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THE IMPACT OF A SECOND TERM OBAMA ADMINISTRATION ON EMPLOYMENT LAW

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A Look Back at the Last 4 Years



Little New Major Federal Employment Legislation

It should be getting easier, right?



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But, signs of things to come...

Pervasive Employment Regulatory Activity

- **In place of statutes and regulations**
 - **Without the difficulty of navigating Congress**
- AND EXECUTIVE ORDERS**

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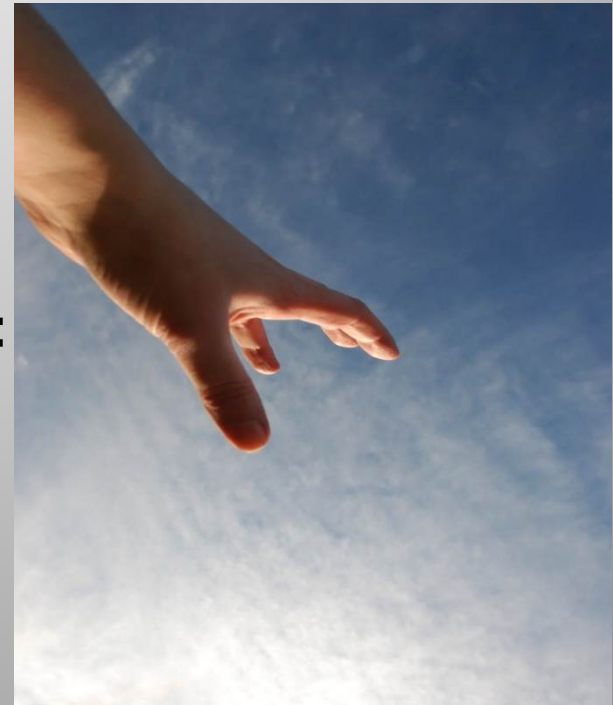
*An Example:
The National Labor Relations Board*



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Backdoor assault...

- The NLRB is aggressively attempting to extend its reach to nonunion workplaces!
- Still pending before the Appellate Courts:
 - Posting Requirement
 - Rules for streamlining union campaigns
- Decisions regarding At-Will Disclaimers
- Site promoting protected concerted activity:
www.nlrb.gov/concerted-activity



Still more...

- **Confidentiality of Employers' HR Investigations:**
 - NLRB recently held in a decision that applies to both union and nonunion employers that the routine practice of asking employees who are involved in an investigation not to discuss the ongoing investigation with co-workers runs afoul of the NLRA
 - NLRB went on to state that employers can ask employees to keep investigations confidential, only if, after making an up-front, individualized assessment of the need for confidentiality based on the following:
 - whether any witnesses need protection
 - whether evidence is in danger of being destroyed
 - whether testimony is in danger of being fabricated, or
 - whether there is a need to prevent a cover up.



Some Good News? At Will Statements Deemed Compliant!!



- The relationship between you and Mimi's Café is referred to as "employment at will." This means that your employment can be terminated at any time for any reason, with or without cause, with or without notice, by you or the Company. No representative of the Company has the authority to enter into any agreement contrary to the foregoing "employment at will" relationship. Nothing contained in this handbook creates an express or implied contract of employment.
- Employment with Rocha Transportation is employment at-will. Employment at-will may be terminated with or without cause and with or without notice at any time by the employee or the Company. Nothing in this Handbook or in any document or statement shall limit the right to terminate employment at-will. No manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.

The NLRB's latest take on Social Media

- General Counsel of NLRB has issued 3 memos providing guidance on social media. **WHY?**
- The latest memo that just came out on May 30 is the most useful. It says what employers are allowed to do; not just what they are prohibited from doing.
- The third time was a charm, and for the first time the Acting GC approved of a policy *in its entirety*. This gives employers an actual roadmap for what should survive NLRB scrutiny.



Don't forget the Employee Free Choice Act!



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The latest from the EEOC



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Another Record Year for the EEOC

- FY 2011 – 99,947
- **FY 2012 – preliminary numbers -- 99,632**
- EEOC secured more than \$365.4 million in monetary benefits for individuals – the highest level of relief obtained through administrative enforcement in the EEOC's history
- Retaliation is still the most common charge of discrimination
- Increased on-site interviews
- Tough negotiation postures

Strategic Enforcement Plan

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.



Targeting Pay Discrimination

- EEOC has launched a pilot program at 3 of its district offices – Chicago, New York and Phoenix
- Purpose of the pilot program is to determine the best approach for conducting direct investigations – investigations initiated without any prior charge of pay discrimination – to determine whether Equal Pay Act violations are occurring
- EEOC is working with other government agencies – OFCCP, Wage and Hour Division and Women’s Bureau of the Department of Labor – to share best practices *and information*
- Note: unlike Title VII, the EPA is enforced through the FLSA – this means that the EEOC does not need to wait for a charge of discrimination to be filed, but instead has authority to conduct direct investigations of employers to assess whether EPA violations are occurring

Protections for Transgender Employees

- What happened: On April 20, 2012, the EEOC determined that discrimination against a transgender individual because that person is transgender is sex discrimination and violates Title VII.
- The Case: Mia Macy, a transgender woman (man to woman), was denied a job with the ATF. Macy applied for the job as a male and was told it was “virtually guaranteed,” based on her military and police background and experience with the ATF’s ballistics system. After disclosing his gender transition, Macy was told the job’s funding was cut. She found out someone else was hired and she sued. The EEOC initially refused to consider her claim for sex-stereotyping/discrimination based on gender identity/sex change. She appealed to the EEOC, which held transgender discrimination equals sex discrimination.

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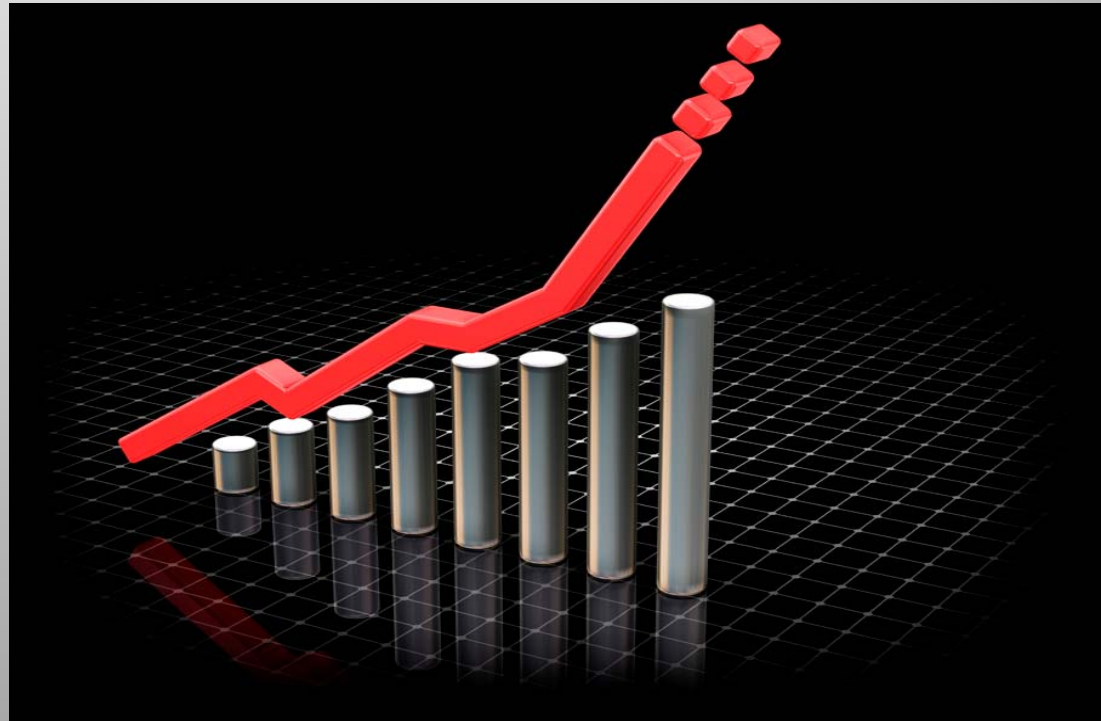
Wage and Hour Litigation



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Record Number Filed in 2012

- 2012 – 7,064
- 2011 – 7,006
- 2010 – 6,081
- 2009 – 5,644
- 2008 – 5,302



What do these types of claims include?

- Misclassification of employees as exempt
- Misclassification of employees as independent contractors
- Failure to pay otherwise exempt employees on a salary basis
- Regular rate and minimum wage issues
- Failure to pay for pre- and post-shift activities, including donning and doffing and other off-the-clock activities
- Tip claims
- Unpaid on-duty meal periods



Americans with Disabilities Act

*Leave, Leave , Leave, Leave, Leave, Leave,
Leave!!! But, where is our guidance??*



2012 Case Law Highlights (besides S.Ct's ruling on the Affordable Care Act)

- Supreme Court includes pharma sales reps as exempt outside salespeople for FLSA purposes (Christopher v. SmithKline Beecham)
- Supreme Court recognized the ministerial exception to antidiscrimination laws (Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC)
- Dukes v. Wal-Mart saga continued; district court refused to dismiss gender discrimination claims for the narrowed class and other courts interpreted S.Ct's ruling narrowly
- FMLA interference claims will be evaluated under the McDonnell Douglas framework (Donald v. Sybra – 6th Circuit)
- Termination of employee who failed to comply with workplace injury reporting requirement upheld (Geronimo v. Caterpillar – 6th Circuit)
- State's medical marijuana act does not regulate private employment; thus, employer can not be sued for its violation (Casias v. Wal-Mart – 6th Circuit)

WHAT'S BEEN HAPPENING IN TENNESSEE?

- Unemployment Insurance Accountability Act
- Legislation passed to reverse effects of *Gossett* decision
- Tennessee Lawful Employment Act
- 2011 Workers' Compensation Amendments



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Looking Ahead : 2013-2016



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What's Going To Happen?

- **Federal Legislation**- probably remains at a *relative* standstill, at least for two years
- **Agency Activity**- continued increase in reliance on election “mandate;” strategic initiatives gain momentum
- **Executive Orders** – aimed especially at federal contractors
- **Court Decisions**
 - Supreme Court
 - Appellate Courts & Trial Courts
- **State Laws** – where action is?



Federal Legislation

- Republicans control House; Democrats control Senate
- ENDA and EFCA
- “Obamacare”
 - Effective for most employers in 2014
 - Mandates coverage or fine for full-time equivalents over 50
 - Employers making changes to workforce in anticipation
 - Will Congress react?
- FMLA Expansion
- Immigration Reform



Agency Activity

- Possible Regulations and/or guidance
 - Leave as a Reasonable Accommodation
 - OFCCP Revisions to VEVRAA Regulations
- Focus on Strategic Priorities
 - Example: EEOC – pregnancy, equal pay, immigration issues, domestic violence guidance
- Increased manpower
 - More intensive investigations
 - Perhaps shorter processing times
- Focus on financial institutions
- Reverberations from Health Care Reform



PAY ATTENTION: The Department of Labor!

PLAN/PREVENT/PROTECT

firmly places the burden on employers to **obey the law**, not on the DOL to catch them violating the law.



Around since 2010, but increased focus and efforts in the new term. Includes OSHA-required implementation of an Injury and Illness Prevention Program, Right to Know efforts by the Wage & Hour Division, and reg revisions by the OFCCP.

A POSSIBLE DENT IN THE ARMOR?

D.C. Circuit Court strikes down recess appointments to the NLRB –

Implications??



EXECUTIVE ORDERS

WAIT A MINUTE, CAN HE DO THAT????



Article II, Section, 1, Clause 1 of the Constitution grants “executive power”

Article II, Section 3, Clause 5 directs the President to “take Care that the Laws be faithfully executed.”

These orders have the full force of law; typically made in pursuance of Acts of Congress.

COURT DECISIONS 2013—SUPREME COURT

- Vance v. Ball State- which employees qualify as supervisor under Title VII (authority to hire and fire vs. authority to oversee daily work)
- Genesis HealthCare v. Symczyk- offer of judgment in FLSA collective action
- D.R. Horton, Inc. v. NLRB- arbitration agreement that applies to FLSA claims
- Comcast v. Behrend and AmEx III- evidence required for certifying a class action



OTHER COURT DECISION ON THE HORIZON

- More cases clarifying the impact of the ADAAA and its associated regulations
- Clarification of interaction between state and federal summary judgment standards/more cases filed in state court
- Effect of Dukes v. Wal-Mart decision
- Cases clarifying collective action certification/burden of proof required

DON'T FORGET ABOUT THE JUDGES!

- 4 current Supreme Court Justices are over 70



State Laws

- Workers' Compensation Reform
 - Court System v. Commission System
 - Governor's proposal
- Guns in Parking Lots and Elsewhere
 - Currently, employers can post parking lots as gun free zones
 - Legislation proposed to circumvent that & compromise bill working through the Legislature
 - Contains employer civil immunity; allows employers to ban firearms for those without carry permits



What else you should be watching . . .

- The Federal Budget – Sequestration implications for both public and private employers
- Possible attack on arbitration agreements (via legislation, court decisions, or union activity)
- ERISA action – A logical outgrowth of the ACA and enforcement agenda
- Legalization of marijuana – Possible fundamental changes in our standard operating practices??

2013 Employment Law Resolutions

- Review your handbook. Pay special attention to: non-discrimination policies, social media policies and at-will statements.
- Consider a wage and hour audit.
- Update job descriptions.
- Go to a seminar on the Affordable Care Act.
- Review your supervisory training agendas.
- Be aware of your union vulnerability.
- Stay informed and give input.



QUESTIONS????

