EMPLOYER LIABILITY

2013 employment law trends

by Hillary J. Collyer

As a new year dawns, we'd like to take the opportunity to discuss some hot-button employment law issues that we expect to hear more about in 2013. While there is no predicting which cases the courts will decide, we thought we'd offer our insight into growing trends that could be significant to the development of employment law.

Retaliation claims continue to rise

According to the Equal Employment Opportunity Commission (EEOC), 2011 and 2012 saw an unprecedented rise in the number of retaliation claims filed. Experts generally tend to blame the weak economy for the increase in filings. During a sluggish economy, employees who have lost their jobs often are unable to find another. Individuals who have no income and no job to fill their time are more likely than a gainfully employed person to file an employment claim or lawsuit against their former employer. We'll see whether EEOC claims, particularly retaliation claims, continue to rise in 2013.

EEOC targets no-fault attendance policies

If your company is subject to the Americans with Disabilities Act (ADA), it's important that you review your attendance policies. If you have what is known as a "no-fault" attendance policy, then you could face an ADA claim for failure to accommodate. No-fault policies typically count absences (regardless of the reason) against workers. However, under the ADA, employees who need time off to deal with the effects of their disability may be entitled to leave as a reasonable accommodation. As such, you shouldn't count that time off against an employee when evaluating him for a raise.

In 2011, the EEOC filed an ADA class action lawsuit against Verizon. The agency contended that Verizon failed to consider whether absences caused by disability should be excused as an accommodation under the ADA. The case resulted in a $20 million settlement—the largest disability settlement in EEOC history—and highlighted the legal risks of no-fault attendance policies. Because the commission has been taking action on the issue and likely will continue to do so, it's important that you review and possibly revise your policies.

NLRB targets arbitration clauses, class waivers

To avoid costly litigation, employers often require employees to sign mandatory arbitration agreements, requiring workers to arbitrate, rather than litigate, their employment-related claims. Additionally, an agreement might require employees to waive their right to pursue a claim as a class with other employees. Recently, the validity of class action waivers has garnered widespread attention.

In 2012, the National Labor Relations Board (NLRB) considered whether a mandatory arbitration agreement that prevents employees from joining together to file employment-related claims violates federal labor law. The Board held that the employer in the case violated the National Labor Relations Act (NLRA) by requiring its employees to sign an agreement precluding them from filing in any forum—arbitral or judicial—joint, class, or collective claims relating to wages, hours, or other working conditions.

The NLRB found that the agreement clearly prohibited employees from exercising rights protected by Section 7 of the NLRA, which provides that employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. As a result, the Board concluded that the employer committed an unfair labor practice (ULP) by interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. *D.R. Horton, Inc. and Michael Cuda,* 357 NLRB No. 184 (Jan. 3, 2012).

While the outcome of the case certainly is unfavorable for employers, it likely isn't the final word on the issue. It remains to be seen whether the courts will follow the decision, particularly because it appears to be in conflict with the U.S. Supreme Court's 2011 opinion in *AT&T Mobility v. Concepcion,* which upheld a consumer class action waiver in a cell phone contract that required customers to individually arbitrate their claims. In the meantime, employers that have class action waiver clauses in their employment agreements might consider suspending the application of the clauses until the courts have weighed in on the issue.

Social media policies and their effect on the workplace

Increasingly, companies use social media for branding, networking, and advertising. Thus, even before an interview, job applicants can access an abundance of information about your company (including blogs and postings about the company by your employees) and what it has to offer. Likewise, employers can use social media to obtain inside information about prospective employees.

In addition to being used by job applicants to get a leg up in the hiring process, social media is used by current employees to air their complaints and get the attention of management. Under Section 7 of the NLRA, employees' posts on Facebook, Twitter, Google Plus, and other platforms may be protected. As we mentioned earlier, Section 7 protects workers (regardless of whether they are represented by a union) from adverse action

based on their concerted activities for the purpose of collective bargaining or other mutual aid or protection. The provision has been interpreted to protect employees who collectively engage in conduct intended to discuss, promote, or protect working terms or conditions.

Traditionally, Section 7 has protected workers who campaign for a union. However, it also protects workers who complain about pay, safety hazards, or even abusive supervisors. The key is that employees act collectively; a single employee acting alone does not receive the protection of the Act.

In a highly publicized case filed under the NLRA, a paramedic in Connecticut filed a ULP charge claiming that her employer violated the Act when it terminated her for critical comments she made on her Facebook page. The NLRB issued a complaint, which caught the attention of many employers that never considered the effect of Board decisions on their workplace. The Board argued that the employee's discharge was a violation of the NLRA. The case was eventually settled.

In light of the NLRB's actions and their effect on even nonunionized workplaces, you should develop and implement a social media policy that is applied consistently to all employees. Also, we advise that you consult an employment attorney before disciplining an employee for any negative comments posted on a social media website.

Bottom line

As we stated in the introduction, it's hard to know which cases the courts will decide this year. But if this year is anything like last year, you should prepare now. An ounce of prevention could save you a significant amount of time and money. ✤