STRATEGIC PERSPECTIVES—2014 in review: A look back at the year’s labor and employment law highlights

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“It’s been a great year! Thanks for being a part of it.” Facebook’s buzz-worthy algorithm spits out random events from users’ posts over the past 12 months, with decidedly mixed results. Here at Employment Law Daily, we’ve endeavored to present the year’s highlights in a slightly more systematic fashion:

8th Cir remands award requiring EEOC to pay over $4M in attorneys’ fees (December 22 issue of Employment Law Daily)

In what the Eighth Circuit called a “second major litigation” over attorneys’ fees in a sexual harassment suit filed by the EEOC, originally on behalf of 270 female employees, the appeals court reversed an award requiring the agency to pay the employer $4.69 million in attorneys’ fees and costs, even though the employer had whittled the claims down to one claimant (EEOC v. CRST Van Expedited, Inc.). The agency filed its sweeping Title VII lawsuit against CRST in 2007, asserting that the company was responsible for severe or pervasive sexual harassment in its new-driver training program, claiming that CRST subjected approximately 270 similarly situated female employees to a hostile work environment.

Systematically dismantling almost every argument the EEOC advanced, the district court had rejected the EEOC’s contention that the case embodied just one primary claim and found that that the EEOC asserted multiple and distinct claims against CRST on which there was a judicial determination on the merits. CRST was the prevailing party on the EEOC’s pattern-or-practice claim and 153 of the EEOC’s individual claims; the district court concluded, awarding $4.69M in attorneys’ fees and costs, believed to be the largest award against the EEOC in its history.

However, the appeals court found the lower court erred in assuming that the EEOC asserted a pattern-or-practice claim, dismissing that claim, and finding that assumed claim as a basis for fees; and further erred in concluding that the dismissal of 67 claims, based on the EEOC’s failure to satisfy pre-suit obligations like conciliation, was a ruling on the merits. It also ruled that the lower court on remand must explain why a particular claim is frivolous, unreasonable, and groundless.

NLRB takes on McDonald’s as ‘putative joint employer’ (December 19)

In a move sparking much criticism, the NLRB General Counsel issued 13 complaints against various McDonald’s franchisees and their franchisor, McDonald’s USA, LLC, as joint employers, calling the fast-food giant a “putative joint employer.” According to the complaints, McDonald’s USA and certain franchisees violated employees’ rights by, among other things, making statements and taking actions against them for engaging in activities aimed at improving their wages and working conditions—including their participation in nationwide fast food
worker protests during the past two years. The Board posted a “McDonald’s Fact Sheet” detailing the charges, settlement efforts, and complaints that were issued.

A firestorm erupted last July when the General Counsel announced that it would name the global franchiser as a joint employer respondent with regard to any unresolved charges against its franchisees stemming from worker protests. That promise added fuel to a fire poised to ignite because only two months earlier, the Board had extended an invitation for briefs addressing its joint employer standard as raised in Browning-Ferris Industries, a move signaling the Board’s apparent readiness to modify the long-standing test. Employers anxiously await the Board’s ruling in that case, thought to be imminent. Capping off a year in which the franchise model faced threats on numerous fronts, the General Counsel’s complaints against McDonald’s were the most significant.

**Divided NLRB issues final ‘quickie election’ rule** (December 12)

The NLRB adopted a final rule amending its representation case procedures to “modernize and streamline” the process for resolving representation disputes. The final rule, published in the Federal Register on December 15, will take effect on April 14, 2015. It was approved by Board Chairman Mark Gaston Pearce and Members Kent Y. Hirozawa and Nancy Schiffer. However, Board Members Philip A. Miscimarra and Harry I. Johnson III dissented. The rule itself includes detailed explanations regarding the rule’s impact on current procedures as well as the views of the majority and dissenting members.

The proposed rule was published on February 6 and, according to the Board’s comments at the time, the proposed version was substantively identical to its prior proposal from 2011, which the Board rescinded after being forced to retreat from its appeal of a district court decision invalidating the much fought-over revisions due to a quorum issue. Much like it has said before, the Board’s official stance is that the rule will enable the agency to more effectively administer the NLRA by modernizing its rules in light of modern technology, making its procedures more transparent and uniform across regions, and eliminating unnecessary litigation and delay. The Board says it “will be better able to fulfill its duty to protect employees’ rights by fairly, efficiently, and expeditiously resolving questions of representation.”

**NLRB opens employer email systems to union organizing** (December 11)

Employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems, ruled a divided NLRB in Purple Communications, Inc., a 3-2 decision. In so ruling, the Board overruled its 2007 decision in Register Guard to the extent that it holds that employees can have no statutory right to use their employer’s email systems for Section 7 purposes. The majority found that the Register Guard analysis was clearly incorrect, focusing too much on the employers’ property rights and too little on the importance of email as a means of workplace communications. Members Miscimarra and Johnson filed separate dissenting opinions.

**No pay for time spent in security checks, Supreme Court holds** (December 9)
Amazon.com warehouse workers who must undergo antitheft security screening before leaving the warehouse each day are not entitled to pay for the time spent waiting to undergo those security checks, or actually undergoing them, a unanimous Supreme Court ruled in *Integrity Staffing Solutions, Inc v. Busk*. Reversing a Ninth Circuit decision to the contrary—which had erred by fixating on the fact that the employer had required the activity—the High Court, in an opinion authored by Justice Thomas, held the security screenings at issue here are noncompensable “postliminary” activities under the Portal-to-Portal Act and thus not compensable under the FLSA. The High Court took heed of Congress’ underlying purpose in enacting the Portal-to-Portal Act way back in 1947: stemming a tidal wave of wage-hour litigation. The Court’s holding here may well have done the same—thwarting a potential flood of class-action security screening suits that had already begun to rise.

The warehouse workers had argued that the employer could easily have reduced the time they had to spend waiting to undergo the screenings by adding more security screeners, or staggering work shifts so that they weren’t all stuck waiting to be screened at the same time. But the fact that the employer could have reduced their waiting time to a *de minimis* amount held little sway with the Court. “The fact that an employer could conceivably reduce the time spent by employees on any preliminary or postliminary activity does not change the nature of the activity or its relationship to the principal activities that an employee is employed to perform,” it wrote. That was an argument to be made to the employer at the bargaining table, it said—not to a court by way of an FLSA claim.

**Obama takes executive action on immigration** (November 21)

In a prime-time address, President Obama outlined a plan for sweeping executive action to reform the nation’s immigration system. While there has been much talk among both parties of the need to rethink our current immigration policies, progress has been stymied in Congress. That left the president to take matters into his own hands—much to the outrage of Republicans, who have vowed to stop the unilateral move from taking effect. Obama promised to issue an executive order calling for a path to legal status and, of interest to the nation’s employers and employment lawyers, work permits for 5 million currently undocumented immigrants. And, while workplace immigration enforcement had notched up during the Obama Administration, the president has signaled that the Department of Homeland Security will target its efforts on illegal immigrants with criminal backgrounds.

Also, responding to the cry to address the workforce needs of high-tech employers, the president will direct an increase in the number of high-tech visas available, and grant work permits to 1 million foreign-born students in Science, Technology, Engineering or Mathematics (STEM) fields. The plan also includes an easing of restrictions on foreign entrepreneurs travelling to the U.S. The White House issued a [fact sheet](#) touting the economic benefits of the executive action. And the DOL posted a triad of fact sheets explaining the agency’s role in the plan.

Obama’s action quickly drew fire. Even before the Republicans could file a court challenge or a legislative response, Maricopa County, Arizona, Sheriff Joe Arpaio, himself a lightning rod in the immigration debate, brought a lawsuit against the president, aided by FreedomWatch, a
conservative legal group. It quickly fizzled, with a federal judge in D.C. finding the questions raised in the suit "amount to generalized grievances which are not proper for the judiciary to address." The Republicans’ lawsuit, and an action filed by a coalition of state attorneys general, remain pending.

**Exotic dancers awarded $10.9M in independent contractor misclassification feud** (November 18)

It was a lucrative year in the courts for strippers. Granting partial summary judgment to a certified class of some 2,300 exotic dancers in an ongoing wage dispute alleging they were erroneously classified as independent contractors, a federal district court in New York awarded nearly $10.9M in damages over a seven-year period in which they were denied minimum wage under the FLSA and New York Labor Law. The ruling came over five years into the litigation, after the dancers had prevailed on class certification and on their claims that they were employees under federal and state law, not independent contractors (*Hart v. Rick’s Cabaret International, Inc.*). A month later, the court held the “performance fees” that the dancers received from customers could not be used to offset the club’s liability for improperly imposing nightly $60 “tip-out” fees on the dancers.

The case was one among a number of successful wage suits brought on behalf of dancers in recent years, and coming to fruition in 2014. In late October, for example, the Nevada Supreme Court also held exotic dancers were employees under state law, not independent contractors, and were entitled to minimum wage.

**Indiana high court upholds state right-to-work law** (November 7)

Dealing a considerable setback to organized labor in Indiana, that state’s high court in November upheld the Right to Work Act, reversing a trial court’s finding that the legislation violated the Indiana Constitution. Rejecting the notion that the statute was an impermissible “demand” by the state that unions provide free services to nonmembers (as it must, pursuant to its federal duty of fair representation), the state high court reasoned that “[a]ny compulsion to provide services does not constitute a demand made by the State of Indiana.” The International Union of Operating Engineers Local 150 had mounted a two-pronged legal challenge to the statute in federal and state court. Both efforts proved unavailing.

**Voters approve minimum wage, paid sick leave, equal rights measures** (November 5)

While Republicans took control of the U.S. Senate in the November midterm elections, ballot measures that typically garner Democratic support won the night in the states. In Alaska, Arkansas, Nebraska, and South Dakota, ballot initiatives aimed to increase state minimum wages carried the day. Indicative of the voters’ split personality, a nonbinding vote to boost the Illinois minimum wage won handily, while that state’s voters elected a Republican governor who opposed the measure (over incumbent Democrat Pat Quinn, who favored the wage hike). Other employee-friendly ballot initiatives, including a paid sick leave measure in Massachusetts and an equal rights provision in Oregon, also prevailed.
Ebola in the workplace: Fears, advice spread faster than virus (October 28)

The autumn was marked by considerable consternation over the potential spread of the Ebola virus in the United States. There was so much news, changing so rapidly, it was difficult to keep Ebola in perspective. Numerous reputable employment law firms provided excellent information about the implications of Ebola in the workplace, which Employment Law Daily distilled in short form for our readers.

With pregnancy bias case pending before SCOTUS, UPS changes light-duty policy (October 28)

In a case that will likely flesh out the extent to which employers must accommodate employees who are pregnant, the Supreme Court granted cert on July 1 in Young v UPS to consider whether UPS discriminated against a pregnant employee who was denied a light-duty assignment to accommodate her 20-pound lifting restriction. The denial was in accordance with its policy in which light-duty work was available only to employees who had on-the-job injuries, employees with disabilities accommodated under the ADA, and employees who had lost Department of Transportation certification.

Although the Fourth Circuit in 2013 held that UPS’ policy was not direct evidence of pregnancy-based sex discrimination or pregnancy discrimination (affirming the district court below), the company nonetheless revised its light-duty policy at the heart of the case in October, as the provision faced imminent High Court scrutiny. Although UPS continued to maintain that it lawfully denied the petitioner’s accommodation request at the time (and thus she could not prevail on her claim for damages), the company announced that, going forward, pregnant employees would prospectively be eligible for light-duty assignments.

The policy change appears consistent with the EEOC’s new guidance on pregnancy discrimination. In a Q&A document issued in conjunction with the new guidance, the Commission explained that an employer must provide light duty to a pregnant employee “if it provides light duty for employees who are not pregnant but who are similar in their ability or inability to work.” Whether that stance passes Supreme Court muster remains to be seen.

Interns win big in wage suits against NBC Universal, Conde Nast (October 24)

NBCUniversal Media agreed to pay $6.4 million to put an end to wage claims brought by unpaid interns—a substantial win in one of the most high-profile cases among a wave of wage-hour actions brought by interns (in the media industry in particular) in recent years. (Similar claims have been levied against Hearst Corp, Fox Searchlight, and Gawker Media, among others.) In a lawsuit filed in federal court in New York in July 2013, the plaintiffs claimed the company violated the FLSA and state wage and hour laws when it classified them and putative class members as nonemployee “interns” exempt from wage-hour laws. Given the unsettled state of the law on the question of whether interns are entitled to compensation, among other factors, plaintiffs’ counsel thought it was a pretty good deal.
In another significant victory for interns, media company Conde Nast signed off on a deal to pay up to $5.85 million to settle a class and collective action wage suit brought by former unpaid interns who contended they should have been compensated as employees for their work at the New Yorker and W magazine. “This case is about the fundamental principle that if you work, you must be paid,” said Outten & Golden’s Juno Turner, one of the attorneys representing the Conde Nast interns, earlier in the litigation. “Our clients seek to end the wage theft endemic in the media industry.” The court gave preliminary approval to the deal on December 29.

**Dollar General to pay $4 million to end FCRA class allegations** (October 20)

Dollar General agreed to pay up $4.08 million to resolve allegations that it violated the Fair Credit Reporting Act when it conducted background checks on job applicants and made adverse employment decisions without properly complying with statutory requirements. A federal court in Virginia granted preliminary approval to a deal that would end a class action suit in *Marcum v. Dolgencorp*. The plaintiffs contended they were denied employment with Dollar General because of their employment-purposed consumer report. The adverse decision, according to the plaintiffs, was either made before the plaintiffs received a copy of their consumer report and a summary of rights, or the company neglected to provide the documents at a meaningful and reasonable time prior to making the adverse decisions. Moreover, the summary of rights form eventually sent to applicants was allegedly outdated.

Dollar General was not the only large company to agree to big payouts when faced with FCRA class actions. Earlier in the year, Swift Transportation Co. agreed to pay $4.4 million to resolve a class complaint alleging that it violated the FCRA by failing to obtain the authorization of online applicants before having criminal background checks run and then relied on the results to take adverse actions without notifying the applicants of their rights. The pronounced spike in FCRA suits in 2014 prompted one commentator to note that, “when it comes to class action lawsuits in the employment-law context, the FCRA is the new FLSA!”

**EEOC files first suits alleging transgender sex bias** (September 26)

In its annual deluge of new court filings at the end of its fiscal year, the EEOC filed two lawsuits alleging sex bias based on transgender status—the first ever brought by the agency. In a complaint against Florida-based Lakeland Eye Clinic, the Commission contended the employer violated Title VII when it fired an employee because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer’s gender-based expectations, preferences, or stereotypes.

The EEOC alleged similar claims against Detroit-based R.G. & G.R. Harris Funeral Homes, Inc. In that case, the employee gave her employer a letter explaining that she was undergoing a gender transition from male to female and would soon start to present in appropriate business attire at work, consistent with her gender identity as a woman. Two weeks later, the EEOC said, the employee was fired, told by the company owner that what she was “proposing to do” was unacceptable.
According to the EEOC, the two lawsuits are part of its ongoing efforts to implement its Strategic Enforcement Plan, which includes “coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply” as a top enforcement priority.

**FedEx drivers employees, not independent contractors, say Ninth Circuit and NLRB (August 27)**

In a decision that “substantially unravels FedEx’s business model,” according to a concurring judge, the Ninth Circuit ruled in two companion decisions that FedEx delivery drivers were employees, not independent contractors, as a matter of both California and Oregon law. The appeals court thus reversed a MDL court’s holding to the contrary. Looking to the “right to control” test and, as to the Oregon drivers, the economic realities test as well, the appeals court reversed a grant of summary judgment to FedEx and a corresponding denial of summary judgment to the drivers, in several class action wage suits (among other claims) against the courier brought under state law.

“As a central part of its business,” Judge Fletcher began—signaling where the appeals court would ultimately end—FedEx contracts with drivers to deliver packages to customers. In each case, the drivers are identified as independent contractors under the company’s operating agreement, which governs the parties’ relationship. When a wave of lawsuits challenged FedEx’s independent contractor model (with cases filed in 40 states), the Judicial Panel on Multidistrict Litigation consolidated the cases for multidistrict litigation proceedings in a federal district court in Indiana.

The MDL court held that nearly all of the plaintiffs were independent contractors as a matter of law in those states where such status is guided by common law agency principles. That holding applied to the California plaintiffs (who represented some 2,300 individuals who worked as full-time delivery drivers in the state between 2000 and 2007, either for FedEx Ground or FedEx Home Delivery) and also to the Oregon plaintiffs (363 drivers, in two classes, who worked full-time for FedEx between 1999 and 2009 in one of the two operating divisions). Reversing the MDL court, the Ninth Circuit in both cases remanded to the respective district courts with instructions to enter summary judgment in the drivers’ favor on the question of their employment status.

In late September, the NLRB reached a similar holding, finding that FedEx Home Delivery drivers were employees within the NLRA rubric. While the D.C. Circuit had compelled the NLRB to reexamine its approach in independent contractor cases, a divided four-member Board panel nevertheless declined to adopt the appeals court’s interpretation of NLRA Sec. 2(3) in holding that the delivery drivers were employees. The Board majority concluded that while entrepreneurial opportunity for gain or loss was a relevant consideration, it represents one aspect of a relevant factor in its independent-contractor inquiry into whether the putative contractor is, in fact, rendering services as part of an independent business. According to the majority, the D.C. Circuit’s position would mean a broader exclusion from statutory coverage than Congress intended.
Court says EEOC can use Franks/Teamsters approach in Sec. 706 claims on behalf of as-yet unidentified bias victims (July 31)

Reversing its March ruling on the EEOC’s motion for reconsideration, a federal district court in Texas allowed the agency to proceed with its ongoing Title VII suit against Bass Pro Shops using the Franks/Teamsters approach to proving pattern or practice race discrimination under suits brought under Sec. 706. The court also held the EEOC can sue on behalf of as-yet unidentified aggrieved individuals, denying the employer’s renewed motion for summary judgment. The dispute reflected “a fundamental disagreement as to the role that the Commission is to play in the vindication of rights guaranteed by Title VII and the scope of its authority to represent those who may have been aggrieved by unlawful employment practices,” the court noted right out of the gate, and “[t]his clash appears to present itself in a great number of Title VII suits in which the EEOC is involved.” The lower courts “have been riven by disagreement—as to the ultimate answers, yes, but more vexingly, as to the proper way of thinking about the issues.”

These questions were “ripe for further illumination from the appellate courts,” the district court observed. “All of this is to say that, while the Court ultimately sides with the EEOC on both motions, it is fully sensitive to the strength of the antithesis.” Readily acknowledging that there was ample support for the contrary position espoused by Bass Pro, the court said it “would look favorably upon a motion for certification of an interlocutory appeal as to the Sec. 706 claims, both with respect to how the EEOC may attempt to prove them and as to whether the individuals on whose behalf the claims are brought must be identified (by name) during the course of the EEOC’s investigation. These are important questions that will not only shape, if not resolve, the case at hand, but also help determine the Commission’s actions in future cases.”

Supreme Court, Wisconsin high court hand harsh losses to public-sector unions (June 30)

Public employee unions were dealt several harsh blows in 2014. Chief among them: the Supreme Court’s holding in Harris v Quinn, which threw a wrench into public unions’ efforts to expand their reach. The High Court ruled that Medicaid-funded home care providers cannot be required, under the First Amendment, to pay agency fees to a union pursuant to a collective bargaining agreement negotiated with the State of Illinois. However, the decision applies only to a category of ostensibly public workers who aren’t “full-fledged” state employees and to which the High Court’s 1977 holding in Abood v. Detroit Bd. of Ed. therefore does not apply.

The “questionable foundations” of that precedent, which held that state employees may be compelled to pay agency fees to public-sector unions, were critiqued at length in a majority opinion authored by Justice Samuel Alito. Dissenting, Justice Kagan (joined by Justices Ginsburg, Breyer, and Sotomayor) countered that Abood fit quite nicely here and to apply it in this case “would fully comport with our decisions applying the First Amendment to public employment." And, while the majority “cannot resist taking potshots” at the case, the decision is “deeply entrenched,” she noted. In Kagan’s view, the decision not to overrule this precedent “is cause for satisfaction, though hardly applause.” In the end, Abood survived another day—and public-sector unions averted what could have been a knock-out punch.
A month later, a divided Wisconsin Supreme Court upheld in its entirety the constitutionality of Wisconsin’s Act 10, a controversial measure attached to Governor Scott Walker, which significantly altered the labor relations landscape for public employee unions. The state high court held the associational rights of employees were in no way implicated by Act 10’s modifications to Wisconsin’s collective bargaining framework. Moreover, the unions’ equal protection claims failed because public employees are not a protected class.

President Obama’s recess appointments to NLRB deemed unconstitutional (June 26)

President Obama’s January 2012 recess appointments to the NLRB failed to pass constitutional muster, the Supreme Court held in a highly anticipated but near-universally predicted opinion. Because the Board appointments were invalid, the Board itself lacked a quorum and so could not lawfully act. The High Court thus affirmed a decision of the D.C. Circuit invalidating the agency appointments. However, the decision was not a total defeat for the executive branch. The Court held that the Recess Appointments Clause empowers the president to fill any existing vacancy during any recess—intra-session or inter-session—of “sufficient length.” Here, it determined that a three-day period was too short a time to trigger a recess within the scope of the Clause.

In the dispute below, the NLRB had found that an employer, Noel Canning, unlawfully refused to execute a collective bargaining agreement. The Board ordered the employer to do so, and to make employees whole for any losses. Noel Canning petitioned for review, claiming that the Board lacked a quorum because three of its five members had been invalidly appointed; thus, the agency lacked authority to act. The nominations were pending before the Senate when it passed a resolution for a series of “pro forma” sessions with no business transacted. Invoking the Recess Appointments Clause, which gives the president the power “to fill up all Vacancies that may happen during the recess of the Senate,” the president appointed the three members between two pro forma sessions. Noel Canning asserted that the three-day adjournment between the two sessions was not long enough to trigger the Recess Appointments Clause. The court of appeals agreed that the appointments fell outside the scope of the Clause. The High Court affirmed.

In a March 2014 memorandum, then-NLRB GC Richard F. Griffin, Jr. indicated there were more than 142 cases that raised issues affected by the Noel Canning case. There were then about 107 pending cases in the courts of appeals in which a party or the court had raised a question regarding the validity of the recess appointments. The High Court decision invalidated a host of Board rulings, which the agency has been doggedly revisiting ever since.

Class action waivers of California PAGA representative actions violate public policy (June 23)

In one of the most significant cases out of one of the nation’s most significant jurisdictions, a divided California Supreme Court held that recent decisions of the U.S. Supreme Court abrogated its holding in Gentry v. Superior Court—meaning the state’s refusal to enforce an arbitration agreement that waived the right to class proceedings was preempted by the Federal Arbitration Act. However, the state high court concluded that an arbitration agreement requiring an employee, as a condition of employment, to give up the right to bring representative Private Attorneys General Act actions in any forum was contrary to public policy. The FAA’s goal of
promoting arbitration as a means of private dispute resolution did not preclude the California legislature from deputizing employees to prosecute Labor Code violations on the state’s behalf, the majority concluded. However, numerous federal district courts in California have since rejected the state high court’s holding in *Iskanian v CLS Transportation Los Angeles, LLC*.

**In sweeping ADA decision, Sixth Circuit holds telecommuting may be a reasonable accommodation (April 22)**

A telecommuting arrangement could be a reasonable accommodation for an employee suffering from irritable bowel syndrome, a divided Sixth Circuit panel held, reviving the EEOC’s ADA claims brought on behalf of a Ford Motor employee who was terminated shortly after asking to work from home a few days each week. Citing technological advances and cautioning against conflating telecommuting and “flextime,” the majority found genuine fact disputes as to whether the employee was qualified for her position as a resale steel buyer and whether she was fired in retaliation for filing an EEOC charge. Thus, it reversed summary judgment in Ford’s favor on the EEOC’s failure-to-accommodate and retaliation claims.

“The class of cases in which an employee can fulfill all requirements of the job while working remotely has greatly expanded,” the majority wrote, adding: “the law must respond to the advance of technology in the employment context, as it has in other areas of modern life, and recognize that the ‘workplace’ is anywhere that an employee can perform her job duties.”

“[W]e are not rejecting the long line of precedent recognizing predictable attendance as an essential function of most jobs,” the majority emphasized. “Nor are we claiming that, because technology has advanced, most modern jobs are amenable to remote work arrangements … We are merely recognizing that, given the state of modern technology, it is no longer the case that jobs suitable for telecommuting are ‘extraordinary’ or ‘unusual.’”

Judge McKeague issued a stinging dissent in the case. He will have another opportunity to sway his colleagues: The appeals court granted rehearing in September, vacating the landmark decision with a majority of circuit judges having voted to reconsider the case *en banc*.

**NLRB regional director finds Northwestern football players are employees (March 26)**

In a closely watched case that could open the door for college athletes to form unions, the NLRB regional director in Chicago ruled that scholarship football players at Northwestern University are statutory employees under the NLRA and directed a representation election to take place. The regional director concluded that scholarship players who perform football-related services for the university under a contract for hire in return for compensation are subject to the employer’s control and are therefore employees within the meaning of the Act.

The ruling immediately drew the ire of Republicans on the House Workforce Committee, who promptly launched a Congressional hearing on the matter. The NLRB granted Northwestern’s request to review the decision and subsequently invited parties and interested amici to comment—drawing an amicus brief from Republicans formally urging the Board not to treat college athletes as statutory employees.
President directs DOL to revise “outdated” FLSA white-collar regs (March 13)

President Obama directed Secretary of Labor Thomas E. Perez on March 13 to take action to strengthen federal overtime protections—presumably in a manner that will expand the population of workers entitled to overtime. The White House cited the erosion of overtime protections as an impetus for its action. Despite progress creating jobs and rebuilding the economy after the five-year economic downturn dubbed the “Great Recession,” and due “to shifts that have taken hold over more than three decades, too many Americans are working harder than ever just to get by, let alone to get ahead,” according to a White House fact sheet. As part of his “Opportunity for All” initiative, the president pledged “to make 2014 a year of action, working with Congress where they’re willing, but using his phone and his pen wherever he can to build real, lasting economic security for the middle class and those working hard to become a part of the middle class.” Thus, he directed the Secretary of Labor “to begin the process of addressing overtime pay protections to help make sure millions of workers are paid a fair wage for a hard day's work and rules are simplified for employers and workers alike.” The DOL indicates that it will release its first draft of the revised rules in February 2015.

SCOTUS says SOX whistleblower provision extends to public company’s private contractors (March 4)

The Supreme Court ruled that Sarbanes-Oxley Act Sec. 806 extends whistleblower protection to employees of privately held contractors and subcontractors who perform work for public companies. Writing for the Court in Lawson v FMR LLC, Justice Ginsburg said that nothing in the statutory language confines the class of employees protected to those of a designated employer. “Absent any textual qualification, we presume the operative language means what it appears to mean: A contractor may not retaliate against its own employee for engaging in protected whistleblowing activity.”

The Supreme Court viewed the application of the whistleblower provision to contractor employees as confirmed when the view is enlarged from the term “an employee” to the provision as a whole. The prohibited retaliatory measures enumerated in Sec. 806—discharge, demotion, suspension, threats, harassment, or discrimination in the terms and conditions of employment—are commonly actions an employer takes against its own employees. Contractors are not ordinarily positioned to take adverse actions against employees of the public company with whom they contract. A narrow interpretation of Sec. 806 would, therefore, shrink to insignificance the provision’s ban on retaliation by contractors.

The majority found scant evidence that its decision would open any floodgates for whistleblowing suits outside Sec. 806’s purposes. “The Department of Labor has been applying SOX responsibly for years now,” R. Scott Oswald, managing principal at The Employment Law Group, PC, told Employment Law Daily in the aftermath of the ruling. “Today the Court gave it permission to continue.”

Stymied by Congress, Obama takes executive action on behalf of government contract workers (February 12)
As promised in his State of the Union address, President Obama on February 12 signed Executive Order 13658, raising the minimum wage to $10.10 an hour for federal contract workers. It would be the first of several EOs issued by the president in 2014 in a bid to assert his employee-friendly labor and employment agenda in the only place he could—the government contracting arena—in the face of staunch opposition in Congress. The DOL said the wage hike stood to benefit nearly 200,000 American workers. The agency published a final rule implementing the president’s directive on October 7.

To mark “Equal Pay Day” on April 8, Obama signed EO 13665, entitled “Non-Retaliation for Disclosure of Compensation Information,” which prohibits federal contractors and subcontractors from discharging or otherwise discriminating against employees and applicants for talking about pay. On September 17, the OFCCP published proposed regulations to implement the measure, which would apply to all federal contractors with contracts entered into or modified on or after the effective date of the rules that exceed $10,000 in value.

On July 21, the president issued an executive order banning discrimination against LGBT employees by federal contractors. The EO adds sexual orientation and gender identity to the list of categories of federal contractor employees protected from discrimination; it also adds to the list of categories of employees in regard to which covered federal contractors must take affirmative action to ensure equal employment opportunity. (It ensures that federal employees, who are already protected on the basis of sexual orientation, are now formally protected from discrimination based on gender identity as well.) The OFCCP announced its final rule implementing the EO on December 3. The final rule does not require contractors to conduct any data analysis with respect to the sexual orientation or gender identity of their applicants or employees, and it does not require contractors to collect any information about applicants’ or employees’ sexual orientation or gender identity. However, it does not prohibit contractors from asking applicants and employees to voluntarily provide this information, although doing so may be prohibited by state or local law.

Finally, on July 31, the president signed an EO on Fair Pay and Safe Workplaces, another executive mandate he said he felt compelled to issue given a Congress that is “doing so little or nothing at all to help working families.” The EO requires prospective federal contractors to disclose labor law violations and will give agencies more guidance on how to consider labor violations when awarding federal contracts. It will also place restrictions on certain arbitration agreements. Aimed at ensuring government contracts don’t go to companies that violate federal labor laws, the measure was signed on the heels of an investigation by the Senate HELP Committee which found widespread labor violations by government contractors that went unnoticed in the contracting process.

**EEOC takes on CVS over severance agreements** (February 10)

The EEOC on February 7 filed a pattern-or-practice action against prescription giant CVS over certain provisions in a severance agreement that the agency claims run afoul of Title VII. CVS purportedly conditioned receipt of severance benefits for certain employees on an overly broad agreement described in five pages of small print. According to the EEOC’s complaint, the
agreement violates employees’ rights to communicate and cooperate with the agency and to file discrimination charges. The EEOC pointed to Section 707 of Title VII, which prohibits employer conduct amounting to a pattern or practice of resistance to rights protected by Title VII, which the agency said permits it to seek immediate relief without the same pre-suit administrative process required under Sec. 706 and does not require its lawsuit to be rooted in a discrimination charge.

Employers understandably were sweating the use of Sec. 707 by the EEOC to launch a Title VII suit in this context. It no doubt was welcome news when, in October, a federal court in Illinois dismissed the suit, rejecting the agency’s attempt to distinguish procedural requirements for Sec. 707(a) pattern-or-practice claims from those applicable to Sec. 707(e) claims, and ruling that because the agency did not attempt to conciliate before filing suit, as required by Sec. 706, CVS was entitled to judgment as a matter of law.

**Volkswagen, UAW float first-ever “works council” model** (February 4)

Some 3,200 workers at Volkswagen’s Chattanooga, Tennessee, plant were slated to vote in an NLRB-conducted election to decide whether to be represented by the UAW. The organizing drive at Volkswagen attracted considerable attention because the auto workers would decide whether to move ahead with a European-style “works council” representational model—the first of its kind in the United States. But the union’s collaboration with the German automaker, in the form of a stipulated election agreement, was not without controversy. The state of Tennessee put up almost $600 million in incentives for the VW assembly plant to be located in the state, and lawmakers signaled that, should the union win, those incentives could dry up. In a February vote, the workers rejected the union by a vote of 712 to 626, following what some characterized as unprecedented and inappropriate threats by the legislators. The UAW filed election objections but subsequently withdrew them in a surprising move, putting an end to the NLRB review process.

Then in July, the UAW announced the formation of Local 42, which the union says was organized by VW workers. The entity would give employees a voice in the workplace through a works council. Local 42 would represent any interested employees who joined as members, but no employee would be required to join. On December 9, Volkswagen verified that employee UAW membership at the Chattanooga plant had exceeded the threshold majority of workers—meaning the UAW now expects Volkswagen to recognize the union as the representative of its members.

Also worth noting: An undeniably similar UAW Local 112 has sprung up at a Mercedes-Benz assembly plant in Vance, Alabama. The formation of the new local was announced at a press conference in October.

**Supreme Court rejects de minimis standard, holds time spent donning/doffing protective clothes not compensable** (January 27)

The time spent by production workers donning and doffing protective gear was not compensable under the FLSA, a unanimous Supreme Court ruled in *Sandifer v U.S. Steel Corp*, affirming the
Seventh Circuit. The High Court clarified the scope and definition of “clothes” and “changing” within the “changing clothes” exception found in Section 203(o) of the Act, which provides that donning and doffing activities may be exempt from compensable time under the express terms of, or custom or practice under, a bona fide collective bargaining agreement. The Court also set forth what it deemed a more workable approach to resolving whether time spent donning and doffing protective gear was compensable, eschewing the *de minimis* doctrine used by some circuits as ill-suited to a statutory provision that is itself “all about trifles.”

“[I]t is most unlikely Congress meant Sec. 203(o) to convert federal judges into time-study professionals,” the Court reasoned. “That is especially so since the consequence of dispensing with the intricate exercise of separating the minutes spent clothes-changing and washing from the minutes devoted to other activities is not to prevent compensation for the uncovered segments, but merely to leave the issue of compensation to the process of collective bargaining.” Thus, starting 2014 much like they ended the year, the Justices proved unsympathetic to wage-hour claimants, leaving them to seek recourse not in the courts, but with a union.

It's been a great year! Thanks, dear reader, for being a part of it. And do let us know if our “algorithm” has missed a big story. Meanwhile, we’re gearing up for what promises to be a big 2015…

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