

# TOP 10 EMPLOYMENT LAW DEVELOPMENTS OF THE DECADE: PART 1

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Legal Briefings - By **Barbara Roth and Tyler Hendry**

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As the 2010s have drawn to a close, it feels fitting to highlight the most significant U.S. labor and employment developments of the decade in quintessential 2010 fashion — through an internet top 10 list.

In this two-part article, we have selected one key development for each year. To warrant selection, the development must have dramatically shifted the labor and employment landscape the year it occurred, and it must continue to have an impact today.

The articles focus primarily on federal developments, but state law developments have been selected where they served as the catalyst for a nationwide trend or otherwise had an impact far beyond state lines. In addition, in part two, we will reveal our overall pick for the most important labor and employment development of the decade.

Without further ado, here are the top labor and employment developments for the early years of the decade — from 2010 to 2014.

## **2010: THE EEOC ISSUES EMPLOYER REGULATIONS TO IMPLEMENT GINA.**

The Genetic Information Nondiscrimination Act was signed into law in 2008. The Human Genome Project was complete and many experts predicted that genomic medicine, which uses an individual's genetic information to help inform clinical care, would become a part of mainstream medical practice.

The anticipated increase in genetic information collection brought concerns of potential misuse by employers and insurers. GINA arose from those concerns.

In late 2010, after a two-year wait, the U.S. Equal Employment Opportunity Commission issued final regulations to implement GINA's employer provisions. The regulations (1) broadly defined genetic information to include information about an individual's personal genetic tests, genetic tests of family members, and family medical history; (2) prohibited employers from collecting, requesting or disclosing this genetic information; and (3) prohibited employment decisions based on genetic information.

Since its implementation, GINA has resulted in a significant number of class actions over employer medical tests and family history inquiries, and it was the vehicle behind one of the most notorious employment lawsuits of the decade. Coined by national news outlets as the case of the devious defecator, a jury awarded \$2.2 million to workers who were forced to take a DNA test as part of the company's investigation into who was leaving feces around the company's warehouse.

However, it is not that case that warranted GINA's selection on this list, but rather its impact on the implementation of employee wellness programs. Because of employer inquiries and lawsuits relating to the terms and implementation of wellness programs, the EEOC issued final rules in 2016 amending the GINA regulations to specifically address wellness programs. Still, class action litigation persists, the most recent involving a class of 5,000 employee participants in a wellness program at Yale University.

As wellness programs continue to proliferate and scientific advances continue, the impact of these regulations will continue through the 2020s.

### **2011: THE SUPREME COURT RAISES THE THRESHOLD FOR CLASS ACTION CERTIFICATION.**

In *Wal-Mart Stores Inc. v. Dukes*, the U.S. Supreme Court clipped the wings of mammoth employment discrimination class actions. The decision — labeled by the U.S. Chamber of Commerce as "the most important class action case in more than a decade" — decertified a nationwide class of 1.5 million current and former female Walmart employees alleging gender discrimination in violation of Title VII. The court held that the lower court's certification of a class was improper because there was no evidence that the nationwide group was subject to the same discriminatory employment policy.

Before this decision, the standards for certifying a class were lenient and denials were rare. The court's decision, which has been cited nearly 5,500 times, has resulted in smaller class sizes, careful scrutiny of certification decisions by the lower courts, and efforts by defendants — with mixed results — to expand the reasoning in *Dukes* to other types of class actions.

For its reshaping of class action litigation, *Dukes* is one of our finalists for the most important development of the 2010s.

### **2012: THE NLRB TAKES AIM AT SOCIAL MEDIA AND OTHER COMMON EMPLOYEE HANDBOOK POLICIES.**

Beginning in late 2011 and continuing into 2012, the National Labor Relations Board set its sights on employer social media policies and employee social media use. At that time, when people spoke of social media, by and large they were referring to Facebook and Twitter, and this was the focus of the NLRB decisions and guidance.

The significance of the decisions and guidance, however, went beyond social media policies, thus warranting its inclusion on this list. The guidance deemed certain employment policies and provisions that had been standard language in employee handbooks for decades to be unlawfully broad.

For example, certain confidentiality policies, nonsolicitation policies, general courtesy and professionalism policies, and policies addressing contact with third parties were scrutinized and deemed overly broad because they were found to potentially limit an employee's right to engage in protected, concerted activity.

As a result, 2012 brought many significant handbook revisions. The NLRB's scrutiny of handbook policies continued through most of the decade, but it was loosened in late 2017 by an NLRB controlled by a Republican majority. The NLRB's enforcement priorities typically shift based on the political party occupying the White House, and depending on developments in the 2020s, this scrutiny may return.

### **2013: THE SUPREME COURT NARROWS THE DEFINITION OF SUPERVISOR UNDER TITLE VII.**

Employer liability for workplace harassment under Title VII often turns on whether the alleged harasser is considered a supervisor, because employers are generally strictly liable for the conduct of supervisors. In *Vance v. Ball State University*, the Supreme Court limited the definition of supervisor to those individuals with the authority to take tangible employment actions — defined as the power to hire, fire, demote, promote, transfer or discipline — against the employee.

Prior to this decision, several circuit courts and the EEOC took a more open-ended approach to supervisory status, tying it to the ability to exercise significant discretion over another person's daily work. The court explicitly rejected this open-ended approach, and in doing so removed those individuals with the power to direct day-to-day activities and assignments from the definition of supervisor.

Cited in nearly 1,000 cases, *Vance* is regularly a determining factor at the summary judgment stage of a lawsuit.

### **2014: PAID SICK LEAVE LAWS SPREAD ACROSS THE U.S.**

In 2014, two states and 13 localities — including New York City — passed and/or implemented paid sick leave laws, setting in motion a trend that has continued through the decade.

At the state level, California and Massachusetts enacted comprehensive paid sick leave laws, becoming only the second and third states to do so. Connecticut became the first in 2011, but the movement did not gain traction until 2014.

Since then, Arizona, Georgia, Illinois, Maine (effective 2021), Maryland, Michigan, Nevada (effective 2020), New Jersey, Oregon, Rhode Island, Vermont and Washington have followed suit and enacted some form of paid sick leave. At the local level, there are now an additional 20 cities and three counties with sick leave laws.

With no form of mandatory paid leave at the federal level, it is expected that states will continue to expand paid leave programs for illness and other reasons, largely thanks to the aggressive movement in 2014 that paved the way.

In part two, we will cover the final five developments of the 2010s, and we will name our top U.S. labor and employment development of the decade.

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*This article was first published on [Law360](#)*

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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