Daily Journal
www.dailyjournal.com
TUESDAY, JANUARY 21, 2014

PERSPECTIVE

2013 saw growing pains in employment law development

By Sharon Kirsch and Hilary Weddell

Every year there are developments in employment law that challenge accepted norms of practice and require employers and employment lawyers to find creative workable solutions. In 2013 in particular, there were several areas that caused growing pains. Employers were challenged to (1) develop social media policies that address technological advances, yet take into account practical and legal considerations when restricting employees' online activity; (2) coordinate benefits for same-sex couples given the diverse, complex, and evolving federal and state laws addressing same-sex marriages; and (3) comply with the law when enacting English-only workplace policies as a business necessity.

Social Media Policies

One area that experienced significant growing pains is social media policies. Social media websites, such as Twitter, Facebook, LinkedIn, Instagram and the like, have changed the way we communicate. Social media has become the new "corporate watercooler," as employees now turn to social media websites to share concerns and discuss work-related issues. In turn, employers — in an attempt to preserve confidentiality and discourage comments that paint them in a negative light or could be construed as discrimination or retaliation against other co-workers — have struggled to craft social media policies that define permissible online conduct, yet do not run afoul of the legal protections for employees who engage in legitimate improvement of working conditions.

Under Section 7 of the National Labor Relations Act (NLRA) employees may confer with one another about their wages and other terms of employment, and may take "concerted" action in an effort to improve their working conditions, without fear of retribution. Employees are protected by Section 7 of the NLRA even if they are not subject to a collective bargaining agreement or are members of a union. In addition, the rights afforded by Section 7 are broad; they do not only apply to conversations that take place at the office, but extend to discussions online, including social media websites. Because of the proliferation of social media in the workplace, the National Labor Relations Board (NLRB), which enforces the NLRA, has been reviewing social media polices with increasing frequency. The NLRB has deemed that many policies restricting employee behavior online are overbroad and unlawful because they interfere with employees' Section 7 rights to discuss wages and working conditions with co-workers. On the other hand, employers have a legitimate need to keep confidential information confidential and to protect their businesses from defamatory statements. Employers are also required to protect employees from discrimination and retaliation, and want to foster good employee morale and increase productivity. All of these concerns can be adversely affected by co-workers' negative behavior toward each other or the employer online. Because of the NLRB's active oversight and the rapid advancement of technology, the law surrounding social media policies constantly evolved in 2013, leaving employers vulnerable. Employers should consult with counsel to draft a social media policy that addresses legitimate business concerns, yet does not infringe on employees' rights to engage in protected conduct.

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Same-Sex Marriage Benefits

2013 also saw a number of states, governmental agencies, and local municipalities struggle to institute same-sex marriage benefits following the U.S. Supreme Court's landmark rulings on the constitutionality of same-sex marriages. In June, the Supreme Court issued opinions in *U.S. v. Windsor*, which invalidated a federal ban on same-sex marriage, and *Hollingsworth v. Perry*, which vacated a decision by the 9th U.S. Circuit Court of Appeals on the Proposition 8 ban on same-sex marriage and had the effect of reinstituting the legality of same-sex marriages in California. The *Windsor* decision gives married same-sex couples who reside in states where same-sex marriages are permitted access to the over 1,000 benefits conferred by federal law. It is still uncertain, however, whether marital benefits are available to same-sex couples who are married in a jurisdiction that recognizes same-sex marriages but live in a state that does not recognize such marriages.

Since the *Windsor* decision, federal agencies have gradually begun to update regulations and provide guidance on how they will determine eligibility for marital benefits. For example, the Social Security Administration announced that it would look to the legality of same-sex marriage in the couple's place of residence to determine eligibility for Social Security benefits. Conversely, the Internal Revenue Service and U.S. Citizenship and Immigration Services will look to the place of celebration — the place where the marriage was entered into — in determining benefit eligibility. The *Windsor* decision and corresponding agency guidelines have several implications for employers, and therefore, employers should consult with counsel and carefully review benefit plans to ensure they are in compliance.

English-Only Policies

There is little doubt that the workplace is becoming increasingly diverse. As more non-native English speakers enter the workplace, communication problems arise due to the linguistic differences among employees. In an attempt to solve the problem employers have begun instituting "English-only" policies — ones that require employees to communicate only in English — with increasing frequency. The U.S. Equal Employment Opportunity Commission (EEOC), the federal agency that enforces federal employment discrimination laws, has reported a growing number of complaints in recent years from employees regarding English-only policies. The EEOC issued guidance to employers in the form of a 2002 compliance manual, but many claim that it is outdated and are calling for the EEOC to issue a revised manual that includes the addition of best practices. In addition, because EEOC guidelines are not binding on courts, some courts have disagreed with the EEOC's stance on English-only policies and have taken a less stringent approach, creating unpredictability for employers.

Although Title VII of the Civil Rights Act of 1964 permits employers to adopt English-only rules in limited circumstances, it mandates that the policy be reasonably necessary to the operation of the business. Some states have also enacted their own laws governing when an employer may enact an English-only policy, which are more restrictive than Title VII. In light of the differences in the various laws, employers should be extremely cautious in adopting English-only policies, taking into consideration equally effective alternatives. Employers should weigh the business justifications for the imposition of the policy against any potential discriminatory effects that would result. Considerations employers should keep in mind include whether the policy is based on business necessity and solely for the purpose of facilitating communications with co-workers and customers, is restricted to only what is necessary for the employer to operate safely and efficiently, and, like other workplace policies, it should not be instituted for discriminatory reasons.

Looking Ahead

It is typical for employers to experience uncertainty when implementing polices to follow new laws or where the law is in a state of flux due to societal changes. Employers should tread carefully in these areas and should consult with counsel to ensure they are in compliance — or as much in compliance as they can be given the confusion in the laws. In 2014, employers should anticipate that the these areas will continue to develop and that there may be new laws that may cause them to suffer additional growing pains: (1) anti-bullying legislation, which would make it unlawful to subject an employee to an abusive work environment not tied to any protected class, is being considered by many states; (2) whistleblower retaliation claims after the implementation of new legislation that broadens such protections; and (3) the enforceability of arbitration agreements in class actions.

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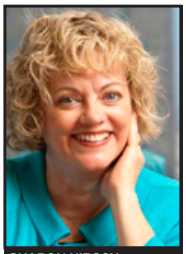

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