HR REVIEW AND OUTLOOK FOR 2013

An employment-wise take on the New Year

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We are approaching that time when the media of every stripe trots out year-end reviews and predictions for 2013. Let me be the first to jump in, with my employment-focused prognostications.

No action from Congress

If past is prologue, we don't have much to go on. No new federal employment laws passed in 2012. Indeed, since President Obama signed the Lily Ledbetter Fair Pay Act in 2009--the first legislative enactment of his presidency--little of his ambitious employment agenda has been achieved.

All dead in the water: the Employee Free Choice Act, aimed at making union organizing easier; the Employment Non-Discrimination Act, extending Title VII protections to gays; and various workplace flexibility bills giving paid sick leave. Congressional deadlock and the interminable election campaign prevented any action on these and others measures intended to increase employee protections.

These bills will no doubt be re-introduced when the new Congress convenes in January. Will they pass next time around? I think not.

I predict that immigration reform will be to President Obama's second term what healthcare reform was to his first: the monster that sucks up all of Congress' energy and time, squeezing out other initiatives at least until the mid-term elections in 2014. We still have a divided Congress, and, notwithstanding an impending solution to the Fiscal Cliff, I think entrenched partisan resistance will continue to prevent the compromises necessary to get things done.

Activist federal agencies fill the gap

Nature abhors a vacuum. So does government, apparently. Federal agencies like the National Labor Relations Board, the Equal Employment Opportunity Commission, and the Office of Federal Contract Compliance Programs have leapt into the void created by congressional gridlock over the last two years.

True, the NLRB's rule providing for "quickie elections" for union representation, and its requirement that all employers display a Notice of Employee Rights under the National Labor Relations Act, have both been stayed by the courts. Yet this agency continues to flex its muscle.

NLRB took the side of an employee dismissed for insulting her boss in a Facebook post, and has issued opinions which have sent banks scurrying to redraft their internet and social media policies. More recently, it has extended the concept of "protected concerted action" to workers who talk about their employers' internal investigations.

I don't see the NLRB slowing down anytime soon.

The EEOC issued guidance this year elaborating on its long-held position that using criminal history as a screening tool discriminates against minorities, as more minorities tend to have criminal records than whites. The EEOC now requires an "individualized assessment" when criminal history is considered in hiring.

The guidance gives lip service to federal laws, like Section 19 of the Federal Deposit Insurance Act, which prohibits banks from hiring those convicted of certain crimes, but makes clear that any screening that goes beyond the federally mandated minimum will draw strict scrutiny.

Many banks also use credit history as a screening tool, based on the reasonable belief that those charged with handling other people's money should be competent at handling their own. Look for the EEOC to issue similar guidance in the New Year restricting the use of credit history in hiring. Studies have shown that minorities and women tend to have worse credit records than white males, supporting the EEOC's position that the use of credit records, like criminal records, is potentially discriminatory.

The OFCCP's Final Rule extending affirmative action plans to veterans, expected last spring, was postponed in anticipation of the election and in view of the Administration's reluctance to impose further burdens on employers in a weak economy with high unemployment. I anticipate that the Final Rule will be published in 2013. Banks with more than 50 employees that are subject to affirmative action plan requirements under Executive Order 11246 will need to maintain logs tracking veteran applications, hires, promotions, transfers, and terminations, just as they do now for women and minorities.

The OFCCP has increased its investigative staff, with the result that many more investigations are being conducted. Expect this to continue into 2013 and beyond.

Also look for the alliance of the U.S. Department of Labor and the Internal Revenue Service to continue. These agencies have united in a campaign to stop the misclassification of workers as independent contractors, rather than as employees.

With the government looking to seal up tax loopholes and enhance efficient collection of taxes already on the books, this looks like low-hanging fruit.

State laws' share of the HR quilt

Employment law is like a patchwork quilt. The federal-law-backing that lines the quilt is one single piece, with the same weave and color throughout, and it extends to each edge. State law provides the pieces that lie on top: all different fabrics and shapes, some multi-colored and thickly padded (California, Washington, New Jersey), and some so thin as to be almost transparent to the federal law backing behind (Georgia).

And the quilt is always changing. While Congress may be inactive in the employment law arena, needleworkers in the state legislatures are stitching away.

Before I get carried away with my analogy, let me just highlight a couple of trends at the state level that I see continuing into the future.

- • State privacy laws and HR. In the absence of a universal federal data privacy law, some states, such as Massachusetts, have adopted a European-type, principles-based model to enact protections for personal information transmitted electronically.

Because e-commerce knows no state boundaries, compliance with these laws becomes a nationwide issue. Relating this trend to employment, we have recently seen several states enact laws prohibiting an employer's requiring an employee or applicant to disclose their social media account passwords.

- • State laws and credit reports. Similarly, while Congress has failed to act on bills limiting the use of credit reports in hiring--as I mentioned, the EEOC may fill this gap with guidance--eight states have already enacted restrictions on employers, and eleven more are considering them.

Banks are so heavily regulated on the federal level, that we may forget this important advice: Check what your state law says.

Courting trouble: Watch litigation trends

I predict that retaliation will continue to be the top claim asserted in discrimination claims before EEOC. This trend started with the U.S. Supreme Court's decision in Burlington Northern in 2007, and has continued through the Dodd-Frank Act's beefed-up protections for financial whistleblowers who feel they have experienced retaliation for speaking up.

I also see no let-up in claims for overtime pay, with allegations that positions have been misclassified as exempt under the Fair Labor Standards Act.

The U.S. Supreme Court's only significant employment decision last year was a rare victory for employers in this area. Christopher v SmithKline Beecham Corp. held that pharmaceutical sales representatives were exempt under the outside sales overtime exemption. This decision should give some comfort to banks still reeling from the U.S. Department of Labor's 2010 Administrator's Opinion that mortgage bankers are not exempt under the administrative exemption: If mortgage bankers work primarily calling on customers at their place of business or homes, they may be exempt under the outside sales exemption.

And with that cheerful news, I wish you all a very merry Christmas and a happy New Year! See you in January.

About Marian Exall

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