ASPATORE THOUGHT LEADERSHIP

Employment Law 2013

Top Lawyers on Trends and Key Strategies for the Upcoming Year

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What the Significant Developments of 2012 Will Mean for Employment Lawyers in 2013

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Introduction

Several legal developments occurred in 2012 that suggest relationships among employers and employees will continue to become more complicated as employment laws evolve and additional regulations are enacted. As the nation's economy grudgingly improves, more employers appear to be hiring, rather than firing, employees, although it is too soon to tell if this is a trend that will continue through 2013 and beyond. Overall, this bodes well for the country, but it does not drastically affect the issues legal practitioners face each day while assisting their clients to navigate the myriad laws, rules, and regulations that dictate employers' actions and protect employees from wrongful conduct. Attorneys who practice employment law will need to be aware of the most recent case decisions, administrative rulings, and employer practices to effectively represent their clients. This chapter seeks to address the most significant developments in those areas.

The Latest Trends in Employment Law

Despite the recent gains in hiring, there is no doubt that years of downward trajectory have had an impact on relations between employers and employees. In 2012,[1] for the second year in a row, for example, the US Equal Employment Opportunity Commission (EEOC) reported a record-high number of charges asserted by employees alleging employment discrimination: 100,259. Of these, retaliation claims were the most common, with harassment and age and disability claims also constituting large percentages. Employers would be well served to continue to educate their workforce about the laws prohibiting retaliation, discrimination, and harassment, investigate claims promptly and thoroughly, and discipline employees determined to have acted outside of the law. Failure to appropriately address legitimate claims remains a significant factor in finding liability against employers. Corporate reluctance to appropriately respond to employee claims will ultimately harm the employer. Both in-house and outside counsel should guard against the temptation to avoid investigating claims and implementing suggested corrective action, and

[1] The EEOC generally releases data regarding charges in August of the next calendar year.

should be especially vigilant in prohibiting retaliatory measures against employee claimants.

In my executive pay practice, I have noticed a clear trend toward employers using contractual provisions that offer greater protections against unlawful or unethical actions by senior and even mid-level employees, to enable the employer to claw back compensation. Employers also are increasingly avoiding guaranteed payments that are not contingent upon the company's and individual employee's overall performance. Investment bankers, analysts, and traders routinely are required to accept non-guaranteed compensation arrangements that would allow their employers to retain significant portions of their pay for multiple years and to recoup such pay in the event of wrongful conduct. This is a useful mechanism to ensure that employers are not left holding the bag when a rogue employee commits malfeasance. It also attempts to align employee performance with corporate performance, a goal that is quite elusive despite best efforts. Interestingly, however, an unintended consequence of longer-term compensation schemes is the prevalence of signing bonuses and "make-whole awards" for senior executives to make up for the monies they "left on the table" at their previous employer. This has served to increase the initial cost to secure the most talented employees, which, when combined with fees often paid to professional recruiters, can result in formidable hurdles for smaller businesses with limited resources.

Finally, employers are more frequently requiring financial industry executives to pay for travel and entertainment expenses out of their compensation, sometimes even from dollar one. Although not yet commonplace, this arrangement is being used for salespersons in the media and online industries. When representing employers, it is a good practice to include such provisions to discourage lavish spending, but I question whether hyper-vigilant expense accounting will stifle business. As always, it is important to take the time to learn and understand your client's business before making suggestions that, while perhaps appropriate for a client in a different industry, could dampen the business opportunity you have been retained to secure.

Recent and Pending Cases and Their Implications

There were relatively few cases decided by the US Supreme Court in 2012 that will have a direct impact on employment law. One such case, however, was *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*.[2] In this action, the Supreme Court unanimously held that the federal discrimination laws do not apply to religious organizations' selection of religious leaders. The court held that the Establishment and Free Exercise Clauses of the First Amendment prohibit lawsuits brought on behalf of ministers against their churches, alleging termination in violation of employment discrimination laws, even where the minister is referred to as a "teacher" and not a "minister," requiring dismissal of the minister's employment discrimination suit against her religious employer. The creation of a "minister's exception" is widely viewed as a victory for religious freedom, in that churches and other religious groups are free to choose their leaders without governmental interference. Thus, those practitioners who represent religious schools should audit any claims against teachers and, if applicable, rely upon this ruling to the benefit of their clients.

Notwithstanding the relative dearth of employment law cases at the highest level, there were several rulings at the Circuit Court level of note. For example, in *Richter v. Advance Auto Parts*,[3] the Eighth Circuit ruled that Title VII claims of retaliation following the filing of an EEOC charge requires the filing of a fresh or amended charge with the EEOC for the claimant to exhaust his or her administrative remedies prior to filing a lawsuit. The *Richter* decision amplifies the split within the circuits concerning this issue following *Nat'l R.R. Passenger Corp. v. Morgan*.[4] Before *Morgan*, the prevailing view was that retaliation suffered because of filing an EEOC charge under Title VII is deemed "like or reasonably related to" the original claim, eliminating the need to file a subsequent charge. The Supreme Court in *Morgan* departed from that view when it held that the term "practice" does not convert "related discrete acts into a single unlawful practice for the purposes of timely filing."[5] Instead, "each incident of discrimination and

[2] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n,* 132 S.Ct. 694 (2012).
[3] *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847 (8th Cir. 2012).
[4] *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).
[5] *Id.* at 111.

each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'"[6]

In *Richter*, the Eighth Circuit followed the reasoning applied by the Tenth Circuit in *Martinez v. Potter*,[7] and ruled that "each discrete incident of such treatment constitutes its own 'unlawful employment practice' for which administrative remedies must be exhausted."[8] There is now a split among the circuits in that the Eighth and Tenth Circuits require a new filing for each retaliatory act following the initial charge, but the First, Fourth, Fifth, and Sixth Circuits do not specifically require such a filing.[9] Until the Supreme Court clarifies the law on this issue, practitioners should check the most recent pronouncements of the law in the circuit in which their lawsuit will be filed. Careful attorneys may decide to file amended claims for each post-filing retaliatory act to be certain to exhaust all administrative remedies.

Conversely, the Eleventh Circuit issued an opinion in 2012 that brought unanimity within all the circuits in recognizing retaliatory hostile work environment as a valid cause of action. In *Gowski v. Peake*,[10] the Eleventh Circuit addressed claims of discrimination, retaliation, and hostile work environment against the secretary of the Department of Veterans Affairs following their filing EEOC claims (i.e., another retaliation case). After acknowledging the prevailing view in favor of recognition of a cause of action for retaliatory hostile work environment, the Eleventh Circuit upheld the claim, joining the other circuits. Counsel for employees and employers nationwide should be aware of this valid cause of action in all circuits.

Finally, there is pending as of the date of this writing a case before the Supreme Court that will determine the scope of the definition of a

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[6] *Id.* at 114.
[7] *Martinez v. Potter*, 347 F.3d 1208, 1210 (10th Cir. 2003).
[8] *Richter*, 686 F.3d at 851 (quoting *Martinez*, 347 F.3d at 1210).
[9] *See Clockedile v. N.H. Dep't of Corr.*, 245 F.3d 1, 4, n. 3 (1st Cir. 2001); *Jones v. Calvert Group, Ltd.*, 551 F.3d 297 (4th Cir. 2009); *Eberle v. Gonzales*, 240 Fed.Appx. 622, 628 (5th Cir. 2007) (unpublished); *Delisle v. Brimfield Twp. Police Dep't*, 94 Fed.Appx. 247, 253-54 (6th Cir. 2004) (unpublished) (divided panel holding that a plaintiff could proceed with three retaliation claims, although only two were presented to the EEOC).
[10] *Gowski v. Peake,* 682 F.3d 1299 (11th Cir. 2012).

"supervisor" as it applies to harassment claims. In *Vance v. Ball State University*,[11] the Seventh Circuit affirmed the trial court's summary judgment dismissal of claims for hostile work environment and harassment under Title VII. The trial court held, and the Seventh Circuit affirmed, that the employer was not liable for the acts committed by the plaintiff employee's co-workers. The Seventh Circuit ruled: "We have not joined other circuits in holding that the authority to direct an employee's daily activities establishes supervisory status under Title VII."[12] The Supreme Court accepted the case for review and held oral argument in November 2012. The court will likely issue a decision that decides whether the term "supervisor" applies to harassment by those whom the employer vests with authority to direct and oversee the plaintiff employee's daily work, or is limited to those harassers who are authorized to "hire, fire, demote, promote, transfer, or discipline" the plaintiff employee. Lawyers who practice in this area are eagerly awaiting this decision, as it has the potential to significantly limit or expand the scope of permissible claims against employers for the actions of their employees. Litigators will naturally need to address the outcome of this case in the assertion of claims and defenses. In-house and business attorneys should also heed the court's decision when training employees with regard to proper supervision and anti-retaliation measures.

Predictive Coding in Electronic Discovery

In 2013, I expect to see a continued increase in the use of electronic discovery in employment litigation. While e-discovery was once limited to "big firm" litigation, it is now commonplace in almost all lawsuits. E-discovery includes the identification, management, preservation, collection, review, and production of electronically stored information (ESI). E-discovery itself can easily be the subject of its own chapter. For brevity's sake, I focus on the anticipated use of predictive coding following the 2012 decision in *Moore v. Publicis Groupe*.[13]

[11] *Vance v. Ball State Univ.,* 646 F.3d 461 (7th Cir. 2011).
[12] *Id.* at 470.
[13] *Moore v. Publicis Groupe,* No. 11 civ 1279, 2012 WL 607412 (S.D.N.Y. February 24, 2012).

In most lawsuits, counsel is required to meet with opposing counsel at the outset of the dispute to identify what information is likely to be relevant to the claims and defenses at issue and attempt to agree upon a framework to guide the search, collection, and production of ESI. Negotiations over the search terms are often critical because of the staggering costs attendant to e-discovery. To assist with this process, and hopefully eliminate some of those costs, attorneys and litigation support vendors have begun to use predictive coding, which is a computer-assisted document search tool that uses small sets of documents that have been reviewed and coded responsive or non-responsive by senior legal counsel to "train" computers to identify or predict the responsiveness of a larger set of documents.

Predictive coding procedures will differ for each category of case, and different predictive coding products follow different search protocols. Generally, predictive coding requires a senior attorney with knowledge of the facts and players to review and code one or more "seed sets" from among the client's potentially responsive documents. The predictive coding software then will review the properties associated with the coded documents in the seed set and create a search algorithm based on those properties to predict the responsiveness of, and assign a responsiveness ranking to, the remaining documents. The attorney then continues to review seed sets, providing the software program with additional information to use to refine the code for other documents and increase the reliability of the screening. Lastly, the attorney reviews a statistically valid random sample of the documents that have not been reviewed. If the results of this sample fall within an acceptable range, the review can be considered accurate and reliable. If not, additional seed sets are reviewed until the testing results fall within acceptable ranges. "Typically, the senior lawyer (or team) needs to review only a few thousand documents to train the computer."[14]

In *Moore*, the plaintiffs assert claims under the Equal Pay Act and Fair Labor Standards Act as a collective action and claims for gender discrimination under Title VII and the similar New York State and New York City laws, pregnancy discrimination under Title VII, and violations of

[14] *Moore*, 2012 WL 607412 * 2 (quoting Hon. Andrew Peck, *Search, Forward*, L. TECH. NEWS, at 25, 29, Oct. 2011.

the Family and Medical Leave Act as class action. There, the district court sitting in the Southern District of New York recognized "that computer-assisted review is an acceptable way to search for relevant ESI in appropriate cases,"[15] but the process was put on hold until other issues are resolved. Predictive coding has not been approved by all courts and is reviewed on a case-by-case basis. What is clear, however, is that managing e-discovery, whether through predictive coding or key term searches, is a developing area of the law that is expected to significantly affect the prosecution and defense of employment disputes. Certain law firms are dedicating attorneys and even groups of attorneys to specialize in e-discovery to assist other attorneys in the litigation, employment, and corporate practice groups. It is a burgeoning field to which all practitioners should pay close attention.

The NLRB Weighs in on Employment At-Will Policies

The National Labor Relations Board (NLRB) has, from time to time, taken stances that could be viewed as hostile to the employment at-will doctrine. Briefly stated, employment at-will means an employer may terminate an employee at any time for any reason, except an unlawful reason, or for no reason, without incurring legal liability. Similarly, an employee may terminate his or her employment at any time for any or no reason with no adverse legal consequences. It also allows an employer to modify the terms of employment, including wages, duties, reporting requirements, benefits, and paid time off.

Many employers employ an at-will relationship and include employment at-will policies in employee handbooks and employment agreements. These policies generally state that the employment relationship shall be "at-will" and often state that no one other than a senior officer is authorized to enter into any agreement contrary to the at-will relationship. The NLRB has expressed concern that at-will policies unlawfully restrict employee rights guaranteed by the National Labor Relations Act; specifically, the right of non-union employees to select union representation and engage in collective bargaining pursuant to Section 7 of the act.

[15] *Moore*, 2012 WL 607412 * 1 (S.D.N.Y. 2012).

In October 2012, the NLRB's General Counsel's Office Division of Advice issued two memoranda opinions addressing this issue.[16] In reviewing the contested at-will policies, the NLRB acknowledged that it has developed a two-step inquiry in reviewing employment policies that might be construed to "reasonably tend to chill employees in the exercise of their Section 7 rights." First, the policy will be deemed unlawful if it expressly restricts Section 7 activities. Second, if not expressly restrictive, the policy will be deemed unlawful upon a showing that: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."[17]

In each of the two memoranda opinions, the NLRB found that the challenged policies did not violate the National Labor Relations Act because the employees would not reasonably conclude that the provisions restricted their right to select a collective bargaining representative and bargain collectively for a contract since a senior company representative could negotiate a modification from the at-will relationship.[18] The NLRB, however, recognized that an administrative law judge previously found that the employer had violated the act by including slightly different language in an employment at-will policy that was construed as a waiver of the employee's right to attempt to modify the nature of the at-will relationship.[19] That dispute was settled before the NLRB reviewed the administrative law judge's decision. The NLRB, therefore, issued the following caution: "Because the law in this area remains unsettled, the Regions should submit to the Division of Advice all cases involving employer handbook provisions that restrict the future modification of an employee's at-will status."[20]

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[16] *See SWH Corp. (Mimi's Café),* No. 28-CA-084365, 2012 WL 5866214 (Oct. 31, 2012); *Rocha Transp.*, No. 32-CA-086799, 2012 WL 5866215 (Oct. 31, 2012).
[17] *SWH Corp. (Mimi's Café),* No. 28-CA-084365, 2012 WL 5866214 (Oct. 31, 2012) (citing *Martin Luther Mem'l Home, Inc.*, 343 N.L.R.B. 646, 646-47 (2004)).
[18] *SWH Corp. (Mimi's Café),* No. 28-CA-084365, 2012 WL 5866214 (Oct. 31, 2012); *Rocha Transp.*, No. 32-CA-086799, 2012 WL 5866215 (Oct. 31, 2012).
[19] *See Am. Red Cross Arizona Blood Services Region*, Case 28-CA-23443, JD(SF)-04-12, 2012 WL 311334 (N.L.R.B. Feb. 1, 2012).
[20] *SWH Corp. (Mimi's Café),* No. 28-CA-084365, 2012 WL 5866214 (Oct. 31, 2012); *Rocha Transp.*, No. 32-CA-086799, 2012 WL 5866215 (Oct. 31, 2012).

Thus, employment lawyers should pay special heed to the NLRB decisions and memoranda opinions when drafting employment agreements, employee handbooks, and at-will policies. Careful drafting should be employed to avoid a waiver of the employee's right to advocate for a change to the at-will status. These key documents could subject corporate employers to significant exposure if deemed overreaching.

The Patient Protection and Affordable Care Act 2013 Requirements

Most employment attorneys are being asked to assist clients with compliance with the Patient Protection and Affordable Care Act, colloquially referred to as "Obamacare," in some way or another. The act is famous for its density and breadth, and it imposes numerous requirements upon employers. The issues to be addressed in 2013 are as follows:

1. Employers must provide employees with certain disclosures concerning the federal health insurance exchange by March 1. Employers must provide written notice to all current employees and new hires of their coverage options through the exchange. The notice must include the following information: a description of the services offered by the exchange, the contact information for the exchange, that the employees may be eligible for a premium tax credit through the exchange, and that employees may be eligible for a premium subsidy or a cost-sharing reduction by purchasing coverage on the exchange.
2. Employers must limit employee contributions to a health flex spending allowance to $2,500 per year. This amount will be adjusted each year to account for changes in cost of living.
3. The Medicare Part D subsidy to employers becomes taxable income in 2013.
4. The Patient Protection and Affordable Care Act now includes a durable medical expense tax of 2.3 percent of the costs of some durable medical devices, which manufacturers can pass on to consumers. This will increase claim expenses, although durable medical devices typically represent a relatively modest cost for employers.

There are numerous other provisions of the act with which employers must comply, and attorneys should be certain to review the act to be prepared to address these issues with their clients.

Congress Considers Enacting a Pregnant Workers Fairness Act

This newly proposed legislation would provide for greater protections for pregnant women in the workplace. Committees in the House of Representatives and Senate are considering "the Pregnant Workers Fairness Act," a law that, if passed, would require covered employers to provide pregnant employees and applicants with "reasonable accommodations," provided the accommodations do not interfere with the employee's position or the applicant's proposed job.[21]

If passed in its current form, it shall be an unlawful employment practice for certain public and private employers to:

1. not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;
2. deny employment opportunities to a job applicant or employee, if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee or applicant;
3. require a job applicant or employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that such applicant or employee chooses not to accept; or
4. require an employee to take leave under any leave law or policy of the covered entity if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee.

[21] Pregnant Workers Fairness Act, S. 3565, 112th Cong. (2012).

This act would significantly enhance the protections afforded to pregnant workers under the 1978 Pregnancy Discrimination Act, which makes it unlawful to terminate an employee's employment because she is pregnant. Pregnancy, however, is not considered a disability and, thus, the existing law does not require that employers provide a reasonable accommodation to pregnant employees.

If the Pregnant Workers Fairness Act becomes law, this is expected to have a significant impact upon relations with pregnant employees and job applicants. Attorneys who advise both employers and employees should follow these bills to be prepared to advise clients in the event that the law is passed.

The Evolving Nature of Negotiations and Settlement Strategies

Many employers include restrictive covenants in their employment agreements, especially with respect to salespersons, computer software programmers, engineers, on-air talent, and senior executives. These non-compete, non-solicit, and non-hire provisions generally prohibit competition with the employee's now former employer, soliciting company clients and vendors made known to the former employee through his or her services to the employer, and hiring other company employees to either start a competing venture or join the former employee at an existing company. Companies invest significant resources to attract and develop employees, obtain and maintain client relationships, and select and collaborate with trusted vendors, such that these provisions are necessary to protect trade secrets and favored relationships.

Attendant to the use of such restrictive covenants is the ability to sue competitors who hire former employees who have agreed to such restrictions before expiration of the restricted period. Also included in most employment agreements is a provision authorizing the employer (or prevailing party in some instances) to an award of reimbursement of its legal fees and expenses in the event of litigation to enforce a restrictive covenant. Significantly, in certain jurisdictions, an employer may be entitled to seek payment of its legal fees and expenses by the new employer as part of a claim for tortious interference with contract.

I recently represented a New York-based employer that hired an individual who was formerly employed by a company located in Minnesota. The individual was a party to an employment agreement that included restrictions against competition with his former employer and solicitation of his former employer's customers for the period of employment and six months thereafter. The Minnesota employer terminated its employee's employment and, when it learned that the former employee had been hired by a competitor, filed suit against the former employee and new employer in Minnesota to enforce its agreement and assert a claim for tortious interference with contract.

In part because of the existence of the provision authorizing recovery of the former employer's legal fees, my clients were desirous of securing a negotiated resolution of the lawsuit. Before addressing a potential settlement, and to equalize the playing field, my clients filed a motion to dismiss the complaint for lack of personal jurisdiction over the former employee and new employer, notwithstanding the former employee's prior consent to jurisdiction in the employment agreement. (Additional facts not relevant here allowed for such a motion to be filed.) Shortly thereafter, but before the motion was decided, we successfully resolved the dispute by agreement to various non-monetary terms concerning the former employer's customers. No payment was made to the former employer and, in fact, the former employer paid the former employee an amount in respect of his participation in the company's 2011 profit-sharing plan. Thus, although the threat of payment of the former employer's legal fees motivated the settlement discussions, a positive settlement was achieved.

Concern for high legal fees has always been a factor that leads parties to settle cases and negotiate claims. Cases concerning the alleged violation of restrictive covenants, as well as those concerning the alleged disclosure of confidential information, can be particularly costly. When combined with the increased use of cost-shifting provisions in employment agreements that can sometimes be levied against a new employer, the concern multiplies. To address this concern, clients are becoming more receptive to earlier settlements, even when the dispute involves post-employment competition.

Employers Are Using Arbitration Agreements More Frequently

Employers in all industries increasingly include arbitration provisions to promote private resolution of employee disputes and thereby avoid much of the publicity associated with jury trials and potentially excessive jury verdicts that are seen in certain jurisdictions. Arbitration can significantly reduce the actual out-of-pocket costs associated with defending employee claims, keep sensitive internal information private, eliminate the possibility for punitive damages, spare years of appellate litigation, and, because of a Supreme Court case decided in 2011, avoid class action litigation altogether.

The Supreme Court ruled in *AT&T v. Concepcion* that the Federal Arbitration Act pre-empts California's judicial rule stating that a class arbitration waiver is unenforceable as unconscionable under California law if it is contained in a consumer contract of adhesion.[22] The action did not arise out of an employment context, but the Supreme Court's analysis has given employers grounds to enforce agreements that include waivers of employee class actions and require individual arbitration of employment-related claims.[23] Congress attempted to reject the Supreme Court's ruling in *AT&T v. Concepcion* with the Arbitration Fairness Act of 2011. The act would have, among other things, declared unenforceable pre-dispute agreements to arbitrate employment, consumer, or civil rights disputes. The act has yet to be voted on and, therefore, *AT&T v. Concepcion* remains good law.

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[22] *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

[23] *See, e.g., Steele v. Am. Mortg. Mgmt. Servs.*, No. 2:12-cv-00085, 2012 WL 5349511 (dismissing employee class action and granting motion to compel arbitration); *Porter v. MC Equities, LLC*, No. 1:12 cv 1186, 2012 WL 3778973 (N.D.Ohio 2012) (dismissing employee class action asserting claims for failure to pay proper overtime compensation as required by the Fair Labor Standards Act and granting motion to compel arbitration); *Quevedo v. Macy's, Inc.*, 798 F.Supp.2d 1122 (C.D.Cal. 2011) (granting employer's motion to compel arbitration of former employee's putative class action claim alleging failure timely to pay wages owed upon termination under California law); *Dauod v. Ameriprise Fin. Servs.*, No. 8:10-cv-00302, 2011 WL 6961586 (C.D.Cal. 2011) (dismissing employees putative class action as barred by agreement to arbitrate class action claims); *D'Antuono v. Service Road Corp.*, 789 F.Supp.2d 308, 331 (D.Conn. 2011) (arbitration clause in exotic dancers' employment agreement not unconscionable in part because the Supreme Court's decision in *AT&T v. Concepcion* casts "significant doubt on virtually *any* 'device [or] formula' which might be a vehicle for 'judicial hostility toward arbitration'") (emphasis in original).

When representing employers seeking to resolve employee claims via arbitration, attorneys must be sure to draft arbitration provisions that are enforceable. Such agreements should:

1. broadly define the types of claims that will be subject to arbitration, including all claims arising out of the employment agreement and all employment-related disputes;
2. provide that the employer shall pay for the fees of the arbitrator and the costs of the arbitration services provider (certain, but not all, jurisdictions require the employer to pay these fees and costs);
3. include express waivers of any right to a trial by jury of claims that would otherwise be so triable and any right to punitive damages;
4. authorize the arbitrator to direct the parties to conduct discovery, consider and grant summary judgment, and award attorneys' fees to the prevailing party;
5. carve out from any provision the right of the employee to file a claim with a governmental agency such as the EEOC;
6. acknowledge that a court of competent jurisdiction is empowered to issue injunctive relief in aid of arbitration or with respect to other provisions in the employment agreement such as the restrictive covenants; and
7. include a specific waiver of participating in an employee class action and an acknowledgment that any employment-related claim be arbitrated individually.

Finally, employers should consider the consequences of choosing to arbitrate class action claims rather than litigate them. Although arbitration can be less costly than litigation because of the reduced breadth of discovery usually attendant to arbitration, there will be no right to appeal certification of the class, or even the ultimate award rendered by the arbitrator except in very limited circumstances.

Conclusion

All of these areas of the law are important and require attorneys to stay abreast of the most recent developments. Attorneys and judges are always pushing the limits of existing laws and regulations to change the landscape

of permissible conduct. Employers must educate their employees on the boundaries of the law, and take proactive steps to ensure compliance. The experienced employment lawyer is able to guide employers and employees through this difficult maze, and deliver real benefits that directly affect their clients' business and lives.

Key Takeaways

- Retaliation claims are at their highest levels. Educate managers and supervisors about the boundaries of the law.
- Claw-back provisions are becoming commonplace in financial and sales industries.
- The Supreme Court has recognized a "minister's exception" to employment discrimination laws.
- Predictive coding is becoming an accepted practice to address e-discovery.
- The NLRB is scrutinizing employment at-will policies.
- The Patient Protection and Affordable Care Act includes specific actions to be taken in 2013.
- Congress is considering enacting the Pregnant Workers Fairness Act.
- Cost-shifting in litigation concerning restrictive covenants can expose a new employer to payment of the former employer's legal fees.
- Companies are increasingly using arbitration agreements to avoid class action litigation.
- Stay updated on circuit court decisions concerning whether new filings for each post-filing retaliatory act following the initial charge are required until the Supreme Court clarifies the law on this issue.
- Be prepared for the Supreme Court's decision on the definition of a supervisor as it applies to harassment claims in the *Vance v. Ball State University* case.[24]
- Research the most recent NLRB decisions and memoranda opinions when drafting employment agreements, employee handbooks, and at-will policies to be certain to avoid anything that would waive an employee's right to advocate for a change to the at-will status.

[24] *Vance v. Ball State Univ.*, 646 F.3d 461 (7th Cir. 2011).

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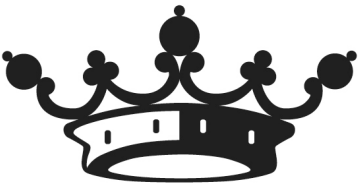

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