

# Preparing for 2013: A Look Back at Significant Labor and Employment Law Developments

**Jenna M. Bedsole, Esq.**

**[jbedsole@bakerdonelson.com](mailto:jbedsole@bakerdonelson.com)**

**Wesley C. Redmond, Esq.**

**[wredmond@bakerdonelson.com](mailto:wredmond@bakerdonelson.com)**

**Baker, Donelson, Bearman Caldwell & Berkowitz, P.C.**

**420 20<sup>th</sup> Street North, Suite 1400**

**Birmingham, AL 35203**

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# No New Federal Employment Legislation

It should be getting easier, right?

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# Signs of things to come...

Pervasive Employment Regulatory Activity

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# The National Labor Relations Board

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## Backdoor assault...

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- The NLRB is aggressively attempting to extend its reach to nonunion workplaces!
- How:
- Still pending before the Appellate Courts:
  - Posting Requirement
  - Rules for streamlining union campaigns

# At-Will Disclaimers

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- **At-Will Disclaimers:**
  - NLRB Administrative Law Judge ruled that the American Red Cross Arizona Blood Services Region violated the National Labor Relations Act (NLRA) by having a provision in its employee handbook acknowledgment stating, "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."
  - The judge ruled the signing of the acknowledgement form, whereby the employee -- through the use of the personal pronoun "I" -- specifically agreed that the at-will agreement could not be changed in any way, was essentially a waiver of the employee's right "to advocate concertedly to change his/her at-will status."

## At-Will Under Fire

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- The NLRB filed a complaint against Hyatt Hotels Corporation, contending that the company's employee handbook acknowledgement form violated the NLRA's protection of concerted activity. The NLRB alleged that several provisions in Hyatt's handbook acknowledgement were overly broad and unlawfully limited employees' right to engage in concerted activity.
- This dispute was settled before the hearing, with Hyatt agreeing to delete these disclaimers from its handbook acknowledgment form, notify employees that the disclaimers had been revoked and removed from its handbook acknowledgment and post a notice assuring employees that it would not violate their NLRA rights.

# Some Good News?

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- **At-Will Employment**

The relationship between you and Mimi's Café is referred to as "employment at will." This means that your employment can be terminated at any time for any reason, with or without cause, with or without notice, by you or the Company. No representative of the Company has the authority to enter into any agreement contrary to the foregoing "employment at will" relationship. Nothing contained in this handbook creates an express or implied contract of employment.



# Approved

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- **“Statement of At-Will Employment Status”**

Employment with Rocha Transportation is employment at-will. Employment at-will may be terminated with or without cause and with or without notice at any time by the employee or the Company. Nothing in this Handbook or in any document or statement shall limit the right to terminate employment at-will. No manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.

## How do you distinguish the decisions?

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- The language in the Mimi's handbook and the Rocha handbook do not say that the at-will relationship can never be altered.
- Employees are just re-affirming the at-will relationship – not making a personal promise to never try to alter it.
- The American Red Cross language was similar to a contract that the employee would never try to change the at-will nature of the employment relationship.

## Still more...

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- **Confidentiality of Employers' HR Investigations:**
  - NLRB recently held in a decision that applies to both union and nonunion employer that the routine practice of asking employees who are involved in an investigation not to discuss the ongoing investigation with co-workers runs afoul of the NLRA
  - NLRB went on to state that employers can ask employees to keep investigations confidential, only if, after making an up-front, individualized assessment of the need for confidentiality based on the following:
    - whether any witnesses need protection
    - whether evidence is in danger of being destroyed
    - whether testimony is in danger of being fabricated, or
    - whether there is a need to prevent a cover up.

# Protected Concerted Activity

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- On June 18, the NLRB made public a webpage that describes “the rights of employees to act together for their mutual aid and protection, even if they are not in a union.”
- The page, at [www.nlrb.gov/concerted-activity](http://www.nlrb.gov/concerted-activity), tells the stories of more than a dozen recent cases involving protected concerted activity, which can be viewed by clicking points on a map.

## The NLRB's latest take on Social Media

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- General Counsel of NLRB has issued 3 memos providing guidance on social media. WHY?
- The latest memo that just came out on May 30 is the most useful. It says what employers are allowed to do; not just what they are prohibited from doing.
- The third time was a charm, and for the first time the Acting GC approved of a policy in its entirety. This gives employers an actual roadmap for what should survive NLRB scrutiny.

# May 30, 2012 NLRB Acting General Counsel Report

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- Approved policy prohibits “inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct.”
- Other approved provisions include:
  - **Confidentiality:** limited to trade secrets and proprietary information – provided examples.
  - **“Be Respectful,” “Fair and Courteous”:** questioned this, but approved because specific, detailed definitions of prohibited conduct were provided.

# May 30, 2012 NLRB Acting General Counsel Report

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- **Provisions approved without comment include:**
  - “Carefully read these guidelines [and other applicable codes and policies] and ensure your postings are consistent . . .”
  - “Make sure you are honest and accurate. . . Never post any information or rumor that you know to be false about [Employer, customers or co-employees].”
  - “Never represent yourself as a spokesperson. . . make it clear that your views do not represent those of [Employer].”

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## The latest from the EEOC

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## Another Record Year for the EEOC

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- FY 2011 – 99,947
- **FY 2012 – preliminary numbers -- 99,632**
- EEOC secured more than \$365.4 million in monetary benefits for individuals – the highest level of relief obtained through administrative enforcement in the EEOC's history
- Retaliation is still the most common charge of discrimination

## EEOC Database – Charge Statistics by State

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- **Interesting statistics:**
  - The seven states that had the highest rate of EEOC Charges per 1,000 workers were in the South: Arkansas, Mississippi, Alabama and Georgia all averaged 1.2—2.2 charges per 1000 workers
  - Tennessee, North Carolina and Louisiana averaged 1.0-1.1 EEOC Charges per 1,000 workers

# Strategic Enforcement Plan

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The SEP identifies six national priorities as the focus of this integrated enforcement effort. These are:

- Enforcing equal pay laws;
- Eliminating barriers in recruitment and hiring;
- Protecting immigrant, migrant and other vulnerable workers;
- Addressing emerging and developing employment discrimination issues;
- Preserving access to the legal system; and
- Preventing harassment through systemic enforcement and targeted outreach.

# Targeting Pay Discrimination

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- EEOC has launched a pilot program at 3 of its district offices – Chicago, New York and Phoenix
- Purpose of the pilot program is to determine the best approach for conducting direct investigations – investigations initiated without any prior charge of pay discrimination – to determine whether Equal Pay Act violations are occurring
- EEOC is working with other government agencies – OFCCP, Wage and Hour Division and Women’s Bureau of the Department of Labor – to share best practices *and information*
- Note: unlike Title VII, the EPA is enforced through the FLSA – this means that the EEOC does not need to wait for a charge of discrimination to be filed, but instead has authority to conduct direct investigations of employers to assess whether EPA violations are occurring

# Protections for Transgender Employees

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- **What happened:** On April 20, 2012, the EEOC determined that discrimination against a transgender individual because that person is transgender is sex discrimination and violates Title VII.
- **The Case:** Mia Macy, a transgender woman (man to woman), was denied a job with the ATF. Macy applied for the job as a male and was told it was “virtually guaranteed,” based on her military and police background and experience with the ATF’s ballistics system. After disclosing his gender transition, Macy was told the job’s funding was cut. She found out someone else was hired and she sued. The EEOC initially refused to consider her claim for sex-stereotyping/discrimination based on gender identity/sex change. She appealed to the EEOC, which held transgender discrimination equals sex discrimination.

## What the EEOC Decided

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- Title VII prohibits discrimination based on “sex.” The courts have interpreted this to mean both sex - - the biological differences between men and women – and gender.
- **Example:** In *Price Waterhouse*, a female manager was denied partnership because she did not act how some of the partners thought a woman should act (e.g., she should walk more femininely, wear make-up, have her hair styled, etc.). The court held that such sex stereotyping, or failing to conform with gender norms, was sex discrimination.
- Sex stereotyping claims have been recognized in the Eleventh Circuit. In *Glenn v. Brumby*, the Eleventh Circuit held that a biological male, who presented at work as a female and was terminated, could state a claim of sex discrimination under § 1983 – not Title VII. The Court held that punishing an employee for her gender non-conforming behavior was sex-stereotyping and violated the Equal Protection Clause.

## What the EEOC Decided

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- The EEOC went even beyond *Brumby*:
  - [G]ender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort. . . . [Such claims] are simply different ways of describing sex discrimination.

## What the EEOC's Decision Means to You

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1. The EEOC will consider discrimination against a transgender sex discrimination even if it is not based on a sex stereotyping theory.
2. EEOC enforcement will be consistent with this decision throughout the country. Courts in different jurisdictions may disagree, but the EEOC will use this to guide them in investigations.
3. The EEOC's decision does not address sexual orientation, but such claims may overlap.
4. Review your policies and train managers consistent with this guidance.



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- **What does this mean for employers?**

- Gender pay discrimination is clearly a priority for government agencies – EEOC is just one of several federal agencies targeting this issue
- Unclear as to how the EEOC will determine targets for direct investigations
- Strongly consider a proactive approach – conduct a compensation analysis/pay equity study to determine whether gender-based pay disparity exists in your workforce

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## Wage and Hour Litigation

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## What do these types of claims include?

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- Misclassification of employees as exempt
- Misclassification of employees as independent contractors
- Failure to pay otherwise exempt employees on a salary basis
- Regular rate and minimum wage issues
- Failure to pay for pre- and post-shift activities, including donning and doffing and other off-the-clock activities
- Tip claims
- Unpaid on-duty meal periods

## Record Number Filed in 2012

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- 2012 – 7,064
- 2011 – 7,006
- 2010 – 6,081
- 2009 – 5,644
- 2008 – 5,302

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## Americans with Disabilities Act

Leave, Leave , Leave, Leave, Leave, Leave, Leave!!!

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# Looking Ahead to 2013

## What to expect in 2013?

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- More to come on social media. Several states have enacted social media laws. For example, one law prohibits employers from asking for employee passwords.
- The US Supreme Court will decide whether a supervisor must have the ability to hire and fire.
- We will continue to see ADAAA decisions giving further guidance on reasonable accommodation issues.
- The EEOC's tactics in litigation will continue to be litigated.
- Unions and the NLRB will try to move forward with the posting rule.
- Expect further efforts to revise the NLRB's election rules.
- Continued aggressive enforcement by federal agencies in President Obama's second term.

## What to expect in 2013? (continued)

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- Continued focus by the EEOC on large-scale, systemic cases.
- The DOL will continue to focus on misclassification issues.
- The DOL also may move forward with “Right to Know” regulations, which would require employers to prepare a classification analysis explaining why a worker is classified as an employee or an independent contractor.
- The NLRB may decide whether liking something on Facebook is protected activity.
- Gun laws and the Workplace



## What to Expect in 2013? End to NLRB Drama?

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- The NLRB is a five member Board and is traditionally bi-partisan.
- President Obama appointed two members in January of 2012 during what his administration considered a recess.
- Therefore, the two members did not have to go through Senate confirmation.
- At the time of the appointments, there was one member on the Board. Two remaining vacancies existed.
- The D.C. Court of Appeals held the two appointments were unconstitutional and thus the NLRB has had no quorum since 1/12.
- February 13, 2013 – President Obama nominated the two members.
- The NLRB is continuing to meet in open disagreement with the Court's ruling. Next stop: the Supreme Court.

# QUESTIONS?

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