McManis Faulkner

BLOG

2013 Employment Law Growing Pains

February 27, 2014 Hilary Weddell

Every year there are developments in employment law that challenge accepted norms of practice and require creative workable solutions. In particular 2013 had several areas that caused some of these "growing pains," including the NLRB's oversight of social media policies that employers adopt to address technological advances, EEOC's guidance on English-only workplace policies, and coordination of benefits for same-sex couples.

Social Media Policies

Twitter, Facebook, Linked In, Instagram and the like have changed the way we communicate. Social media has become the new "corporate water cooler," as employees now go online to share concerns and discuss work-related issues. In turn, employers—in an attempt to preserve confidentiality and discourage comments that paint the employer in a negative light or could be construed as discrimination or retaliation against co-workers—have struggled to craft social media policies that define permissible online conduct, yet don't run afoul of employees' rights.

Under Section 7 of the National Labor Relations Act (NLRA), employees may confer with one another about wages and other terms of employment and may take "concerted" action in an effort to improve working conditions, without fear of retribution. Section 7 protections are broad; they apply to all employees regardless of whether they are members of a union and extend to conversations online. Due to the proliferation of social media in the workplace, the National Labor Relations Board (NLRB), which enforces the NLRA, is reviewing social media polices with increasing frequency, finding many unlawful because they interfere with employees' Section 7 rights.

Employers have a legitimate need to maintain confidential information and protect themselves from defamatory statements. Employers are also required to protect employees from discrimination and retaliation, and want to foster morale and productivity. These concerns can be adversely affected by co-workers' online behavior. Due to the NLRB's active oversight and the rapid advancement of technology, the law surrounding social media policies is evolving, leaving employers vulnerable. Employers should consult with counsel to draft social media policies that address legitimate business concerns, but don't infringe on employees' rights to engage in protected conduct.

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. Employers have instituted "English-only" policies with increasing frequency. The U.S. Equal Employment Opportunity Commission (EEOC), the federal agency that enforces federal employment discrimination laws, reported a growing number of complaints regarding English-only policies. The EEOC issued guidance to employers in the form of a 2002 compliance manual that says that such policies violate the law unless they are reasonably necessary to the operation of the business. Many claim this guidance is outdated and are calling for a revised manual. In addition, because EEOC guidelines are not binding on courts, some courts have disagreed with the EEOC's stance on English-only policies and 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 policies where it is reasonably necessary to the operation of the business, some states have enacted their own laws that are more restrictive that Title VII. In light of the various laws, employers must be extremely cautious in adopting such 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.

Same-Sex Marriage Benefits

This past year also saw a number of states, government agencies and local municipalities struggle to institute same-sex marriage benefits following the Supreme Court's landmark ruling in *U.S. v. Windsor*. The *Windsor* decision invalidated the federal ban on same-sex marriages and gives married same-sex couples who reside in states where same-sex marriages are permitted access to more than 1,000 benefits conferred by federal law. It is still uncertain whether marital benefits are available to those married in a jurisdiction that recognizes same-sex marriages but now live in a state that doesn't.

Since the *Windsor* decision, federal agencies have gradually begun to update regulations and provide guidance on how they will determine benefits eligibility. For example, the Social Security Administrative announced it will look to the legality of same-sex marriage in the couple's place of residence to determine eligibility for benefits. Conversely, the Internal Revenue Service 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 and employers should consult with counsel to review benefit plans.

Looking Ahead

It is typical for employers to experience "growing pains" 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.

We expect to see the following areas to suffer growing pains in 2014: new efforts to strengthen unions and protect concerted activity from the NLRB; anti-bullying legislation, which is being considered by many states; whistleblower retaliation claims following the implementation of new legislation that broadens protections; and the enforceability of arbitration agreements in class actions.

Hilary Weddell is an attorney with McManis Faulkner whose practice focus is employment law. For more information, please visit mcmanislaw.com.

McManis Faulkner

About the author Hilary Weddell Hilary's inquisitive mind, strength, and dependability make her an excellent trial lawyer.