

EMPLOYEES IN THE WORKPLACE

Expert Analysis

Employment and Labor Law in 2014: Has the Workplace Improved?

Have things improved or gotten worse for employees in the workplace in 2014? All told, it is not as bad as the U.S. Supreme Court would likely have us believe and of course, there are always executive orders that empower people to continue to strive for change and a better life. However, with forced arbitration still a reality and a religious exemption clause that can set in motion discrimination and bigotry in the workplace for years to come, employee advocates cannot rest on some of the positive achievements in the year we leave behind.

As 2014 comes to a close, employee rights have taken some unusual turns. Our year began in January with an increase in New York's minimum wage (currently \$8 and going to \$8.75 Dec. 31) and the Supreme Court telling employers they no longer needed to hang posters in corporate kitchens informing employees of their workplace rights. The 2013-14 Supreme Court term ended with the Supreme Court's explosive decision in *Burwell v. Hobby Lobby Stores*, where religious beliefs were introduced into the private workplace. Still, other decisions, agency proposals, statutes and President Barack Obama's most recent executive immigration action came down this year giving employees a glimmer of hope that 2015 might be

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a better year. For better or worse, here are some of the highlights.

'Religious Exemption'

The last Supreme Court decision of the 2013-14 term, *Burwell v. Hobby Lobby Stores*,¹ prompted a firestorm of controversy particularly among advocates for the rights of women and LGBTQ employees, engendering plenty of speculation over the future of the so-called religious exemption for employers. In *Hobby Lobby*, the court ruled that the employer-required coverage of birth control under the Affordable Care Act, as applied to closely held corporations, violated the Religious Freedom Restoration Act (RFRA). Under RFRA, the government must show that it has a compelling government interest when its rules burden religious exercise, and must do so by the least restrictive means. Writing for a five-person majority, Justice Samuel Alito held that closely held corporations can exercise their owners' religion; that the monetary penalties imposed upon corporations that did not provide contraceptive coverage impose a substantial burden on that exercise; and that the contraceptive mandate is not the least restrictive means available to the government.²

In the principal dissent, Justice Ruth Bader Ginsburg admonished the majority for ignoring Supreme Court precedent, cautioning that "allowing a religion-based exemption to a commercial employer would 'operat[e] to impose the employer's religious faith on the employees.'"³ Ginsburg went on to question whether, after religious opinions regarding access to birth control for women, RFRA could now be abused to permit the forms of discrimination involved in prior cases in which businesses refused to serve black patrons; refused to hire an unmarried person living with but not married to a person of the opposite sex; and refused to provide services for a lesbian couple's commitment ceremony — all based upon the religious beliefs of the company's owners.⁴

The decision had immediate ramifications extending well beyond health care. Indeed, after the Hobby Lobby ruling, major leading LGBTQ advocacy groups withdrew their support for the Employment Non-Discrimination Act, which would outlaw discrimination on the basis of sexual orientation or gender identity, because the current bill's religious exemptions clause is written so broadly that it "could provide religiously affiliated organizations—including hospitals, nursing homes and universities—a blank check to engage in workplace discrimination against LGBT people."⁵

The decision does far more than raise concerns. By carving out a religious exemption it imposes an exception to civil rights laws that could be detrimental to discriminatory protections

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in the workplace and motivate illegal behavior by employers.

Pregnancy Accommodations

For the first time in 30 years, the Equal Employment Opportunity Commission (EEOC) issued new guidelines this July clarifying which employer practices involving pregnant workers and expectant parents trigger the protections of Title VII and the amended Americans with Disabilities Act (ADA). As discussions got emotional in the Senate and in the news debating what was really being proposed, government agencies and courtrooms have also been busy addressing enforcement of existing laws addressing those concerns.

The updated guidelines detail a clearer and more robust agency stance toward what the EEOC describes as the “persistence of overt pregnancy discrimination, as well as the emergence of more subtle discriminatory practices.”⁶ The guidelines also provide specific benefits to employers seeking to implement best practices, and EEOC investigators in conducting their investigations will be able to rely upon the dozens of examples provided.

Among the most significant changes in the guidelines are: the prohibition against employers requiring pregnant workers who are able to do their jobs to take leave, under the Pregnancy Discrimination Act (PDA); requirements that parental leave be provided to similarly situated men and women on the same terms; recognition of lactation as a covered pregnancy-related medical condition; and the circumstances under which employers would provide light duty for pregnant workers.⁷ The latter accommodation is, of course, the issue on appeal in *Young v. United Parcel Service*,⁸ for which the Supreme Court was scheduled to hear argument on Dec. 3, 2014.

Also, new protections for pregnant workers went into effect in New York City this year, adding our municipality to others that have recently enacted pregnancy accommodation laws. Under the 2013 New York City Pregnant Workers Fairness Act (NYC PWFA),⁹ employers must provide accommodations to their

employees during pregnancy and post-birth. Because the accommodations requested can be pregnancy-specific, the protections are broader than the federal PDA's approach, which requires the pregnant employee to first prove how the employer treats similarly situated (but not pregnant) co-workers.

The law, which went into effect on Jan. 30, 2014, makes it unlawful for city employers to refuse to provide reasonable accommodations to pregnant workers or workers with a pregnancy-related medical condition that would enable them to perform the “essential requisites” of their jobs, unless doing so would create an undue hardship for the employer. Under this law, pregnancy-specific accommodations may include a temporary transfer to a less physically demanding position, water breaks, occasional rest breaks, time off for recovery from childbirth, changes to the work environment (including avoiding toxins), a modified work schedule, help with lifting, and schedule accommodations for lactation needs.

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New York City joined another trend this year by entitling workers who require sick time to care for themselves or their family to request such time—and be protected from retaliation for requesting it—under the New York City Earned Sick Time Act.¹⁰ In 2014, the City Council broadened the scope of the law significantly to require employers of five or more workers to guarantee up to five paid sick days, and employers of fewer than five employees to guarantee these sick days unpaid (but job-protected) to their employees.

Employers of domestic workers, on the other hand, must provide their employees with up to five days of paid sick leave. While many larger employers must comply with similar or overlapping obligations under the ADA and Family and Medical Leave Act, the Earned Sick Time

Act is a historic effort to safeguard the health and dignity of workers and caregivers employed in smaller workplaces.

NLRB and Concerted Activity

The right to concerted activity (whether by unionized workers or by employees acting in concert) is one of the core rights of the National Labor Relations Act (NLRA). This fall, the National Labor Relations Board issued a rejoinder to several circuit courts on the enforceability of class-action waivers in arbitration clauses, in *Murphy Oil USA*.¹¹ The board emphasized that it may still find employment arbitration agreements barring joint, class, or collective claims unenforceable under Section 7 of the NLRA protecting employees' rights to concerted activity for mutual benefit, including legal actions. It took direct aim at the Fifth Circuit's framework in *D.R. Horton v. NLRB*¹² as unsupported because, the board reasoned, the right to concerted activity is substantive, not procedural, and therefore enforceable by the board through its processes.

The board provided several compelling reasons why these NLRA rights survive the Federal Arbitration Act (FAA). First, the Supreme Court in *National Labor Relations Board v. International Brotherhood of Teamsters*¹³ and *J.I. Case Co. v. NLRB*¹⁴ established that “any individual employment contract that purports to extinguish rights guaranteed by Section 7... is unlawful.”¹⁵ The U.S. Court of Appeals for the Fifth Circuit, however, in *Horton*, did not attempt to reconcile these cases, but ignored them. Second, a contrary congressional command—namely, Section 10 of the NLRA—provides that the board's authority “shall not be affected by any other means of adjustment... established by agreement, law, or otherwise”—including arbitration agreements. In addition, the Norris-LaGuardia Act (which was enacted seven years after the FAA) expressly states that protected concerted activities include “aiding any person participating or interested in any labor dispute who... is prosecuting[] any action or suit,” and “any undertaking or promise... in conflict with the public policy declared [in the act] is declared to

be contrary to the public policy...[and] shall not be enforceable."¹⁶

It now remains to be seen whether any circuit courts will take the board's view. In addition to the Fifth Circuit, the Second¹⁷ and Eighth Circuit¹⁸ Courts have held that as a matter of FAA policy, arbitration agreements should be enforced by their terms. A circuit split would bring the contentious issue of arbitration clauses back before the Supreme Court. No one issue is more compelling for employee and consumer rights than the eradication of forced arbitration.

In July, the NLRB signaled that it will also take a robust view of employer responsibility, when its general counsel ruled that McDonald's could be held jointly liable for labor and wage violations by its thousands of franchisees. McDonald's has already stated that it would contest the decision, and if appealed to the board, this issue may well wind up before the Supreme Court. Labor and management attorneys should keep a close eye upon this development as companies increasingly delegate staffing and other vital functions to subcontractors and temp agencies.

Dodd-Frank and Retaliation

In June of this year, the U.S. Court of Appeals for the Second Circuit decided its first case under Section 922 of the Dodd-Frank Act—rendering a decision on its retaliation provision in favor of an employee who reported trading fraud activity against his hedge fund manager and owner. While this was a clear victory for U.S. employees and against retaliation more generally, the question of who is covered under this statute is not quite as encouraging.

Although four out of the last 14 bounty awards issued by the Securities and Exchange Commission went to non-U.S. citizens in foreign jurisdictions, including the largest bounty of \$30 to 35 million in September, the Second Circuit in *Liu Meng-Lin v. Siemens* affirmed that Section 922 of Dodd-Frank, its retaliation provision, does not apply extraterritorially to non-U.S. citizens working abroad for foreign corporations even when their affiliate German corporation is listed on

the New York Stock Exchange.¹⁹

While non-U.S. citizens are and will continue to be eligible for whistleblower bounties, the nexus for retaliation must be a U.S. employment relationship, and the panel distinguished *Liu* accordingly. Liu Meng-Lin, a Taiwanese citizen and compliance officer, had accused Siemens China Ltd. of making improper payments to Chinese and North Korean officials in violation of the Federal Corrupt Practices Act—complaints that cost Liu his job.

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Liu did not report his concerns to the SEC before his employer's alleged retaliation, and as a result, the Second Circuit did not decide whether his internal reporting of the wrongdoing sufficiently triggered Dodd-Frank's protections. Nevertheless, the panel in *Liu* "assume[d] without deciding that internal reporting is sufficient to qualify for the statute's protection."²⁰

Bold Immigration Order

After years of frustration over immigration reform or lack thereof, on Nov. 20, 2014, President Obama announced an executive action that will have widespread effects on immigrant low-wage and highly skilled workers in the United States. Most significantly, the executive action expands deportation protection for to up to five million undocumented immigrants (out of the estimated 11.2 million in the United States) to include the undocumented parents of U.S. citizens and green card holders and provide them with work authorization. Ultimately, those workers who undergo background checks and pay taxes may receive Social Security and Medicare benefits as a result of this action.

The president had previously, in the 2012 Deferred Action for Childhood Arrivals (DACA) program, suspended deportation and issued two-year renewable work permits for qualified individuals who arrived in the United States before their 16th birthdays; the new program expands upon DACA by lifting the age cap (previously you had to be under age 31) and by issuing three-year permits. The executive action is a partial yet historic step toward promoting family unity and exploitation of immigrants in the workplace.

Conclusion

This year, we have seen a flurry of employment-related activity in all political branches—administrative, (local) legislative, and judicial—and as late as year end, even President Obama got on the bandwagon to push immigration reform despite his lame-duck status. This activity will affect millions of American workers even at a time when Congress has failed to turn its attention to workplace-related legislation. The legal landscape has changed in response to impossible-to-ignore workplace trends, and likely a very different workplace for 2015 will emerge.

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1. 134 S. Ct. 2751 (2014).
2. *Id.* at 2775, 2779, 2782.
3. *Id.* at 2084 (Ginsburg, J., dissenting) (quoting *United States v. Lee*, 455 U.S. 252, 261 (1982)).
4. *Id.* at 2084–85 (Ginsburg, J., dissenting).
5. Ed O'Keefe, "Gay rights groups pull support for anti-bias bill," WASH. POST, July 8, 2014, at A3, available at <http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision/>
6. Press Release, U.S. EEOC, EEOC Issues Updated Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 14, 2014), <http://www1.eeoc.gov/eeoc/newsroom/release/7-14-14.cfm>.
7. U.S. EEOC, "EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues" (July 14, 2014), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.
8. *Young v. United Parcel Serv.*, Case No. 12-1226, cert. granted 134 S. Ct. 2898 (2014).
9. See N.Y.C. Admin. Code §8-107(22).
10. See N.Y.C. Admin. Code §20-911.
11. *Murphy Oil USA*, 361 N.L.R.B. No. 72 (N.L.R.B. Oct. 28, 2014).
12. 737 F.3d 344 (5th Cir. 2013).
13. 309 U.S. 350 (1940).
14. 321 U.S. 332 (1944).
15. *Murphy Oil USA*, 361 N.L.R.B. at *9.
16. *Id.* at *10 (citing *Norris-LaGuardia Act*, Sec. 3, 29 U.S.C. §103).
17. *Sutherland v. Ernst & Young*, 726 F.3d 290, 297–98 n. 8 (2d Cir. 2013).
18. *Owens v. Bristol Care*, 702 F.3d 1050, 1053–54 (8th Cir. 2013).
19. 763 F.3d 175, 180 (2d Cir. 2014).
20. *Id.* at 177 n.1.