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Labor and Employment in 2013: Looking Back and Forward

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In-house attorneys had a lot to think about in 2013, from the legal pitfalls of cloud computing and the growing popularity of outsourcing legal processes to the difficulties faced by law firm partners. On the labor and employment front, there's been plenty going on as well.

Several attorneys specializing in labor and employment issues told CorpCounsel.com what they think has been important in 2013 and what they anticipate coming down the pike in the next 12 months:

WORKING SOCIAL

Elise Scheck Bonwitt of Higer Lichter & Givner points to social media as a major issue to watch in 2014. It's "evolving all the time," she noted, as legal frameworks grow up around still relatively new networking tools like Facebook or Twitter, and many cases involving social media are pending in the courts.

According to Bonwitt, employers should remember that unless they are the ones providing the social network being used or they get consent of an employee, they can't monitor the behavior of the employee on social media. There's more than one form of consent though, and "friending" an employee on Facebook could count.

"If you're Facebooking me and then I'm talking about my day at work, have I consented to you? That's an issue," Bonwitt said.

ADA/FMLA

Another important issue in Bonwitt's estimation is expanding coverage of employees under the Americans With Disabilities Act (ADA). She said that though

individual courts may differ in their interpretations, the trend towards more coverage has been ongoing and will likely continue at a steady clip.

As a result, she advises companies to use the utmost care: “I think it’s really important that an employer document every single conversation that could fall either under the ADA or FMLA, the Family and Medical Leave Act,” she said. She added that research is important for companies too, because they might not know offhand that a certain condition is covered by these laws—for example, she said she didn’t know until recently that narcoleptics are entitled to accommodation under the ADA *and* FMLA.

Amy Burton Loggins of law firm Taylor English Duma said that she’s also seen issues crop up at the intersection of the ADA and the FMLA. “Companies are really trying to grapple with, what does this accommodation thing look like now that more people are covered?” she said.

Loggins reported that she has consulted on many cases connected to the ADA and FMLA recently that involve employees with mental health or addiction issues.

“Especially with addiction, it’s hard to have those interactive process questioning conversations with them because lots of times they haven’t admitted that they have an addiction,” she said.

Most companies, she added, want to do right by their employees and strive to do so despite these obstacles.

EMPLOYEE COMPUTER ACCESS

In the corporate trade secrets space, courts in 2013 still had different interpretations of the Computer Fraud and Abuse Act, a federal law that bars employees from intentionally accessing a computer at a level beyond their authorization.

> “I think it’s going to be very important to continue to follow developments in that area of law,” said Eric Ostroff of Meland Budwick, P. A.

Ostroff explained that it will be important to watch where the courts come down on

this issue in 2014, because those decisions will influence how employers can use the law to protect their proprietary information from current or former employees. “It’s also an important statute because it gives rise to federal jurisdiction, which allows lawsuits to be brought in federal court,” he said. “As opposed to, if there’s no diversity of citizenship, a lot of these trade secret cases end up in state court.”

Currently, he noted, the statute has been interpreted both broadly—meaning that the law prevents employees from accessing proprietary information that they are not authorized to have using their own computers—and narrowly—meaning that the law only applies when the employee accesses this type of information through a computer they are not allowed to use.

“More and more of these decisions have come down on the narrower side,” Ostroff noted.

MOTOR CARRIER EXEMPTION

One of the issues that has been a source of confusion for employers in his region, according to John Mays of Atlanta firm Mays and Kerr, is the motor carrier exemption to the overtime provision of the Fair Labor Standards Act, as so many employers have fleets and drivers. This exemption applies to drivers, drivers’ helpers, loaders and mechanics.

“If someone’s in that role and is doing safety-affecting work or operations on one or of vehicles weighing in excess of 10,000 pounds, then the Department of Transportation has the authority to determine their maximum hours requirements,” Mays said. When the vehicle is smaller though, the employee will remain non-exempt.

Mays said the 10,000-pound standard feels rather arbitrary, and gets downright confusing when it comes to mixed fleets. If employees work with different-sized trucks, should the standard be measured on a week-by-week basis? How should the DOT and Department of Labor count mixed fleets?

“I can’t see any relationship between the weight of the vehicle and how the person should be paid for the hours they work,” Mays said. Regardless, he expects to see more discussion of the exemption in 2014: “This is just going to be a massive issue down here, I think.”