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What Does Magic 8-Ball Think About 2012?

Sick leave law, social media rules likely to trip up employers

By DANIEL A. SCHWARTZ

A few years back, the Connecticut Bar Association gave out what is still among the best swag I've gotten at a conference — a real-life "Magic 8" ball.

So, in looking to see what 2012 might bring in the labor and employment sector, I kept it by my side to add some important guidance to my predictions. (Of course, as in real life, I had to keep shaking it to get the answer I *really* wanted to see, which you'll notice I've added.)

Of course, it'll be difficult to top 2011 in terms of new developments. Passage of the Paid Sick Leave bill in Connecticut, adding "gender identity" as a protected category under the state's anti-discrimination laws, as well as a bevy of U.S. Supreme Court cases all have left employers scrambling to keep up with developments.

There's no rest for the weary, though. Labor and employment practitioners and employers should start looking ahead at 2012.

Will employers have trouble implementing paid sick leave?

8-Ball Says: *It is Certain.*

This is a fairly easy prediction because already the new law is causing lots of confusion for employers. Municipalities are discovering that they are covered and some manufacturers also are finding out that not all of their facilities are exempt from the law. The Connecticut Department of Labor's new guidance has provided some answers to outstanding questions, but others still remain. By all accounts, the law is poorly drafted, so don't be surprised to see a bill clarifying some terms to come about in the next legislative term.

Will the proposed new NLRB posting rules go into effect?

8-Ball Says: *It is Decidedly So.*

The National Labor Relations Board has proposed that virtually all employers (including those without any unions) must post a new notice that informs employees of their rights under the National Labor Relations Act. Some business groups are challenging these requirements, but they are unlikely to prevail. As a result, employers should be prepared to put up new posters effective Jan. 31, 2012.

Will 2012 be another active year for the U.S. Supreme Court?

8-Ball Says: *Without a Doubt.*

2011 was a busy year for employment law cases at the nation's highest court. But there are several cases on the court's docket that are almost certain to make headlines. Among them: *Christopher v. SmithKline Beecham Corp,* in which the court will decide the scope of the "outside sales" exemption under the Fair Labor Standards Act. The case arose over a dispute regarding the overtime pay of SmithKline's pharmaceutical sales representatives. Pharmaceutical companies have traditionally viewed sales reps as "outside sales" employees, meaning they are exempt from overtime pay. The U.S. Department of Labor has disagreed. A decision is expected in June.

Daniel A. Schwartz

The Court will also be deciding the scope of the "ministerial exception" in *Hosanna-Tabor Lutheran Church & School v. EEOC.* At issue in whether the First Amendment restricts employment-related suits against religious organizations. The law has been universally applied to pastors, priests and rabbis who allege discrimination. But there is a divide about whether the doctrine extends to other church employees. This case is likely to set forth some of the parameters. A decision in this case is expected by June 2012.

Will the CHRO get back its human rights referees?

8-Ball Says: *Most Likely.*

For several months, public hearings have been at a standstill at this oft-criticized

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agency — the result of the appointment of human rights referees being held up by Gov. Danell Malloy. When will the delay end? That remains to be seen, but it's hard to imagine that this will continue unabated. Then again, who would've thought we'd be without referees for this long?

Will the new procedural changes at the CHRO make a difference in case processing?

8-Ball Says: ***Reply Hazy — Try Again.***

Last fall, the CHRO introduced widespread changes designed to foster quicker resolution of cases and easier settlements through an early mediation effort. But as a result, more cases also seem to be passing through the initial "Merit Assessment Review," which was designed to weed out frivolous cases. Whether this is mere perception or fact is irrelevant; if employers believe that the CHRO is ineffective at investigating or resolving cases, then the changes at the CHRO are unlikely to result in a significant difference in results. Right now, many are hoping for the best but expecting the worst. Revisit this in a year.

Will the rules regarding social media in the workplace get clearer?

8-Ball Says: ***Don't Count on It.***

2011 was probably a watershed year when it comes to social media and employment law. The NLRB took up dozens of cases to emphasize the point that not all employee conduct on Facebook is a fireable offense. Indeed, the National Labor Relations Board said that a 75-year-old law that allows employees to engage in "protected concerted activity" applies to this very 21st-century technology.

As a result, employers need to think twice before simply tossing out an employee who speaks poorly of the employer. Courts may finally start to decide these issues, but given the range of decisions that have been coming out from administrative law judges this year, the courts are likely to be all over the map. Thus, the confusion (and litigation) of the law and social media will continue.

That said, can and should employers continue to ignore social media?

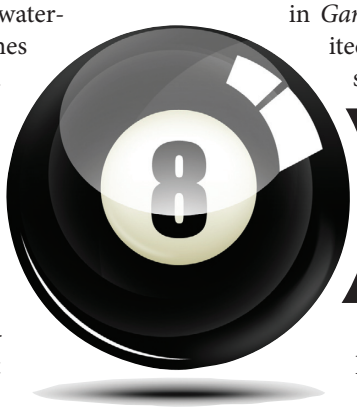
8-Ball Says: ***My reply is no.***

Employers that continue to rely on firewalls to insulate themselves are discovering a hard truth: iPhones, Droids and other smartphones can easily circumvent those restrictions. As a result, employers in 2012 are likely to adopt social media guidelines more and more. With 800 million users on Facebook, it cannot be ignored any longer.

Will the Connecticut Supreme Court decide any important employment law issues?

8-Ball Says: ***Signs Point to Yes.***

The state's highest court hasn't had a lot of high-profile employment law cases over the last year or two. That may change in 2012. Already two cases were argued in 2011 regarding the scope of employee's free speech rights in the workplace. (Full disclosure: I'm involved with one of them.) Among the issues the court may decide: Does the U.S. Supreme Court's holding in *Garcetti v. Ceballos* — which limited the protections for on-the-job speech — apply to Connecticut's law that covers both public and private employers? The answer to that question is decidedly up for grabs.



2012 shows no signs of retreat from the government's interest in cracking down on employers who misclassify individuals as independent contractors. Why? Money is a key issue.

There are a few other employment law cases on the Court's docket as well. In *Patino v. Birken Manufacturing Co.*, the Court is being asked to decide whether a cause of action exists for a hostile work environment claim under state law, Connecticut General Statutes § 46a-81c. In *Velez v. State of Connecticut Department of Labor*, the Court is being asked to decide whether employees who do not work in Connecticut should be counted in determining whether an employer has 75 or more employees for purposes of the state's Family and Medical Leave Act.

Will the Connecticut General Assembly take a break from employment law issues?

8-Ball Says: ***Better Not Tell You Now.***

With the budget dominating the discussions in the legislature in 2011, it still ended up being a very busy year. Paid Sick Leave and the Gender Identity Anti-Discrimination bills were both passed. But there are still others that legislators keep raising year after year. Among the bills that you can expect to see raised in 2012 (based on what transpired in 2011): prohibition of so-called "captive audience" meetings at employers; prohibiting bullying in the workplace; the application of Connecticut's FMLA to public employees; allowing employers to use payroll cards in addition to direct deposit; requiring employers to give notice to employees of employee's entitlements and benefits.

Are we done with wage/hour classification issues?

8-Ball Says: ***My Sources Say No.***

2012 shows no signs of retreat from the government's interest in cracking down on employers who misclassify individuals as independent contractors. Why? Money is a key issue. People who are classified as employees bring more cash to the state's coffers. Indeed, now that various state agencies are starting to coordinate their activities together, expect 2012 to be a year of more headlines and more action.

And there is one final question for the Magic 8-Ball: Are all of these predictions correct?

8-Ball Says: ***Concentrate and Ask Again.***

In a year, we will. ■