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What 2013 Gifts will Employers be Enjoying Well Into 2014?

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The holidays have come and gone. I hope everyone enjoyed them, and I hope everyone received the gifts and presents they asked for. I come from a big family—three siblings, 14 aunts and uncles, and nearly twenty cousins. Growing up, opening presents around the holidays was a roll of the dice. You were just as likely to receive a wool sweater with jingle bells as you were the must-have gift of the season. If you 'won' the sweater, you'd wear it with a smile until mid-January, and then toss into the closet. If you 'won' the must-have gift of the season, you'd play with it well into next Fall. To this day, my Mom will tell you that the best way to judge a gift is to see how far into the next year you're still enjoying it (i.e., how far into the next year you're still playing with it / wearing it / riding it / using it / remembering where you last put it).

Employers received a lot of gifts in 2013. From the Supreme Court, to the EEOC, to the NLRB, everyone was in a giving mood, and give they did. But like Mom will tell you, the best way to judge a 2013 gift is to see how far into 2014 you're still enjoying it. Below are some 2013 gifts that employers will be enjoying well into 2014.

Expanded Interpretations of Title VII

In 2013, we saw continued efforts to expand Title VII to encompass LGBT individuals. For example, the Fifth Circuit decided in *Equal Emp't Opportunity Comm'n v. Boh Brothers Constr. Co., L.L.C.*, that an individual can state a claim for gender-stereotyping (or sex-stereotyping) under Title VII. In other words, the Fifth Circuit ruled that Title VII prohibits discrimination/harassment based on the fact that an individual fails to conform to traditional gender stereotypes. Title VII currently does not prohibit discrimination based on the fact that a female employee is lesbian, but under a theory of gender-stereotyping, Title VII does prohibit discriminating against a lesbian employee because she "fails to conform to traditional female stereotypes." This distinction is an admittedly unclear one, and we will see a number of courts work through this issue in 2014. We may also see the passage of the Employment Non-Discrimination Act, which outright amends Title VII to specifically cover LGBT individuals.

Initial Discovery Protocols for Employment Cases

Admittedly, this is something that started in 2011. But like e-filing, Pintrest, or the touch-screen cell phone, it took a couple of years to hit the proverbial mainstream. All the way back in 2010, individuals attending the Conference on Civil Litigation at Duke University became intrigued by case-type-specific pattern discovery. Following the conference, employment cases became the focus of case-type-specific pattern discovery because, as one judge put it, “you have a group of lawyers who, because they regularly handle these types of cases, know what each side wants and needs from written discovery.” So, in November 2011, the Federal Judicial Center released the Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action. The Protocols require both the plaintiff and defendant to immediately produce (within 30 days of a defendant's first filing) the standard documents in employment cases; e.g., a plaintiff's personnel file, relevant job descriptions, the plaintiff's resume, documents concerning unemployment compensation, etc. The Protocols even provide a model protective order. Several courts adopted the Protocols in 2013, and it's likely courts will continue to do so in 2014.

Technology, Including Wearable Tech

Between Google Glass and Samsung's Galaxy Gear Smartwach, wearable technology officially arrived in 2013. Without a doubt, wearable tech will take center stage throughout 2014. For a quick look at what the future holds, just Google: CES 2014 Wearable Tech. Technology, including wearable tech, presents a unique obstacle for employers, and it will be interesting to see how employers navigate these obstacles in 2014. As with any workplace issue, an employer's first line of defense is updated written policies. Employers need to make sure that their policies cover such things as social media, photography in the workplace, and the audio and visual recording of the workplace.

The Supreme Court

In 2013, the Court decided *Vance v. Ball State University* and *University of Texas Southwestern Medical Center v. Nassar*. In *Vance*, the Supreme Court narrowly defined who can be considered an employee's supervisor, and in *Nassar*, the Court limited an employee's ability to establish a retaliation claim. In 2014, the Supreme Court will hear cases on the Fair Labor Standards Act (*Sandifer v. United States Steel Corp.*, No. 12-417), the Sarbanes-Oxley Act (*Lawson v. FMR, LLC*, No. 12-3), the Employee Retirement Income Security Act (*Heimeshoff v. Hartford Life & Accidental Insurance Co.*, No. 12-729), the Labor Management Relations Act (*Unite Here Local 355 v. Mulhall*, No. 12-99), and it will also determine the validity of President Obama's intrasession NLRB member appointments in January 2012 (*NLRB v. Noel Canning*, No. 12-1281). It will be a busy year!