Happy *hic* New Year! 2011 labor and employment law year in review

By Robin E. Shea on December 30, 2011

What a year, am I right *or am I right?* Here is a catalog of the major employment and labor law developments from 2011. And, just to keep it entertaining, I've started off each month with a weird but true off-topic story that was in the news that month. Many thanks to *Drudge Report* archives for the strange stuff. Thanks also to *Esquire* magazine's annual Dubious Achievement Awards (sadly, discontinued in 2008) and Dave Barry's Year in Review, both of which I am ~~ripping off~~ paying homage to.

Now, fix me a drink, will ya? We have a *lot* to talk about.

JANUARY

Ah-*choo!* Some teenage burglars stole an urn that contained the cremated remains of a man and two great Danes. The teens, obviously not criminal *masterminds*, snorted the ashes, believing them to be cocaine.

and . . .

"He*l, they're all disgruntled. I ain't runnin' no da*n daisy farm!" The EEOC reported that for fiscal year 2010 it received a record number of charges, and that retaliation charges surpassed race discrimination charges for the first time in history.

Express yourself. The U.S. Department of Labor issued guidance on its "lactation accommodation" provisions in the Patient Protection and Affordable Care Act (aka "Obamacare") and requested feedback from the public.

GINA: It's more than just a pretty name. The Genetic Information Nondiscrimination Act, which prohibits the acquisition, use or disclosure of "genetic information," which includes family medical history information, took effect.

Nice family. I'd hate to see somet'ing happen to 'em, ya know? The Supreme Court held in *Thompson v. North American Stainless* that the Title VII anti-retaliation provisions extend to fiances and other significant others of the person who engages in legally protected activity.

FEBRUARY

"Of course, you realize this means war." *Uber*-disgruntled ex-employee Charlie Sheen declared war on his former employers CBS and Warner Brothers.

and . . .

Another county heard from. (Or is it "country"?) Constangy, Brooks launched the most-excellent *Employee Benefits Unplugged*, which covers income tax, executive compensation, 401(k) and 403(b) plans, fiduciary compliance, and Department of Labor and Internal Revenue Service audits. All of the attorneys in the firm's Employee Benefits Practice group contribute, but the Chief Blogmistress is Jewell Lim Esposito from the firm's Fairfax, Virginia office.

MARCH

I hate to say "You can't make this stuff up," but you *really can't* make this stuff up. A New York man who had a court appearance on a DWI charge showed up with an open can of beer and (allegedly) was carrying a bag with four more cans of beer. The man, who had prior DWIs, was jailed with no bail.

and . . .

At the stroke of a pen, entire nation becomes disabled. The EEOC issued its Final Rule interpreting the Americans with Disabilities Act Amendments Act.

Make sure your "paws" know the laws. The U.S. Supreme Court found in *Staub v. Proctor Hospital* that an employer could be liable under a "cat's paw theory" for employment decisions that were influenced by a supervisor or other member of management who had an unlawful motive.

APRIL

Study: Members of Congress give each other much less grief than they deserve. A Harvard professor conducted a study that concluded that members of Congress spent 27 percent of their time taunting each other.

and . . .

Life begins at *Concepcion*. The U.S. Supreme Court found in *AT&T v. Concepcion* that arbitration of class claims was ok and consistent with the policy underlying the Federal Arbitration Act. The *Concepcion* decision overruled the interpretation of the California courts that class claims could not be arbitrated.

OFCCP starts pilin' on. The Office of Federal Contract Compliance Programs issued a proposed rule regarding the obligations of federal contractors to recruit and hire veterans. Although the desire to help veterans is laudable, the rule would impose significant compliance burdens on federal contractors.

Nothing could be finah . . . The NLRB filed a complaint against Boeing Corporation for opening a production line in North Charleston, South Carolina, instead of the outskirts of Seattle, Washington, where most of its production was located. The Board alleged that the move to right-to-work South Carolina was the company's unlawful attempt to avoid dealing with the International Association of Machinists, which had carried on a number of strikes at the Washington State facility over the years.

MAY

Cannibal Lecter. A man ran an internet ad seeking someone "who would agree to be killed, cooked, and eaten." A Swiss man answered the ad, thinking it was just a fantasy game, but after talking with the "cannibal" on the phone, determined that he was deadly serious. (Tehe. Get it?) The would-be "meal" called the police, who answered the ad undercover and foiled the banquet.

and . . .

"I'm a victim of soicumstance!" (Probably true.) Bruce Raynor, President of the Workers United affiliate of the Service Employees International Union and International Executive Vice President of the SEIU, was forced out of both positions after being charged with filing misleading expense reports. Raynor, a labor leader for 38 years and who had been president of UNITE and UNITE HERE for eight years before joining Workers United, contended that he was a victim of SEIU politics.

Kiss our apps! The U.S. Department of Labor launched its wage and hour recordkeeping app (at link, scroll down to "Email your timesheets directly to Big Brother!") for iPhones and iPods, with a promise to develop counterparts for Androids and Blackberrys.

Labor pains. The NLRB sued the state of Arizona over a constitutional amendment that protected the right of employees to have secret ballots in union representation elections. The Board contends that state constitutional amendments like Arizona's are preempted by the NLRB. It has also sued the state of South Dakota for the same reason.

Your money, or your life. The OFCCP proposed changing the scheduling letter that it sends to federal contractors who are being audited. The changes would require contractors to provide detailed, individualized information about employees' compensation, among other proposed changes.

JUNE

One word. Weinergate.

and . . .

Labor pains, about an hour apart. The NLRB issued a proposed rule providing for "quickie elections," shortening the time between the filing of a union election petition and the election date, and giving unions immediate access to contact information of employees.

Love those Supremes. On a more positive note, the Supreme Court held in *Walmart v. Dukes* that a sex discrimination case could not proceed as a class action unless the members of the putative class had so much in common that they could be treated as "one." The Court also held that individual claims for damages had to proceed under rules that allowed the putative class members to "opt out" and that provide more procedural safeguards for defendants.

Don't go away mad, just go away. The Supreme Court upheld an Arizona statute that, among other things, sanctioned employers for knowingly or intentionally employing illegal aliens. The Court, in *Chamber of Commerce of the United States v. Whiting*, found that the Arizona law was not preempted by the federal Immigration Reform and Control Act.

JULY

They couldn't do it here because it would have violated the ADA. The Crowne Plaza announced the introduction of "snore patrols" in its European and Middle Eastern hotels. The patrollers walk through the hallways and notify guests who snore too loudly, disturbing other guests. The heavy snorers are not kicked out of the hotels but may be moved to rooms in the hotel where they won't bother anybody. (In case you didn't get the ADA reference, loud snoring is often a result of sleep apnea.)

and . . .

Labor pains, coming every 45 minutes now. The U.S. Department of Labor issued a proposed rule on "persuader" reporting rules for attorneys and consultants who advise companies in union elections.

Let's you and him fight. The EEOC got the biggest settlement in its history -- $20MM -- against Verizon. In a case that began under the Bush Administration, the EEOC alleged that Verizon violated the ADA by charging no-fault attendance points without making accommodations to employees whose absences were caused by disabilities. Verizon's attendance policy was part of a collective bargaining agreement. We can't help wishing Verizon had called the EEOC's bluff and gone to court, but its reluctance to do so is certainly understandable.

AUGUST

His sexual harassment training apparently didn't "take." An employee at a fast food restaurant in Georgia was arrested after he handcuffed himself to a teenage co-worker who continually rejected his

requests for dates. The girl's co-workers ultimately persuaded him to release her, and she was not hurt.

and . . .

Liebman leaves, poster provision promulgated. NLRB chair Wilma Liebman left the Board as her term expired, but not without a few parting "gifts" for employers, one of which was a requirement that all employers governed by the NLRB post notices informing employees of their right to join unions.

Labor pains, 30 minutes apart now. The NLRB approved a job-based bargaining unit in *Specialty Healthcare and Rehabilitation of Mobile*, in a decision that is expected to make it dramatically easier for employees in the health care industry as well as other industries to organize. Small bargaining units tend to be more advantageous for unions.

SEPTEMBER

Steak tartare. A man was arrested at a Carlisle, Pennsylvania Walmart for eating some of the store's raw meat merchandise and putting the rest back on the shelves. Walmart had to throw out the meat, of course. Even though the value of the meat was just over $24, he was charged with a felony because he had four prior convictions of retail theft.

and . . .

Thanks, but no thanks. The Internal Revenue Service announced an "independent contractor amnesty" program. Employers who voluntarily reclassify their "independent contractors" as employees get a number of nice tax breaks. Sounds great until you realize that, at the same time, the IRS, the U.S. Department of Labor, and a number of state governments have entered into agreements to share information. And the amnesty applies only to the IRS, not to these other agencies. What do you bet the DOL, *et al.*, will come after some poor unsuspecting employer who enters into one of these agreements, hitting it up for back overtime wages, back benefits, back workers' compensation, and more.

Xtreme EEO. Between the first of August and mid-September, the EEOC filed 21 ADA lawsuits against employers, including a case against Walgreen's over a cashier who was fired for eating a bag of potato chips without paying for it, and a case against Goodyear over a production worker with menstrual problems.

Petulant post protected? Pshaw! In *Karl Knauz Motors, Inc.*, an administrative law judge found that a BMW dealership did not violate the National Labor Relations Act by terminating a salesman who posted on his personal Facebook page photographs and snarky comments about a kid who "test drove" a vehicle into a pond. Although the ALJ found that other Facebook posts by the salesman were protected concerted activity (where he'd criticized the cheap food at a customer event, saying

he thought it would adversely affect sales commissions), the ALJ also found that the unprotected "test drive" post was the reason for the termination.

Ain't we something! (Really, you.) *Employment & Labor Insider* and our brother blog, *WorkMatters*, were selected for the LexisNexis top 25 employment law blogs. Thanks so much to you, our readers, for your support!

OCTOBER

That's a lotta apps! Research in Motion, the company that manufactures the Blackberry smartphone, apologized for a three-day email outage by offering users $100 in apps. (*Psssst* -- if you are a Blackberry user and haven't claimed yours yet, you still have until December 31.)

and . . .

Hell hath no fury? The *ABA Journal* caught some grief after it ran an article about a study showing that legal assistants overwhelmingly preferred working for male attorneys. According to the study, no assistants preferred working for female partners, and less than a handful preferred female associates. The author of the *ABA Journal* article and the professor who conducted the study were female.

Poster posting postponed. The NLRB delayed the effective date of its notice posting requirement (see August) until January 31, 2012.

NOVEMBER

I totally understand how this woman feels. A Wisconsin woman had her heart set on a 3 a.m. cheeseburger at McDonald's. Unfortunately for her boyfriend, when they got to the drive-thru window, they were informed that the restaurant had stopped serving "dinner" and was now serving breakfast only. They drove away, and, out of her mind with grief, the woman began hitting her boyfriend, biting his arm, and tearing his shirt. When he pulled over to the side of the road, she allegedly got on top of the hood of his car to keep him from leaving. The woman admitted to the police that she was "freaking out" over her inability to get a cheeseburger. She was charged with disorderly conduct. (This story reminds me of the Whammyburger scene in *Falling Down*, although in that movie, Michael Douglas wanted breakfast. At first.)

and . . .

The incredible shrinking NLRB. With Wilma Liebman's departure (see August), the Board was down to three members, one of whom was Craig Becker, whose recess appointment is due to expire on New Year's Eve, leaving the Board with only two members. Thanks to the Supreme Court's decision in *New Process Steel*, this means that the two-member Board would be unable to take any action because it must have three members for a quorum. In response, the Board delegated authority to litigate and seek injunctions, as well as authority to certify the results of certain secret ballot elections, to the General Counsel of the NLRB.

What shall it profit a man, if he shall gain 666 days without a lost-time accident, and lose his own soul? A Georgia employer was proud of making it 666 days without a lost-time accident and required its employees to wear badges advertising that fact. Only problem was, one employee believed that wearing the "666" badge would cause him to suffer eternal damnation because it was "the mark of the beast" described in the Book of Revelations. Instead of letting this one guy skip the badge and save his soul, the employer fired him. He filed suit for failure to make a religious accommodation.

Labor pains, 15 minutes apart. The NLRB approved a resolution to go forward with its "quickie election" proposal (see June).

DECEMBER

Tubas are the new Escalades. California, which, as we all know, is way ahead of the rest of us, is experiencing a crime wave of tuba thefts. Piccolos, trumpets, maracas, and pipe organs, among others, remain unmolested. Law enforcement authorities believe that tubas are in demand now because of the *banda* music popular in Southern California. A new tuba sells for about $5,000, and a used one for about $2,000.

and . . .

Speaking of California . . . A boatload of new employment laws will take effect in the Golden State on New Year's Day 2012, including a ban on most credit checks, a requirement that some employers certify their efforts to prevent human trafficking and slavery, and much, much more! Probably some other states have laws that will take effect on New Year's Day, too.

Since everyone is now disabled, maybe this won't be too big a deal. The OFCCP issued a proposed rule interpreting Section 503 of the Rehabilitation Act of 1973, which would require federal contractors to establish "goals" of a 7 percent disabled workforce. (Hat tip to Constangy's John Doyle, who pointed out how easy this goal will be to attain, now that the ADAAA has rendered virtually 100 percent of the workforce "disabled." LOL, John!)

Boeing case ends. The NLRB withdrew its complaint against Boeing (see April) after the company agreed to open a new production line in Washington State.

***Buh*-bye.** Craig Becker's recess appointment to the NLRB expires this Saturday night.

Labor pains - GET ME TO THAT DELIVERY ROOM *STAT!* One day before the NLRB issued a final rule on "quickie" elections (see June), the U.S. Chamber of Commerce sued to block the rule. President Obama announced that he would make recess appointments to the NLRB of Sharon Block, the DOL's Deputy Assistant Secretary for Congressional Affairs, and Richard Griffith, General Counsel of the International Union of Operating Engineers, to the Board to restore the quorum (see November), but all 47 Republican senators have gone on record as opposing the appointments. And

the NLRB has postponed its posting provision (see August and October) yet again . . . the new deadline is April 30, 2012.

Thank you again! *Employment & Labor Insider* and our brother blog, *WorkMatters*, were selected for the ABA Blawg 100. We very much appreciate your support and hope you will stay with us in 2012!

Speaking of which, just wait'll next year . . . Did you know that the world really *isn't* going to end on 12/21/12? What's with that?