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Looking Back on 2013 for Issues to Be Wary of in 2014

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As another year draws to a close, many employers might be ready to put 2013 in their rear view mirrors. Never mind the continued and broad challenges they faced in the still-uncertain economic climate, many employers in 2013 contended with a sharp increase in wage-and-hour cases and government enforcement activity.

In its October report titled “The New Lawsuit Ecosystem: Trends, Targets and Players,” the U.S. Chamber Institute for Legal Reform said it all: “Wage-and-hour claims currently outpace all other types of workplace litigation,” accounting for settlements from 2007 through 2012 of \$2.7 billion.

In just the first 11 months of 2013, statistics maintained on the U.S. Courts’ Public Access to Court Electronic Records (PACER) show that a staggering 7,334 cases have been filed in federal courts throughout the country alleging violations of the Fair Labor Standards Act (FLSA). FLSA filings in 2013 are on pace to be the most filed in any year—2014 will most likely break that record. This is part of a long-term trend that has seen more than a 500 percent increase in FLSA claims since 1990, according to the Federal Judicial Center.

In November, NERA Economic Consulting issued its report “Trends in Wage and Hour Settlements: 2013 Update.” The data in the report is striking and provides a good indication on



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where wage-and-hour litigation is headed in 2014:

- Smaller companies are being hit with wage-and-hour litigation and a wider variety of industries are being targeted.
- Median settlement numbers are up both in terms of total numbers and on a per plaintiff basis.

And as many members of the plaintiffs’ employment bar (who typically have practiced in the employment discrimination arena) see these record numbers in wage-and-hour litigation, they are increasingly trying to “get a piece of the [wage and hour] action.”

In 2013, employers also found themselves increasingly targeted by government enforcement activity. The U.S. Department of Labor’s Wage and Hour Division (WHD) recovered nearly a quarter of a billion dollars in back wages in fiscal year 2013 on behalf of more than 260,000 workers.

Moreover, while employers addressed litigation and enforcement activity related to existing laws, state legislatures and

regulators were busy at work passing new laws, amending old laws and focusing on compliance initiatives.

As the ball drops Dec. 31 followed by a rendition of “Auld Lang Syne,” employers would be wise not to forget the wage-and-hour lessons of 2013. Rather, 2014 is likely to see more of the same when it comes to the burgeoning threat of wage-and-hour litigation and enforcement efforts. The good news is that employers, armed with the knowledge of recent and developing trends, can position themselves to address an ever-increasing focus on wage-and-hour issues.

In the spirit of starting the New Year off on the right foot, let us take a look back on some of the biggest wage-and-hour issues of 2013, with an eye toward what employers can do in 2014 to mitigate their wage-and-hour risks.

INDEPENDENT CONTRACTOR MISCLASSIFICATION

In 2013, the WHD targeted independent contractor misclassification through its “Misclassification Initiative,” focusing on the practice of what the WHD characterizes as “improperly treating a worker who is an employee under the applicable law as in a work status other than an employee.”

The plaintiffs’ bar also has aggressively pursued independent contractor misclassification in litigation, bringing class and collective actions on behalf of thousands of employees seeking payment of overtime for workers categorized as contractors rather than as employees,

among other remedies. A truly unfortunate one-two punch for employers, who, in addition to the other fines and penalties that currently can be levied for misclassifying workers as independent contractors, also may in the future face penalties (which some would call taxes) under the Affordable Care Act if contractors who purchase insurance on exchanges later are found to qualify as employees.

UNPAID INTERNSHIPS

Challenges to the viability of unpaid internships came into sharp focus in 2013. In 2014, the U.S. Court of Appeals for the Second Circuit is set to address appeals of two decisions from district courts in New York, one of which granted class and collective action certification to a group of unpaid interns of Fox Entertainment Group and another that denied class certification under New York state law to former interns of the Hearst Corp. These two cases look to be just the tip of the iceberg, as cases challenging the legality of unpaid internships increasingly have been filed in 2013. Conde Nast and the Arena Football League's Pittsburgh Power are but two employers whose unpaid internship programs were challenged in 2013.

THE RESTAURANT INDUSTRY CONTINUED TO FEEL THE HEAT

No industry has been shielded from the uptick in FLSA claims as everything from health care to hospitality has felt the pressure in the wage-and-hour arena. The restaurant industry, for a number of reasons, has come under particular scrutiny.

The WHD has set its sights on the industry, classifying it as a "high risk" and investing its resources to recover millions of dollars in back pay under the FLSA. Private litigants also have not been shy, bringing an increasing number of lawsuits throughout the country challenging the pay practices of restaurants. The New Year promises to bring more attention to wage-and-hour issues in the restaurant and hospitality industries, likely leading to the plaintiffs' bar continuing to expand collective and class actions

beyond nationwide restaurant and management groups, to regional as well as local establishments.

Education and preparation can go a long way in helping employers improve their wage-and-hour outlook in 2014.

COLLECTIVE/CLASS ACTION WAIVERS, ARB AGREEMENTS

A sticky issue for the courts in 2013 has been the legality of arbitration agreements, which include collective/class action waivers. Of course, the National Labor Relations Board's decision in *In re D.R. Horton*, 357 NLRB No. 184 (2012), "that the NLRA prohibits employers from requiring employees to waive their rights to maintain class or collective actions in both judicial and arbitral forums," has complicated employer efforts to curb class and collective actions through the use of arbitration agreements. In December, the Fifth Circuit disagreed with the NLRB's stance in *D.R. Horton*, (<http://goo.gl/mQr89o>) and noted that "the board's decision did not give proper weight to the Federal Arbitration Act (FAA)." The Fifth Circuit's decision is in accord with other courts of appeals and district courts throughout the country.

But the Fifth Circuit may not be the final word. The question of collective/class action waivers in employment arbitration agreements is an issue that could appear on the Supreme Court's docket in 2014. Employers considering the use of class/collective arbitration waivers should stay tuned in 2014 for additional developments in this area of law. To the extent employers currently are using class/collective arbitration waiver agreements, those agreements should be reviewed and

revised to comply with the most recent line of cases in this area.

MAKE 2014 THE YEAR OF WAGE-AND-HOUR COMPLIANCE

As the wage-and-hour trends of 2013 continue into 2014, employers are now equipped with increased awareness and understanding of the challenges they face on this front. As class and collective wage-and-hour actions test additional industries, they also will continue to move beyond large employers, and become concerns for medium-sized and small employers as well.

The good news is that education and preparation can go a long way in helping employers improve their wage-and-hour outlook in 2014. Resolving in 2014 to make the right organizational changes and following a thorough compliance audit of pay practices could help to prevent expensive and disruptive wage-and-hour litigation or a government audit. Depending on the nature of the work force, an audit could involve an analysis of worker classifications (i.e., independent contractor versus employee, intern versus employee, exempt employee versus non-exempt employee), a review of potential off-the-clock work (i.e., during meal breaks, prior to clocking in and after clocking out, remote work) and an assessment of pay practices (i.e., rounding of time, calculation of the regular rate of pay, travel time, training time), culminating in comprehensive recommendations as to any proposed modifications in practices. It is crucial to approach any compliance audit with an understanding of the industry-specific exposure employers face at both the federal and state level and to do so under the ambit of attorney-client privilege. Such efforts will help ensure a brighter and sweeter New Year. •