, SPECIFIC AND PERFORMABLE.

**Q.** What frequent themes drive disputes?

- A.**
- ▶ Money
  - ▶ Re-establish or repair relationships
  - ▶ Restoration of self-esteem or self-confidence
  - ▶ Seek apology
  - ▶ Vengeance or revenge
  - ▶ Grief Resolution
  - ▶ Seek change in policy or practice
  - ▶ Vindication of Rights



## Public Trial

## Mediation

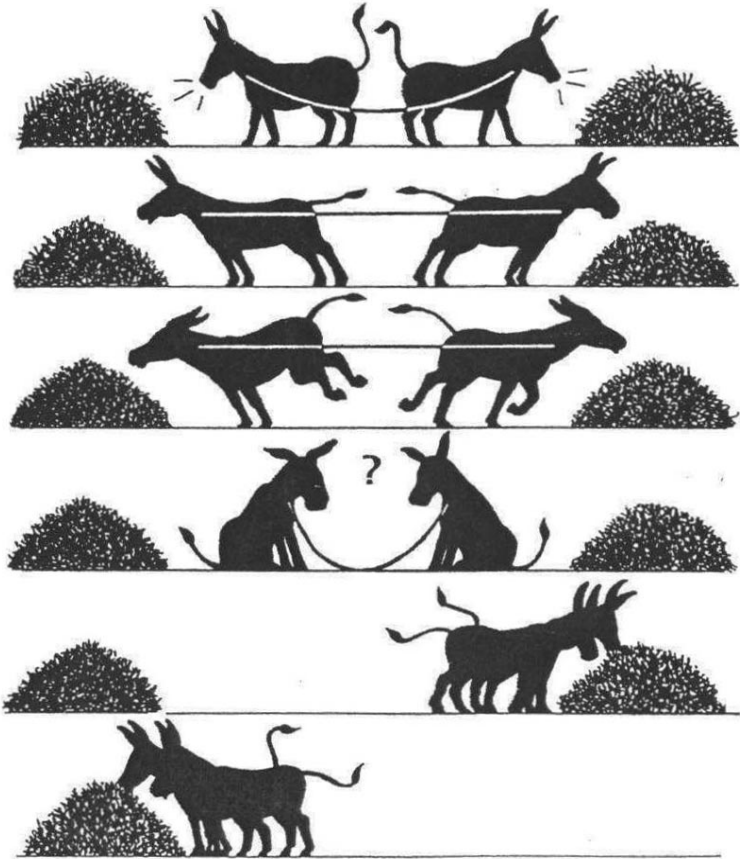
<b>Public</b>	<b>Private</b>
<b>You have no control over outcome</b>	<b>You have complete control over outcome, decisions are yours</b>
<b>High cost in time and money</b>	<b>Expenditure of time and money minimal</b>
<b>An effort to satisfy community standard of justice</b>	<b>Satisfy parties' standards of justice is goal</b>
<b>Formal, rigorous rules</b>	<b>Informal</b>
<b>Limited opportunity to ventilate</b>	<b>Unlimited opportunity to ventilate</b>

**Public Trial**

**Mediation**

<b>Contentious, confrontational</b>	<b>Minimal contentiousness and confrontation</b>
<b>Remedies limited by law</b>	<b>May be able to realize benefit or remedy not available in court</b>
<b>Feelings matter little</b>	<b>Opportunity to express feelings</b>
<b>Resolution/outcome bound by established legal doctrine</b>	<b>Established legal doctrine is not binding</b>
<b>Power and responsibility for resolution lies with court</b>	<b>Power and responsibility lies with parties</b>

**TALE OF TWO DONKEYS**



*Illustration reprinted by permission of Quaker Peace & Service, London, England.*

# QUESTIONS?

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