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Employment Litigation Forecast: Greater Challenges Ahead

Law360, New York (April 12, 2013, 12:53 PM ET) -- Social media has found its way into all aspects of life, including employer-employee relations. Looking ahead, social media is likely to be a continuing focal point in employment litigation. Recent developments underscore this fact.

In fall 2012, the National Labor Relations Board's Costco Wholesale Corp. decision got the attention of employers when the NLRB ruled that the company's social media policy that prohibited employees from posting statements that could "damage the company" was overly broad and therefore invalid.

According to the NLRB, employees could reasonably interpret the policy to preclude them from exercising their rights under Section 7 of the National Labor Relations Act. While the decision gave some hints as to the types of language that may be approved, the decision did not provide a road map for drafting a "litigation-proof" policy, therefore guaranteeing additional litigation on the subject.

The first quarter of 2013 has already proven that additional litigation over the Costco decision and the permissible scope of social media policies is a certainty. On Jan. 25, 2013, the D.C. Circuit held in Noel Canning v. NLRB that President Obama's January 2012 "recess" appointments of board members Sharon Block, Richard Griffin and Terence Flynn were unconstitutional, calling into question whether cases decided by the board in 2012, including Costco, were valid.

The NLRB announced on March 12, 2013, that it is appealing the court's Noel decision to the U.S. Supreme Court. Until the Supreme Court decides this issue, the question of what constitutes a valid social media policy has become even more complicated.

But social media policies are not the only hot topic in the social media arena. Several recent cases have confirmed that social media content will continue to play an increasing role in the discovery process.

In general, social media content is discoverable if it is relevant in employment litigation cases — regardless of whether a party has "locked" the information or kept it private. That can include information that a company uses to promote or market its goods and services, as well as information that its managers or other employees put on a social media site, not just official company communications.

Just last month, the U.S. District Court for the District of Colorado sanctioned the Equal Employment Opportunity Commission in EEOC v. The Original HoneyBaked Ham Company of Georgia Inc. for causing unnecessary delay and expense in the e-Discovery process by failing to provide social media discovery as previously ordered by the court.

This decision makes clear that no party is exempt from the duty to produce discoverable social media evidence. In practice, employers will have to evaluate, at the onset of litigation, whether there is evidence on social media sites that will either help or hurt their cases and adjust their litigation strategies accordingly.

Wage-Hour Class Actions: No End in Sight

Wage and hour litigation remains a key area of employment litigation. According to the newest NERA Economic Consulting study entitled, "Trends in Wage and Hour Settlements: 2012 Update," employers paid an average of $4.8 million to settle a civil wage and hour case in 2012. This is an increase over the 2011 figure of $4.6 million.

There is evidence that overall settlements have been declining over the past five years, but the average employer liability in wage and hour cases still tends to exceed average liability in most other types of employment cases. Consider these figures reported by NERA Economic Consulting for 2011 regarding average settlements: wrongful terminations cases — $789,184; retaliation cases — $722,179; whistleblower cases — $715,045; and employment discrimination cases — $600,690.

There is every reason to believe that wage-and-hour litigation will continue to be at the forefront of employment litigation for the foreseeable future. There is continued uncertainty on several important subjects.

In misclassification cases, for example, the question of whether an employee is an exempt versus a nonexempt employee or an independent contractor versus an employee requires a detailed analysis of inherently subjective factors, making the answer extremely difficult to predict.

In addition, technology and decentralized business operations have made monitoring employee work time more difficult than ever, making employers more vulnerable to "off-the-clock" overtime claims. As my partner Tom Gies explains, "A key challenge employers face in those cases is how to handle the problem of the eager, nonexempt employee who performs work functions after hours remotely. While strong workplace policies and periodic audits are part of the solution, they unfortunately are not a panacea."

Two important wage and hour cases to watch in 2013 are:

- Genesis HealthCare v. Symczyk (before the U.S. Supreme Court): whether a putative class action must be dismissed when the sole plaintiff receives an offer of judgment that provides her with full relief under the Fair Labor Standards Act. The Supreme Court heard oral argument on Dec. 3, 2012.

- D.R. Horton Inc. v. NLRB (before the Fifth Circuit): whether the NLRB's ruling that mandatory arbitration clauses barring class actions violate the NLRA is valid. The Fifth Circuit heard oral argument on Feb. 5, 2013.

The EEOC's Tighter Focus

The EEOC announcement that it is now focusing on "quality, not quantity" when it comes to filing enforcement actions will likely impact equal employment opportunity litigation. From 2011 to 2012, the number of enforcement actions filed by the EEOC has decreased dramatically — signaling this apparent shift in strategy.

Analysis of the filings over a five-year period evidences this strategy. In 2008, there were 290 EEOC lawsuits filed. The number of suits filed remained strong in 2009 with 281 suits filed but began to fluctuate in 2010, dropping to 250 suits filed and up to 261 lawsuits filed in 2011. By 2012, however, there was a significant reduction in the number of actions filed — down to 122.

Rather than pursue enforcement in numerous cases, the EEOC has said that it will tend to look for cases that can address systemic discrimination and have a broader impact. Although this change means that companies will face fewer enforcement actions, it also means that the EEOC will have more resources to put into those that it does pursue.

Companies may be able to adjust their strategies to match the EEOC's new approach. In some cases, companies may want to be more aggressive at the investigative stage to convince the EEOC that the issue is not the type of claim the agency should pursue either because the facts are not good or because the law is against them.

My colleague Kris Meade, co-chairman of Crowell & Moring LLP's labor and employment group, notes, "Employers should also proactively assess whether they are vulnerable to claims of systemic discrimination by conducting privileged statistical analyses of personnel actions and compensation systems."

Whistleblowers Get More Protection

A federal court ruling has opened the door for a growing number of whistleblower retaliation claims. The Dodd-Frank Act, for example, increased the time an employee has to file a complaint with the U.S. Department of Labor, guarantees the plaintiff the right to a jury trial, makes mandatory arbitration provisions on retaliation claims unenforceable and extends the deadline for filing claims in federal court.

The statute of limitations went from 180 days to six years or three years after the discovery of the retaliation (not to exceed 10 years after the date the alleged retaliation occurred). This longer statute of limitations alone will likely result in more claims.

Traditionally, whistleblowers had to go through a fairly elaborate process to successfully file a retaliation claim — taking their case to the Labor Department, exhausting administrative remedies, etc. As a result, whistleblower cases under Dodd-Frank have often been dismissed because the whistleblower didn't follow the proper process.

But in 2012, the U.S. District Court for the District of Connecticut refused a motion to dismiss in Kramer v. Trans-Lux, essentially saying that whistleblowers did not have to follow that narrow procedure. For companies, that means that if a plaintiff files suit, disposing of the case on a motion to dismiss will likely be more difficult, which means that companies may find themselves spending more time and resources defending these cases.

The Affordable Care Act contains its own whistleblower protection provisions, enacted through an amendment to the Fair Labor Standards Act. Like whistleblower complaints filed under statutes such as Sarbanes-Oxley, ACA claims will be enforced by the Occupational Safety and Health Administration.

Among many noteworthy features, OSHA's interim final rule, issued late February, extends traditional whistleblower protections and remedies to employees who find their health insurance coverage limited or terminated as a result of actions taken by insurance companies as their employers, effective January 2014. This expansion of whistleblower claims promises to present significant challenges for employers as they proceed with their plans to implement the ACA.

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This article was adapted from the firm's recently published "Litigation Forecast 2013."

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