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Strategy & Insights

Energy Employment Law Group

2013 L&E Retrospective For Texas Energy Employers

By now, you've probably opened up your holiday presents; and you may have already returned some of them. Here's a gift you'll want to keep from your favorite labor and employment attorneys at Seyfarth Shaw: our summary of the top L&E decisions/developments in 2013. So snuggle up to the fire with a warm glass of eggnog and reminisce with us as we review these important developments. For an in-depth perspective, make sure to browse the hyperlinks below and read our prior client alerts and blogs on these various topics. Also keep an eye out for our next L&E update -- what to watch for in 2014.

Happy holidays and best wishes for 2014, from the Energy Employment Law Group.

12. A Supervisor By Any Other Name…

Vance v. Ball State University, No. 11-556 (June 24, 2013)

The U.S. Supreme Court in *Vance v. Ball State Univ.* (see our previous client alert *here*) narrowed the scope of the term "supervisor" for purposes of Title VII to only those management-level employees who "are empowered" to take "tangible employment actions" such as hiring and firing against lower-level employees, and not managers who merely oversee or direct employees' daily activities. This decision makes it more difficult for employees to hold employers responsible (i.e., to prove vicarious liability) in the context of harassment claims. It also greatly increases an employer's ability to assert the *Faragher/Ellerth* affirmative defense against discrimination and harassment claims brought under Title VII.

11. Plaintiffs Can Sometimes Prove Retaliation, "But For" The Supreme Court

Univ. of Texas Southwestern Medical Center v. Nassar, No. 12-484 (June 24, 2013)

As we discussed previously *here* and *here*, the U.S. Supreme Court in *Nassar* clarified this year that Title VII retaliation plaintiffs must prove that their protected activity was a "but for" cause of the alleged adverse action taken by the employer. Under this standard, a plaintiff must show that he or she would not have suffered the adverse employment action if he or she had not complained. This decision resolved a split in the lower courts and rejected the less burdensome "substantial motivating factor" standard used previously by some courts.

10. The Supreme Court Raises The Bar For Class Actions

Comcast Corp. v. Behrend, No. 11-864 (March 27, 2013)

The issue in *Comcast Corp. v. Behrend* was whether the claims of 2 million cable subscribers that Comcast illegally inflated prices were appropriate to litigate together in a class action. The U.S. Supreme Court ruled that the plaintiffs' inability to

show that damages could be measured on a class-wide basis meant that the case was not a proper class action because "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." In other words, the Supreme Court clarified that to certify a Rule 23(b)(3) class, the plaintiffs will need to establish (through expert testimony or otherwise) that a classwide determination of damages is possible. *Comcast* is especially important for employers defending state wage-and-hour law class actions, since it gives employers a potent weapon for defeating class certification in Rule 23. It is also incredibly important for any class action lawsuit dependent upon expert analysis to cross the class certification threshold, such as complex discrimination cases. For additional guidance on this topic, visit our previous blogs *here* and *here*.

9. The Fifth Circuit Strikes Back … Overturns Controversial D.R. Horton Decision

D.R. Horton, Inc. v. National Labor Relations Board, No. 12-60031 (December 3, 2013)

Earlier this month, the U.S. Court of Appeals for the Fifth Circuit gave the green light to employers who want to use traditional bilateral arbitration to resolve employment disputes. In *D.R. Horton*, the Fifth Circuit overturned the NLRB's controversial decision that Section 7 of the NLRA invalidates class arbitration waivers. In overturning that decision, the Fifth circuit ruled that the NLRB's decision conflicted with the Federal Arbitration Act and that federal labor law does not forbid employers and employees from agreeing to resolve disputes through individual rather than class or collective arbitration. This ruling, along with prior pro-arbitration decisions from the Supreme Court, clears the way for employers to use individual arbitration to resolve wage and hour disputes under federal and state laws without subjecting themselves to Rule 23 class or Fair Labor Standards Act collective arbitration claims. For an in-depth discussion regarding *D.R. Horton*, see our previous blog and client alert *here* and *here*.

Employers considering mandatory arbitration agreements with class and collective action waivers should review our recent primer on this topic, which provide practical guidance for employers considering such agreements. The article was recently published by Wolters Kluwer Law & Business it in its *Employee Relations Law Journal*, Vol. 39, No. 3 Winter 2013, and can be accessed *here*.

8. Same-Sex Marriage And The End Of DOMA

United States v. Windsor, No. 12-307 (June 26, 2013)

In a 5-4 decision, the U.S. Supreme Court struck down Section 3 of the federal Defense of Marriage Act ("DOMA") -- the provision defining marriage only as a legal union between one man and one woman -- as unconstitutional, holding that it was a deprivation of the equal liberty of persons protected by the Due Process Clause of the Fifth Amendment. From an employer's perspective, the case is significant because in those states which recognize same-sex marriage, employers will no longer have to treat their married heterosexual employees differently than their married same-sex employees for purposes of providing federal rights, benefits and obligations. The decision also means that same-sex couples who choose to marry are now considered married for purposes of all federal statutes and regulations which confer rights, benefits and obligations based on marital status. For an in-depth discussion of *Windsor* and its various implications, including implications for the FMLA and immigration law, visit our prior blogs and client alerts *here*, *here*, *here*, and *here*.

7. High Costs Of Pursuing Individual Claims Does Not Diminish Enforceability Of Class Action Waivers

American Express Co. v. Italian Colors Restaurant, No. 12-133 (June 20, 2013)

In *American Express Co. v. Italian Colors Restaurant*, the U.S. Supreme Court addressed whether class action waivers are enforceable in cases where the plaintiff's cost of individually arbitrating her federal statutory claim exceeds her potential recovery and is, therefore, not economically feasible. The Court's answer was a resounding "Yes." Although this decision arose in the antitrust context, it has a direct impact on class and collective action claims in the employment context, including

wage and hour claims and complex discrimination cases. The case allows employers to compel individual arbitrations–and avoid class or collective arbitrations–where their arbitration agreements clearly prohibit class and collective arbitrations. Under *Italian Colors*, employer can compel arbitration even when the cost of individual arbitration is higher than the potential recovery. Visit our previous blogs on this topic *here* and *here*.

6. Don't Do It! Understanding The Risks Of Having An Arbitration Clause That Is Silent On The Issue Of Class Actions

Oxford Health Plans LLC v. Sutter, No. 12-135 (June 10, 2013)

The U.S. Supreme Court in *Oxford Health Plans LLC v. Sutter* upheld an arbitrator's decision to permit class arbitration even though the parties' arbitration agreement did not explicitly provide for such procedures. The Court said that the arbitrator, who read the relevant arbitration clause to permit arbitration on a classwide basis (rather than limiting it to bilateral disputes between the contracting parties before him), did not exceed his powers. The Supreme Court reasoned that once the parties submitted the question of interpreting the clause to the arbitrator, the narrow scope of judicial review under the Federal Arbitration Act limits a court to simply asking whether or not the arbitrator construed the agreement. In other words, courts may not second-guess the correctness of an arbitrator's construction of an arbitration clause. This decision contains some important lessors for companies who require employees to sign mandatory arbitration agreements, including a lesson on clear drafting: Going forward, if you like arbitration but don't want your arbitrations to proceed on a class basis, make sure the agreement states explicitly that such procedures are not permitted. That avoids the "silence" issue altogether and renders decisions like *Sutter* irrelevant. *Sutter* contains additional lessons for employers. For more information, visit our prior blogs on this topic *here* and *here*.

5. The OFCCP Issues New "Game-Changing" Regulations Governing Protected Veterans and Individuals With Disabilities -- Effective March 24, 2014

In September 2013, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued historic new regulations that update and strengthen federal contractors' affirmative action and nondiscrimination responsibilities for protected veterans and individuals with disabilities, including–for the first time–a requirement for contractors to adopt quantifiable hiring goals for those two protected groups. These changes to the Vietnam Era Veterans' Readjustment and Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act (Section 503) take effect on March 24, 2014, with phased-in compliance for some employers. Among other things, the VEVRAA now requires contractors to establish an annual hiring benchmark for employment of veterans, either 8% or based on the best available data and factors unique to the employer's establishment. Similarly, Section 503 now establishes an aspirational 7% utilization goal for the employment of individuals with disabilities. Other significant changes in the regulations relate to recordkeeping and to documentation of specific hiring/recruiting metrics, both of which are intended to measure accountability for the contractor's compliance obligations. Federal contractors must prepare to navigate and comply with these complex new regulations, including the hiring goals and other data collection requirements. For additional guidance on this topic, visit our prior blogs and client alters *here* and *here*.

4. Delayed Employer Mandate And ACA Implications For Employers

In July 2013, the Obama Administrator announced it will not be imposing penalties on employers who do not offer minimal affordable coverage in compliance with the Affordable Care Act ("ACA")–the so-called employer mandate–in 2014. The Administration also said it would delay until 2015 the employer reporting requirements that the IRS will use to facilitate the employer mandate penalty payments. In other words, it appears the earliest an employer could be penalized for failure to offer coverage would be 2015 (with payments due in 2016). However, the IRS encourages employers to voluntarily comply with the reporting requirements for 2014 (once the reporting rules are issued) in preparation for the full application of the provisions in 2015. Employers can obtain additional guidance to help them understand the ACA and comply with

its numerous multi-faceted obligations *here*. Employers should also keep in mind that the ACA implemented several amendments to the Fair Labor Standards Act, including anti-retaliation protections and a requirement for employers to provide nursing mothers with reasonable breaks and a private, non-bathroom area to express breast milk. Guidance on these and other FLSA amendments can be found *here*.

3. OSHA Changes To Hazardous Communication Standards -- Effective December 1, 2013.

As of December 1, 2013, employers must begin complying with OSHA's new Hazard Communication standard. The new standard mandates changes to Safety Data Sheet format, hazard classification, labeling requirements, and training requirements. As OSHA inspectors are going to be looking for these elements on their site visits, employers need to make sure that all of their policy manuals and training programs are compliant with these new rules. Additional guidance on these topics can be found on our prior blogs *here*, *here*, and *here*.

2. Texas Adopts A Uniform Trade Secrets Act All Its Own

On May 2, 2013, Texas Governor Rick Perry signed into law the Texas Uniform Trade Secrets Act ("TUTSA"). Texas has now joined forty-seven other states that have adopted some variation of the Uniform Trade Secrets Act ("UTSA")--a welcomed development for employers who now have additional ammunition to prevent valuable and confidential know-how from walking out the door with former employees. The new legislation (which took effect on September 1, 2013) will result in some noteworthy changes to trade secret law in Texas, including the recovery of attorneys' fees for the misappropriation of trade secrets. The new law departs from the model UTSA by specifically including customer lists in the definition of a trade secret. It also provides for a presumption in favor of granting protective orders to preserve the secrecy of trade secrets during the pending litigation. For more information on this topic, visit our prior client alerts *here* and *here*.

1. The Fifth Circuit Recognizes "Macho Man Discrimination"

EEOC v. Boh Brothers Construction Co., No. 11-30770 (5th Cir. Sept. 27, 2013)

In a case of first impression for the Fifth Circuit, an en banc majority of ten judges held in *Boh Brothers Construction Co.* that harassment based on gender-stereotypes can be actionable harassment "because of sex" under Title VII. In this case, an ironworker on a bridge-maintenance crew was subjected to "almost-daily verbal and physical harassment because [he] did not conform to [the supervisor's] view of how a man should act." As the Fifth Circuit observed, the EEOC's evidence demonstrated the supervisor thought the victim was not a "manly-enough man" and fell outside the supervisor's "manly-man stereotype." The Court held the EEOC could prove that the same-sex harassment was "because of sex" by presenting evidence that the harassment was based on a perceived lack of conformity with gender stereotypes, and ruled that the EEOC was not required to show that the victim was not, in fact, "manly." This was a significant win for the EEOC and will embolden the agency's continued focus on discrimination based on perceived failure to adhere to gender stereotypes. For additional background and analysis regarding this case, visit or prior blog on this topic *here*.

By: *Steve Shardonofsky*

Steve Shardonofsky is a labor and employment attorney in Seyfarth Shaw's Houston Office. He is Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization and may be contacted at *sshardonofsky@seyfarth.com*.