

# LOOKING BACK & LOOKING AHEAD: Keeping a Watchful Eye on the Road Ahead with a Glance in the Rearview Mirror

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## 2013: A Grab Bag

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- New I-9 issued
- Wage & hour lawsuits reach record high (up 10% over 2012)
- Final rule issued (effective 1/1/2015) to extend overtime protection to home care workers
- “Use or lose” rules for FSA’s modified; up to \$500 may be carried over
- TN – Guns in Parking Lots; Workers’ Comp taken out of the courts (effective 7/1/2014)



# 2013: What Happened in the Legislature

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- Congress: Government Shutdown
  - E-Verify went down
  - No Affirmative Action Plan Analysis
- ENDA: Not Dead, but on life support
  - Approved by Senate 11/7/13, 64-32
- Immigration Reform
  - Written by “Gang of 8”
  - Approved by Senate 6/27/13, 68-32





# 2013: A Review of Executive Action

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



# The National Labor Relations Board

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- Struck down “no-gossip” policy
- Withdrew appeal of controversial labor board rule aimed at streamlining union elections - - but more to come!



## Driving Test Question:

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- In 2013, What Agency Secured More than \$372 Million in Monetary Benefits for Individuals?



## Answer: 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.

# EEOC Strategic Enforcement Plan

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The SEP identifies six national priorities :

- 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.



# EEOC 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.



## EEOC - 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.

## Driving Test Question:

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- What Federal Department is Charged With Enforcement of the FMLA?



# Answer: The Department of Labor

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## 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)

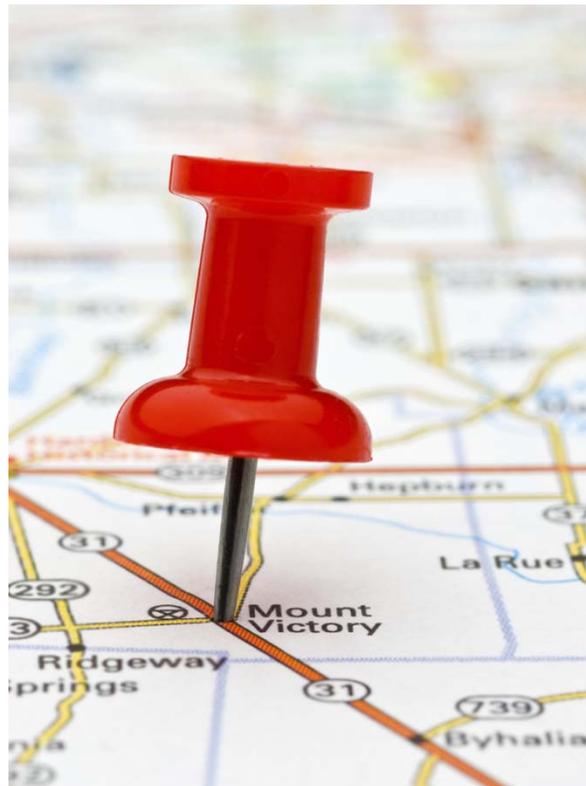
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- The new rules also make major changes to military family leave, including:
  - (a) expanding caregiver leave so it can be taken to care for veterans discharged within the past five years;
  - (b) allowing caregiver leave to be taken for a pre-existing injury or illness that was aggravated in the line of duty;
  - (c) extending exigency leave to family members of the Regular Armed forces;
  - (d) requiring that service members be deployed to a foreign country in order for their family members to qualify for exigency leave, and
  - (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.

# Don't Forget

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- Revised OFCCP Regs regarding VEVRAA and Rehab Act
- EEOC's focus on Criminal Background Checks



## Focus of PRESIDENT'S ATTENTION:

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# OBAMACARE

- Employer Mandate
- Individual Mandate



# Driving Test Question:

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- What nine member Court handed down decisions that significantly impacted employers?



# Answer: The Supreme Court?

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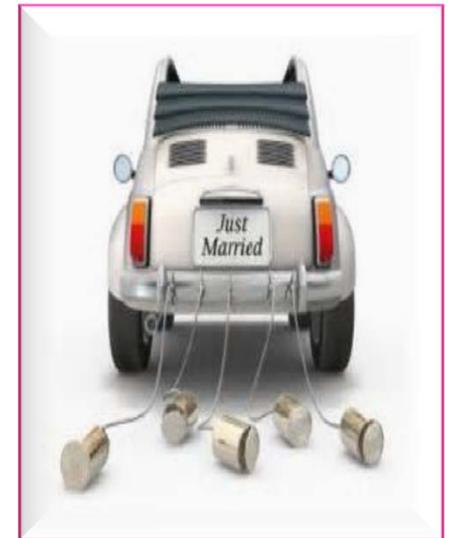
**They were busy and so were we!**

# 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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“Title VII retaliation claims must be proved according to the traditional principles of but-for causation,” requiring “proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”



# Who is a Supervisor?

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



# The Other Courts Were Busy Too!

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- Rulings on Arbitration Agreements
- Attendance can be an essential job function!
- EEOC forced to pay fees and costs
- NLRB can determine appropriate bargaining units



# Looking at the Road Ahead: Legislation in 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
  - IMMIGRATION REFORM
  - TAX REFORM
- Minimum Wage
- “An America That Works”
- The Healthy Families Act
- Tennessee: Guns, Marijuana, Same-Sex Marriage



# Senate Outlook



Democrats	Republicans
<p>Baucus, Max (D-MT) (Retiring) Begich, Mark (D-AK) Booker, Cory A. (D-NJ) Coons, Christopher A. (D-DE) Durbin, Richard J. (D-IL) Franken, Al (D-MN) Hagan, Kay R. (D-NC) Harkin, Tom (D-IA) (Retiring) Johnson, Tim (D-SD) (Retiring) Landrieu, Mary L. (D-LA) Levin, Carl (D-MI) (Retiring) Markey, Edward J. (D-MA) Merkley, Jeff (D-OR) 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)</p>	<p>Alexander, Lamar (R-TN) Chambliss, Saxby (R-GA) (Retiring) Cochran, Thad (R-MS) Collins, Susan M. (R-ME)* Cornyn, John (R-TX) Enzi, Michael B. (R-WY) Graham, Lindsey (R-SC) Inhofe, James M. (R-OK) Johanns, Mike (R-NE) (Retiring) McConnell, Mitch (R-KY) Risch, James E. (R-ID) Roberts, Pat (R-KS) Sessions, Jeff (R-AL)</p> <p>* Maine voted for Obama in 2012</p>

# What to Expect in 2014 from the Executive Branch?

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- Lots of NLRB decisions to be released.
- Expect further efforts to revise the NLRB's election rules, as well as revisitation of *Weingarten* rights & the *Burns* Doctrine.
- We will see continued aggressive enforcement by federal agencies in President Obama's second term.
- The EEOC will focus on large-scale, systemic cases.
- The EEOC's tactics in litigation will continue.
- Persuader Rules may become final!



# 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.
- Continued focus on OBAMACARE roll-out issues.
- OSHA to release final rule to exempt some low risk industries from the OSHA log requirement.
- Expect revision of regulations in light of DOMA.



“[T]he perception is wrong that you cannot organize in the South”

– UAW President Bob King

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

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- Supreme Court will decide the *Noel Canning* case.
- Supreme Court will decide whether illegal immigrants can recover overtime and minimum wage under the FLSA.
- Supreme Court will decide whether certain portions of the ACA are unconstitutional based upon religious grounds.



# QUESTIONS?

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