

THE COMING REGULATORY AVALANCHE:

Engineering Practical Employment and Labor Law Compliance Solutions

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This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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THE COMING REGULATORY AVALANCHE: Engineering Practical Employment and Labor Law Compliance Solutions

INTRODUCTION

In early 2010, the relentless snow fell in Washington, D.C., crippling the city and surrounding suburbs and bringing the federal government almost to a grinding halt. For the first time in 30 years, the U.S. Postal Service failed to deliver mail on Saturday.¹ With only essential personnel asked to report to work, the storm dubbed “Snowmageddon” by President Obama was a symbolic precursor to the avalanche of regulations that U.S. employers would expect from the Administration in the following months. While healthcare reform was narrowly approved by Congress, the mid-term elections clearly signaled that the prospects are dim for any new employment legislation during the coming term. Even so, this has not stalled the Obama Administration’s agenda of strengthening employee rights in the workplace as evidenced by the ongoing efforts involving new and proposed regulations, informal directives and heightened agency enforcement efforts. The regulatory “reforms” during the second half of President Obama’s first term promise to create the greatest workplace compliance challenge for employers within the last 100 years. Like the snow storms of 2010, the regulatory “avalanche” is making history.

The focus of this 2011 Littler Report is to provide employers with information to prepare and plan for regulations recently passed and those currently making their way through the agency rulemaking process. Part One of this Littler Report will set the stage and define the challenge employers will face in the coming years as the Obama Administration enters the second half of its term. Part Two of this Report provides a comprehensive analysis of the various regulatory activity that employers can expect from the various federal agencies as they relate to employment and labor law developments.

Of utmost importance to employers, is what to do to prepare for this avalanche of new regulations and the incumbent changes in business strategy and processes. Overall compliance with the coming regulatory avalanche is provided in Part Three, The Littler Seven Step Compliance Program. As expected with a 21st-century Compliance Program, technology-enabled solutions are an essential part of the Littler Plan. Additionally, practical compliance recommendations are provided following each section and summarized in Appendix A. When the sets of recommendations appear to overlap, the critical difference is that the Littler Seven is intended for those professionals who are responsible for multiple-agency compliance, while the recommendations following each section focus on the specific agency discussed.

PART ONE: The Regulatory Avalanche—Defining the Challenge for Employers

The 2010 midterm Congressional elections altered the balance of power in Washington, and, with it, the pathway for dramatically transforming the workplace through federal employment and labor policy. President Obama took office in 2009 with large Democratic majorities in Congress and even larger expectations for an extremely ambitious employment and labor legislative agenda. Enactment of the Lilly Ledbetter Fair Pay Act² (Ledbetter Act) on January 29, 2009, was seen as a precursor to a flurry of perceived pro-employee and organized labor legislation. Yet, these bills generally were cast aside as healthcare reform consumed the Congressional calendar and topped the White House's priorities. The prolonged healthcare debate followed by Wall Street reform left little time or appetite for lawmakers to tackle controversial employment and labor legislation in the remainder of the 111th Congress. Republican gains last November may have sealed the fate of bills such as the Employee Free Choice Act (EFCA),³ the Paycheck Fairness Act⁴ and the Robert C. Byrd Miner Safety and Health Act of 2010⁵ in Congress, but they have not tempered efforts to achieve similar objectives through other means.

In 2011, with a Republican-controlled House of Representatives and a closely divided Senate, the legislative avenue for pursuing the agenda that began with passage of the Ledbetter Act is effectively closed. Legislation favoring organized labor or creating new employee rights will not likely be considered in the House during the 112th Congress, much less pass. Prospects for significant employment and labor legislation are dim even in the Senate, where Democrats retain a slim 53-47 seat majority, well short of the 60 votes needed to overcome a filibuster. However, employers should not find comfort and complacency in the legislative logjam. Employers are facing changes of perhaps an even greater magnitude from another direction. An avalanche of regulatory actions coming from the federal government, and some state governments, awaits them. An avalanche that can overwhelm unprepared employers has already formed, and changes have, indeed, begun.

While Congress and the country focused their attention elsewhere, a revolution in employment and labor policy has been underway at the federal agencies. The seeds of change were planted over the past two years as the Obama Administration installed strong pro-labor advocates in key agency political positions. From the Department of Labor (DOL) to the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC) and beyond, federal workplace policy is being driven by leaders fiercely committed to redefining the way employment and labor laws are interpreted and enforced. Under their leadership, the

agencies are steering employment and labor law in a direction that Congress will not. Encouraged by special interests and supported by the plaintiff's bar, employment law and its practical impact on the workplace is poised to change more in the next two years than in the prior twenty. Through rulemaking and other administrative action, the Administration is advancing its workplace agenda even further, in some cases, than what could have been accomplished through stalled legislation.

The regulatory route to workplace reform is, in many ways, smoother and more direct than the legislative route. Rulemaking does not require the same negotiation and compromise involved in passing legislation through Congress. Accordingly, the agencies have a freer hand to craft regulations that further their agenda. The critical interpretation and implementation of employment and labor law is within the purview of the regulators. Though the agencies are bound by statutory authority and administrative law, the regulators are given considerable latitude in their interpretation. Regulations can be reversed under the Administrative Procedures Act⁶ upon showing that the action was "arbitrary and capricious," failed to follow procedural requirements or exceeded statutory authority, a difficult standard for challengers to meet. Although Congress can block agency funding or overturn regulations pursuant to the Congressional Review Act, the political realities of a divided Congress suggest otherwise.

The Obama Administration appears intent on using the regulatory process to reshape the American workplace. At the DOL, this work has already begun, and only will intensify with the Congressional stalemate. The DOL's Fall 2010 Regulatory Agenda,⁷ which lists all the regulations the Department expects to actively consider in the coming six to 12 months, is both a roadmap and a warning for employers about the impending regulatory avalanche. As announced in the Regulatory Agenda that was released on December 20, 2010, the DOL already has completed 18 rulemakings. A total of 35 regulations are at the proposed rule stage while 25 rules are at the final stage of development. In addition, 13 proposals are at the pre-rule state and another eight are slated for long-term action.

Federal regulatory activity that can significantly impact employers is not limited to the DOL. The EEOC has embarked on an ambitious rulemaking agenda that extends beyond implementation of recently enacted legislation. The NLRB and National Mediation Board have turned to rulemaking to alter the labor-relations landscape. Employers need to recognize that change is coming from other agencies as well. The Department of Health and Human Services (HHS) is playing a crucial role in implementing the Patient

Protection and Affordable Care Act,⁸ the sweeping healthcare reform law that can fundamentally remake the compensation and composition of the American workforce. The HHS also is charged with interpreting the health information technology and privacy provisions of the American Recovery and Reinvestment Act.⁹ The Dodd-Frank Wall Street Reform and Consumer Protection Act¹⁰ contains important new employment-related provisions that the Securities and Exchange Commission, among other agencies, is charged with implementing through regulations.

Employers need to look beyond regulations to appreciate the magnitude of the avalanche approaching them. A seismic shift in workplace policy is occurring below the surface at the sub-regulatory and enforcement level. The agencies are using sub-regulatory guidance to effectuate change in employment and labor policy. Sub-regulatory guidance, which falls outside the public notice and comment requirements for rulemaking, is a less transparent, but no less effective tool to shape federal workplace law.

Enhanced enforcement is a common thread among the various agencies with jurisdiction over employment and labor laws. Employers can see the Obama Administration's commitment to vigorous enforcement in the form of more investigations, audits and charges. What employers may not recognize is that enforcement begins long before the investigator arrives at the door. It begins with the federal budget process that allocates money to the agencies and maps out how those funds will be used. The Administration has altered the landscape of employment and labor law by increasing and redirecting resources towards investigating and prosecuting violations of workplace law.

Secretary of Labor Hilda Solis described the new enforcement landscape for employers several months after taking office in March 2009:

As I have said since my first day on the job — make no mistake, the Department of Labor is back in the enforcement business. You can see this commitment echoed in my Fiscal Year 2010 Budget request. This budget will return our worker protection efforts to a level not seen since 2001.¹¹

The Fiscal Year 2012 Budget Request for the DOL continues this trend. The Department's Fiscal Year 2012 proposed budget seeks \$12.8 billion in discretionary budget authority.¹² Although the proposal would reduce the DOL's overall discretionary spending by 5% from current levels, the budget would increase funding for the agencies charged with regulating and enforcing worker protections. Although federal funding must be approved by Congress, where it faces opposition and uncertainty, it should be clear to

employers that the Obama Administration is, indeed, "back in the enforcement business."

As companies struggle to compete in the global economy, an effective strategy for facing the regulatory and enforcement avalanche is a business imperative. Employers are not left without a voice in the regulatory process, nor are they left without a means of preparing for and complying with the changes ahead. The federal rulemaking process, which requires a public notice and comment period for regulatory proposals, affords employers an opportunity to register their concerns with the agencies. In addition, Republican-controlled House Committees are closely scrutinizing agency activities and the impact of rulemaking on economic growth and job creation. President Obama has himself called upon the agencies to consider the burden of regulations on business and competitiveness. Executive Order 13563 directs agencies to identify and use the "least burdensome tools for achieving regulatory ends."¹³ Even so, the Obama Administration is not likely to reverse the course of its employment and labor policy. However, by alerting policymakers to the impact of regulations on economic growth and job creation, employers have an opportunity to at least moderate the rate of change.

This blizzard of ongoing and potential changes may not be well understood or anticipated by employers. Those employers that do understand and are prepared for these changes have a competitive advantage over those that do not. Viewed in isolation, regulatory, sub-regulatory and enforcement activity by individual federal agencies creates significant new obligations for employers. Viewed in a broader context, Administration-wide efforts to recast the interpretation and enforcement of workplace laws dictate that employers fundamentally revisit their compliance strategies. The sweeping nature of the Administration's activity touches all areas of employment practices and threatens the competitiveness of U.S. employers. It requires a proactive, coordinated, and comprehensive response. For at least the next two years, as the Obama Administration seeks to administratively implement its employment and labor agenda, nothing less will be effective.

PART TWO: Regulatory Developments

Before the avalanche of new regulatory, sub-regulatory and agency enforcement actions gains too much momentum, employers need to methodically review the agendas and developments in the numerous federal agencies charged with furthering the Administration's employment and labor law agenda. In order to get a better handle on the types of changes awaiting employers, Part Two of this Report is divided into sections covering the full range of employment and labor law regulatory topics including wage and hour compliance, labor management relations, equal employment opportunity, retirement and healthcare plans, executive compensation, whistleblowers, employee privacy, workplace safety and immigration.

I. WAGE AND HOUR ISSUES

Secretary of Labor Hilda Solis ("Solis") began to set a new tone at the Department of Labor (DOL) by declaring immediately after her confirmation that "the Department of Labor is once again back in the enforcement business."¹⁴ Over the last two years, the leadership at the DOL's Wage and Hour Division (WHD) has embraced this policy direction—as every new initiative or program has focused on increasing punitive enforcement, with decreased resources designated to assisting good faith employers trying to comply with the wage and hour laws. This change in direction adds new challenges to employers already burdened by class actions and requires a renewed assessment of what compliance efforts are necessary.

A. The Leaders at the Wage & Hour Division

The Administrator of the WHD is the senior official at the DOL responsible for directing all activities of the agency to ensure compliance with the federal Fair Labor Standards Act (FLSA). The Administrator, a position created by the FLSA, is appointed by the President and confirmed by the U.S. Senate.¹⁵ The last Senate-confirmed Administrator of the Wage & Hour Division was Tammy D. McCutchen, now a shareholder in Littler's Washington, D.C. office. This position has remained vacant during the Obama Administration.

In the absence of a confirmed Administrator, the senior political appointee at the WHD is Deputy Administrator Nancy Leppink ("Leppink"), who was designated as the Acting Administrator in January of 2011. The Solicitor of Labor is M. Patricia Smith ("Smith"). She also likely has a significant role in setting policy for the WHD. Like most of the other senior political appointees at the DOL, both Leppink and Smith have very little, if any, experience working for a private-sector employer. And, significantly, both of them played a key role in their prior positions addressing the misclassification of

workers as independent contractors, which as seen below, is a key focus of the WHD.

B. The Regulatory Agenda

The DOL, with the publication of its Spring 2010 Regulatory Agenda, announced a new department-wide strategy for regulation and enforcement—the "Plan/Prevent/Protect" initiative. Under the Plan/Prevent/Protect umbrella, the DOL proposes to require employers "to assemble plans, create processes, and designate people charged with achieving compliance." Employers "will be required to implement these plans and evaluate their effectiveness in achieving compliance."

DOL's Plan/Prevent/Protect strategy will require employers to take three steps to ensure compliance with the law:

- **Plan:** The DOL will "propose a requirement that employers and other regulated entities create a plan for identifying and remediating risks of legal violations." The DOL would require employers to "provide their employees with opportunities to participate in the creation of the plans," and "the plans would be made available to workers so they can fully understand them and help to monitor their implementation."
- **Prevent:** The DOL will "propose a requirement that employers and other regulated entities thoroughly and completely implement the plan in a manner that prevents legal violations."
- **Protect:** The DOL will "propose a requirement that the employer or other regulated entity ensures that the plan's objectives are met on a regular basis. Just any plan will not do. The plan must actually protect workers from violations of their workplace rights."

Underlying this strategy seems to be an assumption that employers have no interest in compliance with the FLSA, and will only implement compliance programs if forced to do so through regulation. According to Deputy Labor Secretary Seth Harris ("Harris"), the DOL seeks to replace the employer strategy of "catch me if you can." Harris described the "catch me if you can" strategy as employers depending "on luck or coincidence to avoid the violations of workers' rights or, perhaps worse, they make a calculated decision whether to comply with employment laws. They assess the benefits of refusing to comply with the law and compare them to the costs of complying with the law. Then, they weigh these costs and benefits against the likelihood they will be caught and the penalty they might suffer if they are caught."¹⁶

The DOL has not yet published a proposed regulation requiring employers to create compliance plans, but confirmed its commitment to the Plan/Prevent/Protect strategy in its 2010 Fall Regulatory Agenda.

Also in the Spring 2010 Regulatory Agenda the WHD announced a Notice of Proposed Rulemaking concerning the FLSA recordkeeping requirements. The DOL intends to issue regulations that update the recordkeeping regulations to “foster openness and transparency, to increase awareness among workers and to encourage greater compliance by employers.” The DOL has dubbed the proposed rule as a “right to know” requirement. The rule will impose additional notice requirements and mandate that employers notify their employees about their rights under the FLSA and to provide detailed information about overtime exemptions, hours worked and wage computations.

The most onerous proposal will require employers to conduct a “classification analysis, disclose that analysis to workers, and retain the analysis to give to [DOL] enforcement personnel...” The DOL has also hinted that the new rule will somehow alter the burdens of proof in an exemption case if the employer has failed to comply with the new recordkeeping and notice requirements.

C. FY 2012 Budget Request

In its FY 2012 budget request to Congress, the U.S. DOL seeks an appropriation of \$240.9 million and 1,677 full-time equivalent employees (“FTEs”) for the Wage and Hour Division—an increase of \$13.3 and 95 FTEs over FY 2011 levels. The FY 2012 budget request is an increase of \$65.2 million and 469 FTEs over FY 2008.

The Wage & Hour Division plans to spend an additional \$15.2 million and add 107 investigators to support its “Misclassification Initiative,” discussed in section D, below. To fund the Misclassification Initiative, in addition to the requested appropriation, the Wage & Hour Division will *decrease* resources for the Employer Compliance Assistance Program and Call Center by \$2,029,000 and 12 FTEs. In short, the DOL plans to increase funding for enforcement, while decreasing resources currently designated to assist employers in understanding and complying with the law. The Misclassification Initiative, however, is not confined to the WHD. Rather, the DOL has requested a total increase of \$46 million for six DOL agencies to support the initiative.

The FY 2012 budget documents also reveal the WHD’s intention to work more closely with workers, worker advocates, community organizations and unions while decreasing the level of partnerships with employers and decreasing funding for employer compliance assistance. Although the WHD no longer enters

formal partnership agreements with employers, the agency intends to develop partnerships with “worker and community-based organizations” that will “represent the collective benefit of the workforce, be a means for disseminating information on rights and/or obligations, and mitigate the fear of retaliation among workers who seek assistance in remedying violations.” Further, the agency plans an “aggressive awareness campaign to workers” where “worker advocates, community organizations, and unions will help engage workers in preventing and identifying violations.”

D. Enforcement Initiatives

Misclassification Initiative

Solis testified before a House subcommittee hearing in March 2010 about the DOL’s employee Misclassification Initiative designed to deter employers from wrongly categorizing employees as independent contractors. Solis explained that this Initiative would use \$25 million to create a multi-agency program to strengthen and coordinate federal and state efforts to enforce statutory prohibitions on misclassification, and identify and deter instances of employee misclassification as independent contractors. The Misclassification Initiative supports new, targeted efforts to recoup unpaid payroll taxes through state audits of problem industries supported by federal audits. The program rewards the states that are the most successful or improved at detecting and prosecuting employers that fail to pay the appropriate taxes due to worker misclassification. According to Harris, the goal of having a multi-agency collaborative approach to the Misclassification Initiative is to ensure “employers will no longer be able to opt employees out” of statutory and regulatory protections.

In a January 2011 Q&A session conducted by the WHD concerning the fall regulatory agenda, Leppink explained that the Treasury Department is a key partner in the Initiative to detect and deter the misclassification of employees as independent contractors. She stated that the DOL and the Treasury were coordinating their efforts to detect violations arising from misclassification because such misclassifications generate substantial losses to the Treasury and the Social Security, Medicare, and Unemployment Insurance Trust Funds. She also explained that the program targets certain “high-risk” industries that can expect an increase in investigations. Targeted industries are construction, janitorial work, home healthcare, child care, transportation and warehousing, meat and poultry processing and other professional and personnel service industries. Leppink stressed that certain studies indicated that the construction industry, in particular, was rife with employee misclassification. Therefore, the construction industry is likely to see the highest increase in misclassification investigations.

Furthermore, the WHD will also target specific employers who are identified as having misclassified employees or groups of employees. Finally, the WHD is targeting what they refer to as “fissured” industries—“those sectors that increasingly rely on a wide variety of organizational methods that have redefined employment relationships: subcontracting; third-party management; franchising; independent contracting; and other contractual forms that alter who is the employer of record or make the worker-employer relationship tenuous and less transparent.” With an enhanced emphasis on enforcement, employers, particularly those in the industries identified above or those with unique employment relationships, can expect that their worker classifications will receive significantly greater scrutiny by the WHD and other partner agencies.

Low-Wage Industries

The WHD has traditionally targeted employers in low-wage industries for wage and hour violations. Historically, garment manufacturing and agriculture were the two major targets. In 1997, the healthcare industry was added as one of three nationwide sectors in which the WHD concentrated its efforts. The list of industries currently in the WHD crosshairs has ballooned to at least nine with the additions of day care, restaurants, guard services, hotels and motels, janitorial services and temporary help.

The agency targets low-wage industries based on the theory that employees in these sectors may not otherwise have a lot of options for addressing wage-hour violations. According to a WHD fact sheet, the Division also chooses certain types of low wage industries for investigations because of the high rates of violations, the employment of vulnerable workers, as well as the quick changes in the growth or decline of the businesses. For example, the WHD recently identified the hospitality industry along with other low wage industries as “high-risk” in regard to the frequency of federal wage and hour violations against vulnerable workers. As a result, the DOL has planned an initiative that will target the hospitality industry across the country with audits and investigations. Two principal reasons the hospitality industry is a target is that these employers hire large numbers of younger employees and/or employees who are H2B workers, and the WHD considers hospitality to be a “fissured industry” as discussed above.

The Bridge to Justice Program

The “Bridge to Justice” Program was launched by the DOL on December 13, 2010. The program is a collaboration between the WHD and the American Bar Association Standing Committee on Lawyer Referral and Information Service. The WHD now provides attorney referral information to complainants if their FLSA or Family Medical Leave Act (FMLA) claims are not pursued by the DOL.

The purpose of the referral is to assist the complainant in hiring an attorney to pursue private litigation claims against employers. In its description of the program, the WHD states that it received over 40,000 complaints in 2010 and, due to limited resources, many of these complainants were turned away. Under the new initiative, employees will be given a toll-free number to obtain referrals to attorneys in their area so that more complainants have options. The program will undoubtedly result in an increase in FLSA and FMLA cases.¹⁷

E. Informal Guidance

The Obama Administration promptly changed one legacy source of guidance for employers and employees—the opinion letter. The DOL declared that the WHD would no longer issue fact-specific opinion letters, but would replace the opinion letters with Administrator Interpretations of broader scope. Opinion letters had been issued since shortly after the passage of the FLSA in 1938. Reliance on the written advice of the WHD was made a defense to liability under the FLSA by the Portal-to-Portal Pay Act of 1947.

The demise of the opinion letter was made vivid by the Obama Administration’s withdrawal of opinion letters—some mailed, some signed but not mailed—in the last days of the Bush Administration. Nearly 20 opinion letters were withdrawn.¹⁸ The Administrator Interpretations issued to date under the FLSA are few. One Interpretation addressed the exempt status of mortgage loan officers. Perhaps not surprisingly, the Interpretation found in sweeping and generalized terms that such employees could not be overtime exempt administrative employees.¹⁹ In another Interpretation, the WHD narrowly interpreted the “clothes” the changing of which could be excluded from compensable work time by the terms of, or a practice under, a collective bargaining agreement.²⁰

The DOL’s interpretations have received mixed acceptance from the courts. Perhaps the best example of that mixed interpretation is the divergent opinions of the Second and Ninth Circuits concerning pharmaceutical representatives. In *re Novartis Wage & Hour Litigation*,²¹ the Second Court of Appeals concluded that the DOL’s interpretation of what activities comprised sales was entitled to substantial deference. Just months later, the Ninth Circuit Court of Appeals in *Christopher v. SmithKline Beecham Corp.*,²² reached exactly the opposite conclusion. The court’s opinion finely parsed the DOL’s guidance and then concluded that the DOL’s interpretation was entitled to no deference because it did nothing more than reiterate the terms of the statute and then offer a conclusion.

F. Unannounced Procedural Changes

In addition to its publicized regulatory agenda and unprecedented outreach to employees, labor unions, worker and community advocacy groups and plaintiff-side employment lawyers, the WHD has quietly changed certain longstanding procedures that promise to have as great an adverse impact on employers as the proposed regulatory changes. In general the changes outlined below are making it harder for employers to work cooperatively with the DOL to correct possible compliance issues and obtain a valid release of FLSA claims even when paying back wages. Additionally, the DOL is pursuing more aggressive damage theories in investigations including a three-year statute of limitations, liquidated damages and civil money penalties.

Partnerships with Employers

During past administrations, the DOL encouraged employers to self identify potential violations and work cooperatively with the DOL in compliance partnerships to issue supervised back wage payments. Employers across the country successfully worked with the DOL to correct potential violations and issued supervised back wage payments to affected employees. These arrangements were mutually beneficial to employees and employers as they fostered legal compliance and ensured employees received back wages without the need to pay a lawyer some portion of their back wage recovery and await an uncertain outcome in litigation. Some plaintiffs' lawyers objected to these compliance partnerships and lobbied successive administrations to eliminate them. It appears that plaintiffs' lawyers finally found a willing ear in Secretary Solis. Under her leadership, the DOL has largely abandoned voluntary compliance partnerships and, embraced instead, a compliance model premised on adversarial proceedings through investigations and litigation.

Waiver Forms

During previous administrations, the DOL willingly supervised the payment of back wages such that employers could obtain valid releases of FLSA claims in exchange for the payment of back wages. As evidence of the DOL's review and approval of the back wage payments, the DOL would provide an employer with a release form, known as the WH-58, Receipt for Back Wages, which was sent to employees along with actual back wage payments. Several courts have held that a valid release cannot be obtained in a DOL investigation without the use of the WH-58. In sharp contrast with its past practice, the current DOL is now only offering employers the WH-58 in what it is characterizing as a "full" investigation. Equally troubling, even when insisting on the payment of back wages the DOL does not advise employers that such payments will not result

in a valid waiver unless accompanied by the receipt form. This change is a trap for the unwary employer who may not be aware of this nuance in FLSA law.

Extended Statute of Limitations for Back Wages and Liquidated Damages

During past administrations, it was standard practice for the DOL to seek only two years of back wages during a routine investigation. The DOL has now signaled in any number of investigations that it will seek up to the maximum of three years where it believes an employer has willfully violated the Act. The DOL is also pursuing liquidated damages in more cases where it rarely did so in the past.

Civil Money Penalties

In appropriate cases, the DOL can impose an administrative penalty known as civil money penalties, for violations of the minimum wage, overtime and child labor provisions of the Act. While civil money penalties have been imposed during prior administrations the current administration has pursued these penalties more aggressively than in the past.

G. Family Medical Leave Issues

Military Leave Issues

With regard to military leave issues, the WHD has stated it plans to:

Initiate rulemaking to implement the new amendments to the military family leave provisions of the Family and Medical Leave Act (FMLA) contained in the National Defense Authorization Act for FY 2010. The [WHD] will review implementation of the military family leave amendments that were included in the National Defense Authorization Act for FY 2008, as well as other provisions of the FMLA regulations that were revised and implemented in January 2009.

The stated goal of the Secretary in pursuing this regulatory agenda is to provide flexibility for the middle class and assist it in maintaining health benefits during such leaves.

Funding for State Leaves

In the FY 2012 budget the DOL proposed a fund of \$23 million to assist states in setting up paid family leave programs similar to what already exists in California and New Jersey. If approved, these monies will be available as grants to help states set up paid family leave programs. The grants can be used to design a program, to set up a protocol to pass legislation to withhold taxes to fund the program,

research and analysis with respect to such a program and other steps needed to set up such a program for implementation by a state. The DOL opines that such programs are needed to enhance job retention and help workers stay on their career path.

H. What These Wage and Hour Developments Mean for Employers²³

The increasingly challenging regulatory environment in the near term requires four fundamental responses by the employer: (1) Get more involved in the regulatory development process; (2) re-assess the resources allocated to attaining and maintaining wage and hour compliance; (3) re-calculate within its compliance programs the risk-benefit analysis of when compliance is attained; and (4) use technology to increase compliance while reducing cost. Each response is addressed below.

- Re-assess organization's commitment to compliance. The outward facing aspects of compliance—monitoring developments from the DOL, monitoring litigation developments, and monitoring state developments—will all be important. The inward facing aspect of compliance—conducting trainings and conducting audits—will be more important. Of particular importance to the inward facing aspect of compliance will be responding promptly and effectively to new requirements promulgated by the DOL. Employers should budget and staff for this increased undertaking. Now is the time to review, strengthen and commit compliance programs to writing both to ensure compliance and to have a head start on the “Plan/Prevent/Protect” regulatory initiative.
- The compliance calculation within an employer's compliance efforts may change somewhat as a result of the DOL's regulatory and enforcement initiatives. While compliance that is risk free is an ephemeral and likely prohibitive undertaking, the assessment of possible risks must be undertaken with increased caution. For job classifications as to which there is any question as to the employees' exempt status, some relative risk control measures may be appropriate, such as reducing the hours worked, providing some compensation for weekend work, or creating a middle-tier of salaried employees with overtime. Nonexempt pay practices should be closely scrutinized, with particular attention to recording all work time down to adding time clocks to provide more accurate recording of hours worked. All systems that reflect employees' hours of work, such as email, log in/log out, and transactional databases need to be reviewed side by side to ensure that they provide a consistent

record of employees' hours of work. Employers should be taking steps to ensure that all pay processes, including the calculation of the overtime rate, the rounding of time, the timeliness of delivering paychecks, and any deductions from paychecks are in total compliance.

- Use technology to increase compliance while reducing cost. Increasingly compliance will depend on the efficient use of technology. Presented in Part Three of this Report is a more expansive discussion of new technology driven compliance solution. For Wage and Hour compliance one of the revolutionary innovations has been legally engineered online training programs for managers and a shortened version for employees. This is a way to get wage and hour policies circulated, explained, and receive a commitment for compliance. For more details see Part Three of this Report discussing the Littler Seven Step Compliance program and Appendix A.

The regulatory initiative will present new challenges that will require a broad-based response from employers. That response must start with addressing the burdens and excesses in the regulatory agenda and extend to re-examining the resources and processes needed to ensure a higher level of compliance.

II. LABOR MANAGEMENT RELATIONS

A. Who Comprises the New Obama National Labor Relations Board (NLRB)

The NLRB is composed of five Members, who are appointed by the sitting President to staggered five-year terms, with one seat expiring per year. Since January 2009, Wilma B. Liebman has been the Chairman of the NLRB. She is an ardent supporter of unions and a vocal critic of right to work laws. A strong dissenter in many NLRB decisions in favor of employer rights issued during the Bush Administration, Chairman Liebman is presently working with her fellow members to pen NLRB decisions to promote unions and employee rights to unionize. In March 2010, President Obama nominated Craig Becker, Mark Pearce and Brian Hayes to sit on the NLRB. Messrs. Pearce and Hayes were confirmed as NLRB Members, and Mr. Becker was given a recess appointment through December 31, 2011. Member Becker, who served as Associate General Counsel to both the Service Employees International Union and the AFL-CIO, remains controversial given his divisive views regarding limitations on an employer's role during a representation election campaign and the use of card checks in lieu of democratic elections.

B. The Obama NLRB's Regulatory Agenda

On December 22, 2010, the NLRB (or "the Board") published a proposed rule that would require all private sector employees covered by the National Labor Relations Act (NLRA) to post a notice informing employees of their NLRA rights.²⁴ This posting requirement would be imposed on all employers covered by the NLRA even if there is no union in place. The notice would be similar in form and content to the notice the DOL recently approved for use by federal contractors, and includes an extensive listing of employee rights arising under Section 7 of the NLRA, many of which employees may not generally be familiar with, particularly in non-union environments.

The proposed rule requires the notice to be posted where other workplace notices are typically posted. According to the rule, if a company communicates with employees through electronic means, the notice would have to be posted electronically as well as provide a link to the NLRB's website.

Significantly, an employer's failure to post the notice under the proposed rule would be treated as an unfair labor practice and could warrant tolling of the six-month statute of limitations for filing ULP charges. An employer's knowing failure to post the notice could also be considered as evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA.

Comments to the proposed rule were due on February 22, 2011. The reception that the proposed rule receives will probably be a factor in whether the NLRB will avail itself of its rulemaking power more frequently in coming years.

Signaling a potential change in the long-standing secret ballot election process, in June 2010 the NLRB sought information regarding the viability of electronic and internet voting in representation elections. This request through the NLRB's contracting office signaled to the business community that the new Board is continuing to explore ways to reduce reliance on secret ballot elections in the aftermath of the failed efforts to pass the Employee Free Choice Act (EFCA).

C. Recent NLRB Decisions and the Changing Landscape

Within the past six months, several decisions have been issued that highlight the Obama Board's significant efforts to change the course of labor relations in favor of expanded employee rights and private sector unionization.

In *J. Picini Flooring*,²⁵ the Board announced a new policy requiring remedial postings to be displayed electronically in

addition to physically. As many employers have viewed the notice posting remedy as nothing more than the proverbial slap on the wrist because the posting was limited to the employer's facility, the requirement for electronic dissemination will heighten its impact.

In *Kentucky River Medical Center*,²⁶ the Board increased the impact of the traditional backpay remedy by subjecting backpay to daily compounded interest, instead of computing interest quarterly.

In *Dana Corp.*,²⁷ the Board substantially expanded the permissible scope of neutrality agreements. Prior case law suggested that it would be unlawful for employers outside of the construction industry to "pre-negotiate" with unions the terms of their possible future collective bargaining agreements, before the union had obtained the support of a majority of the employer's employees in a unit appropriate for collective bargaining. In *Dana*, the Board approved a neutrality agreement in which the company and the union agreed on certain governing terms and principals that would be included in any collective bargaining agreement should the union become certified at new locations. The Board reasoned that the employer and the union had merely agreed on a "framework" for future bargaining. This new ability to essentially pre-negotiate at least some provisions of future collective bargaining agreements may make neutrality agreements more attractive to some employers, and may therefore serve to aid unions in expanding their presence in an employer's workforce.

In *Parexel International L.L.C.*,²⁸ the Board held an employer liable for discharging an employee under the "preemptive discharge theory." Under this new theory, an employer may be liable for discharging an employee if the Board concludes the discharge was a "preemptive strike" to prevent the employee from engaging in protected conduct, before the employee actually engaged in any protected conduct.

In *Hawaii Tribune-Herald*,²⁹ the Board held that an employer violated the Act by firing an employee who secretly recorded a meeting with his supervisor. The Board implied that any work rule prohibiting employees from making clandestine audio recordings in the workplace might be deemed unlawful, if the rule did not include an express exception for recordings made in an effort to protect or advance employee rights under Section 7.

Additionally, the Board's complaint and subsequent settlement of unfair labor practice charges against ambulance service provider AMR on February 7, 2011, serve as a warning shot to employers about the permissible scope of social networking and Internet use policies. In that case, the Board took issue with the employer's policy prohibiting employees from "making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's

superiors, co-workers and/or competitors” in online postings.³⁰ The General Counsel concluded that this policy unlawfully interfered with employee rights to freely discuss wages, hours, and working conditions amongst themselves and with others, while on non-working time. In settling, the employer agreed to revise its rule and rescind discipline against an employee who called a supervisor a “mental patient” in a Facebook posting. Although the General Counsel’s position has not yet been approved by the Board or endorsed by any Administrative Law Judge or court, the AMR settlement gives a good indication of the approach the Board will likely adopt.

D. Office of the General Counsel (National Labor Relations Board)

Acting General Counsel Lafe Solomon

President Obama nominated Lafe Solomon to serve as General Counsel of the National Labor Relations Board on January 5, 2011. Solomon has been serving as Acting General Counsel since June 2010. Solomon is a career NLRB attorney. He has issued a series of aggressive internal directives seeking to toughen enforcement of the NLRA.

Enforcement Agenda

On September 30, 2010, General Counsel Solomon issued a memorandum to all of the NLRB’s Regional Directors, instructing them to consider seeking injunctive relief from the federal courts under Section 10(j) of the NLRA in any case in which it is alleged that an employer has fired a union supporter during a union organizing drive. Pursuant to the memorandum’s directive, the Board would seek a preliminary court order requiring the employer to reinstate the discharged employee while the underlying unfair labor practice charge is pending, in order to prevent the discharge from having a negative impact on the union’s organizing efforts.³¹

On December 20, 2010, General Counsel Solomon urged all Regional Directors to seek broader remedies in all cases where the Region determines an employer has committed “serious” unfair labor practices during a union’s initial organizing drive. Additional remedies include requiring a high-level representative of the employer to read the Board’s notice of the employer’s violations of the law aloud to all employees, and requiring the employer to provide the union with access to on-site company bulletin boards for posting pro-union campaign materials. In the most serious cases, General Counsel Solomon suggested it may be appropriate to require the employer to grant union representatives access to non-working areas on company property, such as employee break rooms, for the purpose of campaigning; to provide the union’s representatives with “equal time” to deliver a speech to assembled company employees,

if the employer chooses to deliver such a speech to its employees in advance of the election; and in some cases even to allow the union to deliver an on-site speech to assembled employees even if the company does not deliver any such speech.³²

In a memorandum issued on January 12, 2011, General Counsel Solomon directed that all settlement agreements, including both formal and informal compliance settlements, must include language under which the Charged Party agrees that in the event it fails to comply with any provision of the settlement agreement, the relevant Regional Office will be entitled to issue a complaint based on the underlying unfair labor practice charge, and the Office of the General Counsel will then be entitled to move for summary judgment on the complaint, with all allegations in the complaint being deemed admitted by the Charged Party. The only issue that may be litigated is whether the Charged Party in fact failed to comply with its settlement agreement.³³

In a memorandum issued on February 18, 2011, General Counsel Solomon delegated authority to the Board’s Regional Attorneys to seek enhanced remedies in bad-faith bargaining cases involving first contract negotiations with newly certified unions. Regional attorneys may now seek remedial orders requiring employers to read violation notices to assembled employees, extending the period during which employers must bargain in good faith with new unions before the Board will consider any decertification petition, and even imposing schedules for bargaining (such as requiring employers to bargain for at least twenty-four hours per month, and at least six hours per session). In some cases, the General Counsel indicated that he will also consider authorizing Regional Attorneys to seek orders requiring employers to reimburse unions for bargaining and litigation expenses. However, the pursuit of that remedy must still be approved by the Division of Advice on a case-by-case basis.³⁴

E. Department of Labor Office of Labor Management Standards

The DOL has announced its intent to propose new standards for interpretation and enforcement of the Labor-Management Reporting and Disclosure Act (LMRDA), as applied to employers regarding persuader activity during a union organizing campaign and otherwise.

Currently, the LMRDA, which focuses primarily on reporting and disclosure by labor organizations, contains sections requiring employers and outside labor relations consultants to file disclosure reports identifying any arrangement where the consultant was retained to: (1) persuade employees regarding union organizing or collective bargaining; and/or (2) obtain information about employer

or union activities related to a “labor dispute.” When there is reportable persuader activity, both the employer and the third-party consultant must file reports with the DOL that disclose detailed financial and other information as prescribed on the report forms.³⁵

LMRDA Section 203(c) provides an “advice exemption” from these reporting requirements. Since exempt advice is not considered reportable persuader activity, the advice exemption permits employers to consult with labor counsel about what the employer may and may not lawfully do during a union campaign.

The DOL’s proposed rule, at the very least, would narrow the scope of the “advice exemption,” and expand persuader reporting obligations under Section 203.³⁶ If the new regulations are enacted in the manner proposed, they could significantly impair employer speech rights and the right to obtain legal counsel during union organizing campaigns. Furthermore, even before the proposed rules have been issued, the DOL has embarked on a program of sending a notice to every individual who is identified as a representative of the employer in an NLRB representation proceeding. The notice informs the recipient that he or she may be a persuader and warns of the need for persuaders to comply with the LMRDA’s reporting requirements. Similar notices are being sent to employers in representation proceedings, advising them of their reporting obligations if they utilize a persuader.

F. National Mediation Board

The National Mediation Board (NMB) has changed a 75-year-old rule to make it easier for airline and railway employees to unionize. Under the old rule, the NMB, in most cases, required a vote in favor of representation by a majority of the entire craft or class of eligible voters before it would require an air or rail carrier to recognize a labor organization as the representative of the group. In other words, eligible workers in the airline and rail industries who did not cast a ballot in favor of the union were effectively counted as having voted against unionization. The NMB’s new rule provides that a simple majority of those who vote in a representation election will decide whether the entire craft or class becomes subject to union representation.³⁷

The new rule represents a significant shift in labor-management relations subject to NMB jurisdiction. Challenges to the change have so far been unsuccessful in the U.S. Senate and federal court.³⁸

G. What Do These Labor Law Developments Mean for Employers?

The NLRB’s agenda, General Counsel pronouncements, actions by the DOL regarding labor relations and developments by

the National Mediation Board clearly indicate that the following actions should be considered:

- All employers, and particularly non-unionized employers, should prepare for a labor environment in which employees are more often aware of their Section 7 rights, and in which the NLRB, DOL, and NMB interpret those rights more broadly than ever before.
- Employers should review their policies and procedures to ensure that written rules do not prohibit or discourage employees from engaging in “protected conduct,” and that managers are not disciplining employees for behaviors that likely qualify for protection. In many cases it now appears the NLRB will find that general policies requiring good conduct in the workplace violate Section 7, unless the policy—or at least the employer’s personnel manual—includes an express disclaimer indicating that no policy will be interpreted or enforced in a way that penalizes employees for engaging in protected conduct. Employers should consider the potential benefits of adopting such disclaimer language now, rather than risking that the Board will find the policy unlawful. Employers that are either facing an organizing drive or bargaining for a first contract after a successful organizing drive should take into account the enhanced penalties and more aggressive enforcement stance the Board and the General Counsel have adopted.
- Many of the “rules” for dealing with union organizing and for managing in a newly unionized workplace are counter-intuitive. Now more than ever, employers should ensure that every member of the management team—from front-line supervisors to policy-making executives—receives specific training and ongoing legal support before attempting to operate during an organizing drive or in a newly unionized environment.
- Finally, employers must either remain or become engaged in the administrative process. Whether by responding formally to proposed rules during comment periods, either as an individual company or through participation in an industry or trade organization, or by contacting legislative representatives to express concern over heavy-handed administrative tactics, employers are well advised to stay abreast of the many changes taking place in the administrative agencies that interpret and enforce private sector labor law in the United States, and to express concern when the changes appear unfair or excessive. Offering well-reasoned objections to seemingly excessively zealous administrative action may temper current changes, and may also serve to limit the scope of future efforts.

III. EQUAL EMPLOYMENT OPPORTUNITY

A. Equal Employment Opportunity Commission

The EEOC is composed of three Democratic Commissioners, Chair Jacqueline Berrien, Chai Feldblum and Stuart Ishimaru and two Republican Commissioners, Constance Barker and Victoria Lipnic. On December 23, 2010, the Senate officially confirmed Berrien, who had previously worked as Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, to a term ending on July 1, 2014. At the same time, the Senate confirmed Feldblum, who had been Director of Georgetown Law Center's Federal Legislation and Administrative Clinic, and co-director of Workplace Flexibility 2010, to a term ending on July 1, 2013.³⁹ Lipnic, who had served as U.S. Assistant Secretary of Labor for Employment Standards from 2002 until 2009, was confirmed for a term ending July 1, 2015. The Senate also confirmed P. David Lopez in the critical position of general counsel.⁴⁰ Barker's term expires July 1, 2011, and Ishimaru's term expires one year later. With the full five-member Democrat-controlled Commission and General Counsel now confirmed, employers can expect both an active regulatory agenda and aggressive and strategic enforcement activities.

EEOC Regulatory Agenda

The Commission already has in motion an extremely ambitious agenda, which includes recently enacted regulations involving the Genetic Non-Discrimination Act of 2008 (GINA), final regulations under the Americans With Disabilities Act Amendments Act (ADAAA), renewed focus on age discrimination issues and updated recordkeeping requirements. In connection with the regulatory Executive Order 13563, the EEOC solicited public comments on its plan to conduct a retrospective review of its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed, to make the EEOC's regulatory program⁴¹ more effective and/or less burdensome in achieving its regulatory objectives.⁴²

GINA Final Regulations

As one of its first acts as a full Commission, the EEOC approved the final regulations implementing Title II of GINA. The EEOC issued a final rule on November 9, 2010, providing long-awaited guidance on employer's compliance obligations under GINA, which implicate a number of policies and programs ranging from fitness-for-duty exams to wellness programs. The final regulations reflect, to some degree, consideration of employer concerns with the proposed rule.⁴³ The GINA regulations are discussed in more detail in Part II, Section VII, below.

ADAAA Final Regulations

On March 25, 2011, the EEOC issued the long-awaited final regulations implementing the ADAAA.⁴⁴ The ADAAA, which was signed into law on September 25, 2008, significantly expands the definition of disability, enabling more individuals to be covered by the ADA. In September 2009, the EEOC issued proposed regulations to reflect that the expanded ADA definition of disability should be interpreted broadly.⁴⁵ Following active outreach based on various public meetings held around the country, the EEOC approved the final regulations in December 2010 in a 4-1 vote, reflecting the new Commission crossing party lines to reach consensus in passage of the regulations.

Highlighting the importance of engaging in the public comment process, the final regulations address several key concerns raised by the employer community to some degree. Notably, instead of providing a list of impairments that would "consistently," "sometimes," or "usually not" be disabilities, the final regulations provide nine rules of construction to guide the analysis and explains that by applying those principles, there will be some impairments that virtually always constitute a disability. The final rule also provides examples of impairments that should easily be concluded to be disabilities, including epilepsy, diabetes, cancer, HIV infection, and bipolar disorder. In addition, language in the proposed rule describing how to demonstrate that an individual is substantially limited in "working" was deleted from the final regulations and moved to the appendix. The final rule also retains the existing familiar language of "class or broad range of jobs" rather than introducing a new term, as the proposed rule did. Unlike the proposed rule, the final rule does not explicitly address the issue of discrimination based on symptoms or mitigating measures under the "regarded as" prong. While the final rule made positive improvements compared to the initial proposal, employers should recognize that the ADAAA statute itself fundamentally altered the dynamics for ADA compliance by broadly expanding the law's coverage.⁴⁶

Proposed Rules Under the ADEA

Age discrimination clearly is an issue of concern to the Commission in view of recent U.S. Supreme Court decisions,⁴⁷ and the EEOC currently plans to proceed with its proposed rules clarifying both the meaning of the "reasonable factors other than age" (RFOA) defense used in an Age Discrimination in Employment Act (ADEA) claim,⁴⁸ and the disparate impact burden of proof under the ADEA.⁴⁹ In *Smith v. City of Jackson*,⁵⁰ the U.S. Supreme Court held that disparate impact claims were cognizable under the ADEA, and that an employer could use RFOA as a defense against such a claim. To that end, in March 2008, the EEOC issued a notice of proposed

rulemaking (NPRM) regarding disparate impact claims under the ADEA. In this NPRM, the EEOC asked whether more information was needed on the meaning of RFOA in this context. In light of the 2008 U.S. Supreme Court opinion in *Meacham v. Knolls Atomic Power Lab*,⁵¹ in which the Court held that the employer bears the burden of production and persuasion when using a RFOA defense in an ADEA case, and comments it received from its NPRM, the EEOC stated that before issuing final regulations concerning disparate impact claims under the ADEA, it would issue a new NPRM to address the scope of the RFOA defense. In February 2010, the EEOC issued proposed rules. The comment period on that NPRM ended in April 2010. Final rules clarifying both elements of the ADEA are scheduled to be released by July 2011.

Recordkeeping Regulations

The EEOC also plans to amend its current Title VII and ADA recordkeeping regulations to address recordkeeping obligations under GINA.⁵²

Race and Ethnicity Data Collection Methods

Also at the proposed rule stage, the agency intends to issue regulations revising its race and ethnicity data collection method to conform with current reporting instructions for the EEO-1 Report, making employee self-identification the preferred method for collecting race and ethnic data on employees.⁵³ According to the EEOC, current regulations allow employers to gather race and ethnic data about employees by visual surveys of the workforce or from employment records.

It is noteworthy that only the ADAAA and GINA make express reference to the EEOC adopting substantive rules relating to the respective statutes. In contrast, Title VII does not include such a provision and the general practice instead is to provide interpretive guidance.

EEOC Enforcement Agenda

National Law Firm Model and Systemic Initiative

Private sector workplace discrimination charge filings with the EEOC nationwide hit an unprecedented level of 99,922 during fiscal year (FY) 2010.⁵⁴ Commenting on the number of charges, Chair Jacqueline Berrien stated that:

We are pleased to see that our rebuilding efforts are having an impact on how efficiently and effectively the Commission enforces the civil rights laws protecting the nation's workers. Discrimination continues to be a substantial problem for too many job seekers and workers, and we must continue to build our capacity to enforce the laws that ensure that workplaces are free of unlawful bias.⁵⁵

Under Berrien's leadership, it is expected that the agency will seek to accomplish this by the prudent use of their limited resources that will include: (1) the more effective use of technology; and (2) a focus on their systemic initiative, which may include using the national law firm model to avoiding duplication of efforts.⁵⁶ For example, a recent ADA pattern or practice case in Chicago that included hundreds of depositions in a compressed discovery schedule involved attorneys from numerous EEOC offices working on the case, thus demonstrating cross-district collaboration.⁵⁷ This initiative also may include partnering with the private plaintiffs' bar in appropriate cases and more cross-agency efforts and sharing of information between the OFCCP and the Justice Department, which includes former EEOC attorneys. According to the FY 2012 budget request, "the priority for agency resources continues to be litigating systemic cases and maintaining a manageable inventory of cases."⁵⁸

Expanded Commission Role in Setting Policy Through Investigations/Litigation

The EEOC has announced that it will develop and implement investigative and litigation strategies to address what it views as discriminatory practices, as illustrated by its E-Race (*i.e.* Eradicating Racism and Colorism from Employment) initiative, in which the EEOC stated that investigation and litigation strategies will focus on selection criteria and methods that it believes may foster discrimination based on race and other prohibited bases, "such as credit and background checks, arrest and conviction records [and] employment tests."⁵⁹

Initiation of Class Action Type Lawsuits

As part of enforcement agenda, the EEOC will continue to focus on class action type "pattern or practice" lawsuits, remedying what it views as systemic discriminatory practices by employers.⁶⁰ As an example, for FY 2010, among the 205 "merit" lawsuits filed by the EEOC, 192 (37%) involved "multiple-victim" or "pattern or practice" lawsuits.⁶¹ It is anticipated that the EEOC's current trend will continue in which nearly 40% of all lawsuits initiated by the EEOC will involve class action type lawsuits, in which the EEOC is not bound by Rule 23 requirements applicable to class actions initiated by plaintiffs' attorneys.

Anticipated Trends

Equal Pay

While legislation to amend the Equal Pay Act (EPA) and the Paycheck Fairness Act, has been stalled in Congress, it is clear that this issue will remain front and center at the EEOC (in tandem with other agencies such as DOL, OFCCP, and DOJ) based on

the recently commissioned National Equal Pay Enforcement Task Force.⁶² Employers are frequently not aware that the EEOC on its own can initiate “directed investigations” and address what it believes are systemic pay discrimination issues (based on gender), even without a charging party. The EEOC also has commissioned a study by the National Academy of Science “to determine what data it should collect to most effectively enhance its wage discrimination law enforcement efforts.”⁶³ To avoid duplicative efforts, the EEOC will likely work in tandem with the OFCCP “when evaluating data collection needs, capabilities and tools.”⁶⁴

Hiring Issues

The EEOC recently held a public hearing focusing on the use of credit reports in hiring decisions.⁶⁵ This hearing, coming after a prior Commission hearing on both credit and criminal history being viewed as having a discriminatory impact on African Americans and Hispanics, demonstrates that the EEOC will continue to focus on hiring-related issues.⁶⁶ Recent litigation also indicates that this issue will remain in the forefront as part of the EEOC’s systemic litigation agenda.⁶⁷ Other hiring concerns also may be addressed as evidenced by a recent EEOC hearing involving “unemployed” applicants and “examining the impact of considering only those employed for job vacancies.”⁶⁸

ADA Issues

Prior to enactment of the ADAAA, disability cases were bogged down in litigation involving coverage under the Act. For a period of time, no cases even could be filed without approval from the Commission. Such hurdles have now been removed and the battleground shifts to the reasonable accommodation process, and vigorous enforcement can be expected, as already has been the case over the past year. A rise in ADA cases coupled with GINA claims also is expected. One area that employers should keep front and center involves blanket rules involving leaves of absence. The EEOC will continue to challenge employers with fixed leave of absence policies in which adverse action is taken after individuals remain on leave for disability-related reasons after specified time periods, as illustrated by significant settlements with major employers, who entered into Consent Decrees, after extensive litigation,⁶⁹ and similar lawsuits continue to be filed against employers with similar policies.⁷⁰

B. U.S. Department of Labor-Office of Federal Contract Compliance Programs (OFCCP)

OFCCP Director

Patricia Shiu serves as Director of the OFCCP. Prior to taking the position at the OFCCP, Shiu served as the Vice President for

Programs at the Legal Aid Society-Employment Law Center (LAS-ELC) in San Francisco. Shiu has also worked as the director of the Society’s Work and Family Project, and lobbied for the passage of California’s Family Rights Act and its regulations. In addition, Shiu is a former member of the National Employment Lawyer’s Association’s (NELA) Executive Board, and served as one of its vice presidents.

Shiu’s advocacy of family leave and employment anti-discrimination issues makes it likely that she will continue to champion pay equity as a top priority of the agency. During a recent webinar on the OFCCP’s regulatory agenda, Shiu stated that:

OFCCP’s plans for regulatory reform seek to strengthen affirmative action requirements of nearly 200,000 federal contractors and subcontractors who profit from taxpayer dollars, particularly with regard to veterans, individual with disabilities, and women and minorities in the construction trades. We are also seeking public comment on how we collect wage data. This data will be critical to realizing President Obama’s goal of ending, once and for all, the persisting gap in pay between men and women.⁷¹

Indeed, her agency’s FY 2012 budget request to Congress flatly declared: “Eliminating compensation discrimination is a priority issue for OFCCP.” Under Director Shiu’s leadership, government contractors and subcontractors also can expect significant changes in the agency’s approach to enforcement. At an August 2010 speech to the National Industry Liaison Group, Shiu said that: “with respect to enforcement, OFCCP is working to transform its enforcement procedures to be more effective, more efficient, and more pro-active. OFCCP staff across the country is stepping up their investigations and audits, ensuring accuracy, thoroughness and quality outcomes.”⁷²

Regulatory Agenda

The OFCCP is making significant investments in its regulatory capacity, which is focused on the promulgation of new rules. According to the agency’s FY 2012 budget request, the OFCCP “plans to execute a robust regulatory agenda.”⁷³

Equal Pay

Similar to the EEOC, the OFCCP is placing a focus on pay equity, and members of the National Equal Pay Enforcement Task Force included a representative from the OFCCP. As part of this effort, the OFCCP has announced plans for issuing an Advanced Notice of Proposed Rule Making (ANPRM) addressing equal pay, which was scheduled to be released in February 2011. As described in the abstract summarizing plans for the notice, the DOL stated:

Eliminating gender and race-based, compensation discrimination continues to be a priority issue for OFCCP. Consequently, OFCCP is considering the development of a new strategic compensation data collection tool that will effectively identify contractors that are likely to violate E.O. 11246. In addition, the data collection tool may be used to conduct establishment-specific, contractor-wide, and industry-wide analyses. Through publication of an NPRM, OFCCP will seek input from stakeholders on issues relating to the scope, content, and format of the tool to ensure that it is an effective and efficient data collection instrument.⁷⁴

The tool would collect compensation data from 70,000 to 110,000 contractors, depending on the threshold set for completing the survey. This data would be likely arranged by job group. The OFCCP has indicated that, although the scope of the data has yet to be fully determined, current possibilities include salary, gender, race and ethnicity data for each employee or average compensation and variances for each group by gender, race and ethnic category.⁷⁵ Also not yet determined is the type of personal activity data that will be required and whether data on veteran status and disability will be included in the application. Although the OFCCP may be in only the initial stage of designing the compensation data collection tool, its development merits significant attention by government contractors.

Affirmative Action for Veterans

The OFCCP will soon issue a proposed rule with request for comments on its plan to revise regulations implementing the nondiscrimination and affirmative action provisions of the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA).⁷⁶ This notice of proposed rulemaking (NPRM) would strengthen the affirmative action requirements for federal contractors and subcontractors. According to the OFCCP, the NPRM would amend the regulations to require that federal contractors and subcontractors conduct more substantive analyses of recruitment and placement actions taken under VEVRAA and would require the use of numerical targets to measure the effectiveness of affirmative action efforts. The NPRM would also make revisions to recordkeeping requirements.

Affirmative Action by Construction Contractors

By July 2011, the OFCCP also intends to issue a NPRM to revise the regulations implementing the affirmative action requirements of Executive Order 11246 that are applicable to federal and federally assisted construction contractors.⁷⁷ According to the agency, the proposed rule would “strengthen and enhance the effectiveness of the affirmative action program requirements for federal and

federally-assisted construction contractors and subcontractors, particularly in the area of recruitment and job training.”⁷⁸

Affirmative Action for Disabled Workers

In another proposed rule dealing with affirmative action requirements, the OFCCP plans to issue a NPRM by August 2011 that “would strengthen the affirmative action requirements for federal contractors and subcontractors under Section 503 of the Rehabilitation Act.”⁷⁹ The NPRM would amend the regulations to require that federal contractors and subcontractors increase linkages and conduct more substantive analyses of recruitment and placement actions taken under Section 503 (which requires employers with federal contracts or subcontracts that exceed \$10,000 to take affirmative steps to hire, retain, and promote qualified individuals with disabilities). The NPRM would also make revisions to related recordkeeping requirements.

Strengthened Enforcement by the OFCCP

As noted in the DOL’s Budget Request for Fiscal Year 2012, the OFCCP continues to broaden enforcement beyond systemic, low-wage hiring discrimination cases brought under the Executive Order 11246.⁸⁰ The changes in the OFCCP’s enforcement strategy include a “more comprehensive, thorough, and timely compliance evaluation process that will result in deeper and more effective enforcement of all EEO laws and regulations administered by OFCCP.”⁸¹ Government contractors can expect the OFCCP to modify its current investigation practice to achieve what the agency describes as “effective enforcement.”⁸² Towards this end, over the past year, the agency has hired over 200 compliance officers to build its capacity to conduct more comprehensive compliance evaluations and increase enforcement efforts.⁸³

New Enforcement Manual

During the past year, the OFCCP has begun revisions to the Federal Contract Compliance Manual in order to ensure “consistency within its investigative process.”⁸⁴ The OFCCP is expected to issue the new compliance manual in the near future.

Cross-Agency Collaboration

The OFCCP is engaging in more collaborative efforts with the EEOC and the Civil Rights Division of DOJ, including memoranda of understanding, protocols and a pilot program, as evidenced by their participation on the National Equal Pay Enforcement Task force.

Litigation Strategy

As part of its litigation strategy, it is anticipated that the OFCCP will include its Solicitors earlier and more often. Further, in the

event a violation is found in one facility, OFCCP has considered expanding the scope of a compliance review to other facilities, with the possibility of “enterprise wide” enforcement.

Two recent OFCCP decisions underscore its apparent increased willingness to litigate. First, it decided to litigate the temporal scope of a compliance review in *OFCCP v. Frito-Lay, Inc.*, asserting that it has the right to continue to request documents and expand its original investigation for as long as compliance officers allow the review to languish unclosed. Second, it decided to pursue *Florida Hospital of Orlando* in the face of a Department of Defense letter imploring the OFCCP not to impose affirmative action obligations on the network of healthcare entities that provide care under America’s military healthcare system. These decisions are a harbinger of this Administration’s willingness to litigate.

Directives

The OFCCP has issued a directive discontinuing the agency’s Active Case Management (ACM) procedures⁸⁵ and instead replaced it with its new Active Case Enforcement (ACE) Directive.⁸⁶ Instituted in July 2003, the ACM process was “primarily an abbreviated desk audit process” to expedite the closing of supply and service (S&S) contract compliance evaluations where there existed no evidence of systemic discrimination. The agency considered cases with fewer than 10 potential victims to fall under this category. According to the directive, absent such evidence of widespread discrimination, full desk audits were to be performed only once out of every 25 such cases, and onsite evaluations only once out of every 50th review. The OFCCP claims in the directive that the ACM has caused the agency to “narrow the focus of its enforcement efforts” and has “eroded” its enforcement authority, thereby prompting its revocation.

Under its ACE procedures, all S&S audits will be a “full desk audit.”

- Contractors can expect, routinely, to receive lengthy requests for information relating to compliance with E.O. 11246, Section 503, VEVRAA, the Sex Discrimination Guidelines⁸⁷ and the Religious Discrimination Guidelines⁸⁸ very soon after the initial desk audit materials are submitted.
- For quality control purposes, every 25th establishment will be selected for a full compliance review, including an onsite visit.
- Whenever an onsite is conducted, the compliance officer will check to ensure compliance with EO 13496, which requires notification to employees of their rights under the National Labor Relations Act.

- Consistent with the theme of ensuring greater agency coordination, whenever a compliance review is scheduled, the compliance officer must contact the EEOC and the respective State and/or Local Fair Employment Practice (FEP) agencies to determine the nature, status and outcome of any complaints that have been filed against the contractor at the establishment under review in the past three years.
- The compliance officer also is directed to check with the DOL’s Veterans Employment and Training Service (which receives the VETS-100A reports) and the DOL’s Wage and Hour Division so that any patterns of discrimination or noncompliance with other labor and employment laws can be taken into account in assessing whether an onsite investigation is warranted.

Anticipated Trends

Equal Pay

The OFCCP is playing a lead role on the topic of pay equity as a member of the President’s Equal Pay Enforcement Task Force. Director Shiu has underscored her view regarding gender discrimination and pay disparities, echoing some of the same comments expressed by members of Congress during Congressional hearings involving the Ledbetter Fair Pay Act and the view that women on average make less than male coworkers.⁸⁹ The development of the compensation data collection tool is a key component of this initiative. Many employers use grades, job families, bands and other groupings of employees in their compensation structure. Employers should anticipate that, as part of any audit, the OFCCP will look behind how employees are grouped and whether they are grouped appropriately. Because the OFCCP is not complaint driven, the agency is uniquely suited to address wage-based discrimination because it receives compensation data in every desk audit that it conducts and has the ability to form its own groups that it can use as a basis to allege unequal pay practices, which in turn give it justification to go on site and get individual, line-item pay data during an investigation. If it is successful in requiring employers to use web-based portals to upload audit submissions and to collect compensation information from 70,000 to 110,000 employers each year, it will have the ability to evaluate pay disparities on an unprecedented scale.

The OFCCP also is proposing to rescind guidance materials addressing compensation discrimination that would ultimately give the agency more leeway in finding federal contractors and subcontractors liable for pay disparities. According to the agency, the first guidance document at issue, *Interpreting Nondiscrimination*

Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination, has limited the OFCCP's ability to "effectively investigate, analyze and identify compensation discrimination."⁹⁰ As for the second document to be rescinded, *Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Executive Order 11246 with Respect to Systemic Compensation Discrimination*, the OFCCP claims that it has been largely unused by federal contractors and is not an effective enforcement strategy.⁹¹

Misclassification

According to the DOL's FY 2012 budget request, the OFCCP will focus its resources on expanding efforts to deter, detect, and eliminate worker misclassification as part of a multi-agency misclassification initiative. Specifically, the OFCCP intends to expand its investigative process during compliance evaluations to include an analysis of workers' potential misclassification as independent contractors.

C. Other Equal Employment Opportunity Legislation

Dodd-Frank Act

Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act⁹² (Dodd-Frank) creates offices of Minority and Women Inclusion (OMWI) among various federal agencies assessing diversity initiatives in financial services industry and further imposes diversity requirements on contractors doing business with the agencies. The director of each such office will be charged with, among other things, developing and implementing standards for ensuring "to the maximum extent possible, the fair inclusion and utilization of minorities, women, and minority-owned and women-owned businesses in all business and activities of the agency at all levels, including in procurement, insurance, and all types of contracts." Contractors dealing with these agencies will be required to provide a written statement attesting to the fact that they—and their subcontractors—have fairly included women and minorities in their workforces. Standards and procedures will be developed to assess whether such contractors and subcontractors have failed to make a good faith effort to do so. In this event, the director of the OMWI will have the ability to recommend that the agency head terminate the contract; make a referral to the OFCCP. The scope of the Act's obligations remains unclear until regulations are issued, but the impact could significantly affect those in the financial services and other companies doing business with the agencies.

D. What Do These EEO Developments Mean for Employers?

Employers need to be prepared to deal with an active regulatory agenda and multi-agency cooperation and sharing of information, particularly between the EEOC and the OFCCP, in dealing with EEO-related issues. Employers also should expect increased charge activity and more aggressive and potentially expanded investigations, which in various cases may include nationwide requests for information. As part of an employer's compliance efforts, the following should be critical elements of an employer's EEO compliance activities:

- Closely monitor agency developments, including notices of hearings, proposed rulemaking and other opportunities for input on areas of focus by these agencies as well as carefully monitor enforcement efforts (*i.e.* new lawsuits/administrative actions) and settlements.
- Update recordkeeping practices to comply with revised reporting requirements for EEO-1 reports, Title VII, the ADA and GINA.
- Conduct refresher training for all recruiters and anyone else involved in the hiring and selection process in government contractor workplaces regarding OFCCP's definition of an Internet Applicant and the records necessary to defend any statistically significant selection patterns for each step of the employer's process.
- Review pre-employment practices, including screening devices that may disqualify applicants for employment, including credit and/or criminal history, and monitor actions by the EEOC and the OFCCP addressing such practices, recognizing that at a minimum blanket and across-the-board policies will create significant risks for employers.
- Carefully evaluate and consider privileged audits of pay and promotion practices, particularly dealing with potential gender discrimination based on the planned focus by the EEOC and the OFCCP on such practices, but recognize that potential pay practices involving minorities also may be closely scrutinized. This might include a statistical analysis conducted as much as possible under the attorney-client privilege.
- Insure that the company is ADA and GINA compliant, including updating policies to ensure compliance with the new regulations, revising any policies that may have blanket provisions involving potential termination after specified time periods and providing training and/or guidelines on the required interactive process in dealing with alleged disabilities.

- Monitor any required changes for affirmative action plans, policies, and recordkeeping practices based on proposed rules impacting on obligations involving veterans, the disabled and construction contractors.
- Review recruitment and posting policies to ensure that recruitment activities specifically include outreach to employees and potential applicants in the labor market who are disabled or veterans.

Many of these recommendations overlap with the Littler Seven Step Compliance program recommended in Part Three of this Report. This demonstrates the importance and efficiency of planning a comprehensive response to employment and labor law regulations, guidelines, and directives. In turn, this coordinated effort should be integrated with an organization's overall compliance systems and initiatives.

IV. EMPLOYEE BENEFITS

A. Defined Benefit Pension Plans

Traditional defined benefit pension plans (“DB Plans”) face a funding crisis of enormous proportions. A number of factors have conspired to create this crisis. First, low interest rates have had the effect of both pushing funding obligations higher as well as causing plans with lump sum payout options to pay greater than usual benefits. Second, substandard investment returns over the last ten years have caused plan asset amounts to fail to meet funding estimates. Third, a faltering economy chock full of layoffs and forced retirements has accelerated the flow of funds out of pensions as workers have retired earlier than they may have planned.

Plans sponsored by single employers as well as multiemployer funds that benefit union workers are chronically underfunded, as are funds maintained for public sector employees. This funding crisis has spurred both Congress and regulatory agencies to act.

Pension Regulation Prior to Pension Protection Act

The Employee Retirement Income Security Act of 1974 (ERISA) was the first comprehensive statute to regulate DB plans. Among other things, it established funding requirements for DB plans. It also established the Pension Benefit Guaranty Corporation (PBGC) to provide insurance against pension plan failures.

Several defaults in large pension plans in the early 2000s and the increasing deficit for the PBGC prompted the government to consider proposals for pension funding reform. The reform was aimed at correcting several perceived deficiencies in the regulatory scheme, including the following: (1) sponsors were not required to make additional contributions to a pension plan as long as the plan

was at least 90% funded; (2) underfunded plans, in some cases, had 30 years to amortize funding shortfalls; and (3) some sponsors were not required to make contributions for several years because they had made contributions beyond the required minimum in the past. The use of these “credit balances” was another factor which led to the funding crisis.

Pension Protection Act

The Pension Protection Act (PPA), which became law in 2006, imposed many new rules for DB plans, with a primary goal of increasing the minimum funding requirements and strengthening the PBGC. The PPA standardized the interest rates and mortality assumptions a plan may use when determining the present value of plan liabilities. The PPA establishes a phased-in funding requirement for plans that requires any unfunded liability to be amortized over seven years. Severely underfunded plans will be required to fund their plans in accordance with special rules. The PPA also mandates benefit limitations in underfunded plans. If a plan is below 60% funded, all benefit accruals in the plan must cease. Also, the PPA does not allow a plan to adopt an amendment that increases benefits if the plan is below 80% funded, or the amendment is likely to cause the plan to be below 80% funded, unless the employer makes additional contributions to fully fund the new benefits. Additionally, the PPA provides restrictions on the payment of lump-sum distributions if a plan is below 80% funded whereby it may not pay all or some of a participant's accrued benefit as a lump sum.

With respect to multiemployer plans, the PPA establishes a new set of rules for improving the funding of multiemployer plans deemed to be in “endangered,” “seriously endangered,” or “critical” status. The PPA requires multiemployer plans to amortize any increases in plan liabilities over 15 years (as opposed to the pre-PPA 30-year period). Amounts already being amortized under the old schedule are not required to be recalculated. The PPA also establishes mandatory procedures, effective through 2014, to improve the funding of severely underfunded multiemployer plans

The PPA prospectively solved three of the most pressing issues facing hybrid retirement plans. First, it clarified that cash balance plans do not discriminate against older workers as long as benefits fully vest within three years of service and the interest credits do not exceed a market rate of interest. It also prohibits the wear-away of benefits accrued before conversion of a traditional DB plan to a cash balance plan for conversions occurring after June 29, 2005. *Wear-away* refers to the period after conversion in which a participant accrues no new benefit under the cash balance plan, which could occur if the employee's initial benefit under the cash balance plan is less than the value of the benefit the employee had accrued prior to

conversion. Finally, the PPA eliminated the “whipsaw” requirement that sometimes led to departing employees receiving an amount that exceeded the nominal value of their hypothetical account. This occurred when the interest rate under the cash balance plan was higher than the interest rate required for calculating lump-sum distributions under the Code.

The Regulatory Environment for Defined Benefit Plans

Although the PPA took certain measures to remedy traditional DB plan-funding issues, these plans remain in a funding free-fall and employers have been abandoning these plans in light of their perceived high costs and unpredictable funding requirements. Employers often believe that their employees prefer to have an individual account that they can take with them if they leave, which also makes the DB plan an unpopular vehicle. However, there is an understanding among lawmakers that if Americans are to have retirement security, they may need to be covered by some type of DB plans.

Because the government is not desirous of giving up on DB plans, they likely will be heavily regulated with these five goals in mind: (1) increasing funding requirements; (2) increasing funding transparency; (3) strengthening the PBGC; (4) encouraging hybrid pension plans; and (5) encouraging continued use of traditional DB plans.

Funding Requirements

The PPA requirement that plans be better funded will keep the funding issue in the forefront for regulators. In this regard, it is expected that both legislators and regulators will likely impose requirements that encourage high-funding levels. This is a shift from the traditional view of the IRS, which had been wary of too much being funneled with consequential high deductions being taken by employers. Accordingly, there is likely going to be an increase in current annual funding limits. In addition, higher funding levels will be encouraged if regulators loosen rules that currently limit how a plan surplus can be used by employers after the plan has been terminated. Currently, employers are wary of creating a plan surplus because if a plan is terminated with a surplus, the employer will face a heavy excise tax unless it uses the money in the manner dictated by the IRS.

Funding Transparency

Due to the PPA, pension plans are required to provide an annual funding notice to participants and beneficiaries, the PBGC, any labor organization representing employees in the plan, and, for multiemployer plans, each employer contributing to the plan.

The DOL issued a model funding notice in 2009 and also noted that additional guidance would be forthcoming on this subject. Employees often do not understand the high costs that employers pay to maintain DB plans nor how continued employment will result in higher benefits. Helpful guidance would encourage employers to provide this information.

Strengthening the PBGC

In order to strengthen the PBGC, either premiums for DB plans will need to rise, or the PBGC will need to cut the amount of benefits it provides. There may also be a push to give the PBGC more authority to intervene when a plan is severely underfunded. The economic recovery should help eliminate some of the PBGC’s deficit, but lawmakers will likely be seeking more permanent solutions to ensure that the PBGC remains solvent.

Regulation of Hybrid Pension Plans

This will likely be another focus of regulation in the coming years. The IRS issued final and proposed regulations affecting hybrid pension plans in late 2010. This area will probably see the most regulation outside of funding issues because many companies are switching to hybrid plans. If DB plans are to flourish, hybrid plans must be encouraged. Hybrids, such as cash balance plans, are favored by employers because they have many of the attributes of a defined contribution plan, such as an account balance form of benefit that can be easily understood by employees. Additionally, employers will be able to provide in a hybrid plan that participants receive a fixed return while employers can attempt to reduce funding levels through more robust investments. However, the regulatory environment for hybrids has been one that has left employers unclear as to whether the establishment of a hybrid plan would lead to an age discrimination lawsuit. Future regulation must clarify that hybrid plans are not discriminatory and allow employers to establish them without fear of litigation.

Encouraging Continued Use of Traditional DB Plans

Traditional DB plans are not likely to survive, even though the lifetime benefits they offer to participants are beneficial. There is probably not much that can be done to save these plans, other than increasing the amount that an employer may deduct for contributions to the plan, relaxing the funding requirements, both of which are unlikely, or reducing perceived penalties for overfunding a DB plan, which remains a possibility.

The best way for the regulators to encourage continued use of DB plans is to ensure that regulations affecting hybrid plans are not overly complex or burdensome. The IRS could also expand the scope of so-called DB(k) plans, which combine a modest traditional DB

plan structure with a 401(k) plan. The PPA authorized employers with less than 500 employees to establish a safe harbor type of DB(k) plan. A key issue to resolve in such a plan is how to satisfy the Internal Revenue Code's nondiscrimination rules, but if the IRS were to offer several safe harbor options for each component of the plan, it could greatly reduce the complexity, while offering a fair amount of flexibility.

B. Defined Contribution Plans

Defined contributions plans are the most popular types of retirement plans in the U.S. today largely because their costs to employers is predictable, they provide a portable benefit to a mobile workforce and they are inexpensive, when compared to defined benefit pension plans. The challenges facing these plans largely revolve around the issue of whether they will provide sufficient benefits to retirees. Unlike defined benefit plans, these vehicles largely rely upon participant contributions and employees are not contributing enough to these plans. Therefore, regulators have been and will continue to be active in attempting to encourage employee plan contributions, monitoring fees paid by participants and encouraging greater employer contributions.

PPA Commenced Move to Encourage Retirement Savings

The PPA enacted a "safe harbor" that eliminated certain nondiscrimination testing for plans that adopt an automatic enrollment provision. Plans offering automatic enrollment must give the employee a chance to opt out. Preliminary surveys have indicated that automatic enrollment greatly increases the number of employees that participate in these plans.

Aside from the PPA changes in September 2010, Congress enacted the Small Business Jobs Act of 2010. Under a provision in this Act, plans are now allowed to permit participants that have rollover-eligible account balances to convert such amounts to a Roth account within the plan. Prior to enactment, an individual that wanted to convert a rollover-eligible account to a Roth needed to take the money from the plan and roll it into a Roth IRA. Additionally, if the taxpayer converted to a Roth account in 2010, they have the option of paying the tax associated with the conversion over 2011 and 2012.

Current Initiatives to Shore Up Retirement Savings

There are several proposals to increase individual savings in retirement accounts. Many of these proposals are particularly targeted at increasing retirement savings for lower income individuals. They also rely heavily on government involvement.

Clarify Automatic Enrollment and Default Investment Rules

The PPA added new provisions to the Code that allow employers to automatically enroll their employees in their 401(k) plans. Many employers are not utilizing automatic enrollment because they worry that they might be held liable for losses in employee investments. Although the DOL has issued guidance relating to default investments, many employers still would like additional guidance on safe harbor investments for automatically enrolled employees before adding an automatic enrollment feature to their plans. The regulatory trend to encourage automatic enrollment will likely continue.

Expand In-Plan Roth Conversions

This may not technically increase savings, but many individuals would welcome the opportunity to convert their current 401(k) account to a Roth account. The recent law allowing in-plan Roth conversions only applies to amounts that are eligible for distribution from the plan. Allowing conversion of some amounts that are not eligible for distribution could provide a nice short-term revenue increase and could encourage more individuals to take advantage of having a Roth account.

Institute a Revised Compulsory Government Savings Plan

The government already has a compulsory savings plan—Social Security. Some are also advocating that the government create a plan where a portion of each worker's pay is placed in a government-sponsored savings account that cannot be touched until retirement. The government would provide a guaranteed interest rate on the monies placed in the account. The worker would then receive a lifetime annuity when reaching a pre-determined retirement age.

Make the Saver's Credit Refundable

The Saver's Credit does not help many low-income taxpayers because they have little or no tax liability against which to apply the credit. Making the credit refundable would allow them to benefit from the credit regardless of tax liability and would provide additional funds that could be put in a retirement account.

Offer a Government Match on Tax Refunds that Are Placed in an IRA

Individuals would be more likely to place some of their tax refund into an IRA if the government provided some type of match. Such a proposal would likely increase savings for lower-income taxpayers, but the cost of such a proposal would need to be offset by a revenue increase.

Provide Automatic or Elective Enrollment in EITC-Funded Retirement Accounts

Many low-income taxpayers are entitled to the earned income tax credit (EITC), a refundable tax credit that millions of taxpayers receive each year. The government could utilize EITC amounts to increase savings in at least two ways. First, the government could decrease the amount of the EITC, but offer a match if the taxpayer chooses to deposit all or part of the EITC into an IRA. This proposal could be structured in a revenue-neutral manner. Another proposal would be to simply require a taxpayer to deposit half of the EITC into an IRA. The government could also encourage the taxpayer to deposit part of the other half by offering a modest match on electively deposited funds. This would lead to additional costs that would need to be offset by a revenue increase as well.

DOL Mandates Greater Disclosure of Fees Payable by Participants

In November 2007, the DOL mandated that Form 5500 annual reports for retirement plans provide more detailed disclosure of fee information in connection with a plan's annual reporting requirements. Additionally, in December 2007, the DOL proposed a new rule that would require ERISA plan service providers to fully disclose any fee or alternative compensation arrangements to plan fiduciaries.

These changes now require that all direct compensation paid by a plan and indirect compensation (compensation received from sources other than the plan or plan sponsor) paid by plan participants be reported on the annual Form 5500. Indirect compensation generally includes gifts, awards, trips for employees, research, finder's fees, soft dollar payments, and float income. In large part, the revision is designed to identify indirect compensation that has previously been hidden from the plan's fiduciaries because they are not charged directly against the plan's assets, but that the DOL believes have the effect of reducing the plan's investment return.

In addition, the DOL mandated disclosure of revenue sharing from one service provider to another, even if such sharing includes kickbacks that are illegal under federal law.

IRS/DOL Stepped Up Retirement Plan Audit Activity

Recently, the IRS and the DOL have significantly increased their audits of qualified retirement plans, focusing mostly on 401(k) plans. The audit effort comes as a result of various compliance assistance outreach efforts made by the IRS and the DOL through their websites, phone forums, newsletters, webinars, workshops, and various seminars both agencies are holding throughout the country.

Both agencies offer plan sponsors ways to mitigate their plan liability by offering tools including, fix-it guides, correction programs and education programs for fiduciaries. Based on the governmental guidance, litigation, and audit experiences, Littler attorneys have designed several plan sponsor best practices tools to assist plan sponsors in order to mitigate against penalties under plan audits.

Retirement Plans: Practical Steps for Employers

Employers should be prepared for the onslaught of initiatives to shore up defined benefit plans, encourage savings under defined contributions plans, and make plan costs more transparent. Employers should also be ready for increased IRS and DOL audit activity.

The best practices to deal with these initiatives include:

- Rethink the retirement plan structure for the workplace of today and tomorrow rather than merely continuing with a structure that worked in prior years.
- For plan sponsors with defined benefit pension plans, adopt a funding strategy that will minimize large fluctuations in annual funding amounts.
- Consider 401(k) plans with automatic enrollment to encourage employee deferrals.
- Consider adding a Roth component to a 401(k) plan.
- Review plan governance structure to best guard against an adverse DOL audit finding. In this regard, it is prudent to organize and prepare Plan Administrative and Investment Committees for their fiduciary roles and duties, including assisting in periodic meetings, reviewing requests for proposals, advising on service agreements and advising on law change.
- Compile and review required plan documents (including plan, trust agreements, amendments, resolutions, service agreements and summary plan descriptions). Update documents if necessary.
- In lieu of waiting for the IRS or DOL to discover compliance issues during an audit, use voluntary IRS and DOL compliance programs, which include the: (1) DOL late filer program; (2) DOL late employee contributions program; and (3) IRS voluntary programs for operational defects including Employee Plans Compliance Resolution System (EPCRS), self-correction and Voluntary Correction Program (VCP).

C. Healthcare Reform

After a prolonged debate over reforming our nation's healthcare system, President Obama signed the Patient Protection and Affordable Care Act ("Affordable Care Act")⁹³ into law on March 23, 2010. The legislation was amended one week later through a separate bill, the Health Care and Education Reconciliation Act of 2010.⁹⁴ The Affordable Care Act, as amended, creates significant new obligations for employers, some of which are already effective while others are years away from implementation.⁹⁵ Cumulatively, these new requirements will substantially alter both the benefit and business strategies of many U.S. employers.

The Regulators: The Departments of Health and Human Services, Labor and Treasury

While the new healthcare legislation imposes sweeping new employment-related requirements, the statute itself provides employers little clear direction on how to comply with the law's provisions. Implementation of the Affordable Care Act rests with the regulators, spawning an unprecedented bureaucratic undertaking among multiple agencies. A trio of federal agencies, the Departments of Health and Human Services (HHS), Labor (DOL) and Treasury, are charged with developing regulations and enforcing various employment-related provisions of the healthcare law. At the HHS, Secretary Kathleen Sebelius, a former state insurance commissioner, has taken an active and visible role in healthcare reform implementation. The newly created Center for Consumer Information and Insurance Oversight at HHS, which is led by Steve Larson, is responsible for helping develop regulations governing private health insurance. At DOL, the Employee Benefits Security Administration led by Assistant Secretary Phyllis Borzi is overseeing implementation of the law's group health plan requirements. The Internal Revenue Service (IRS) at the Department of Treasury not only shares in jurisdiction for the insurance market reform regulations, but also is responsible for implementing a number of other employment-related provisions.

Healthcare Reform Regulatory Agenda

The sheer volume of regulations to be issued under the Affordable Care Act, many of which require multi-agency coordination, has left employers with little time to fully comprehend their compliance obligations before they become effective. With statutory effective dates fast approaching, the agencies issued a flurry of rules in the form of interim final regulations. This deviation from the normal rulemaking process creates binding regulations before public comments are considered and final regulations issued. The interim final regulations, issued without the benefit of public comments, have

raised questions and concerns, prompting the regulators to release subsequent additional guidance. In some cases, the regulators have announced delayed enforcement of Affordable Care Act obligations or deemed compliance voluntary pending further guidance. While providing some direction for employers, the expedited and unusual regulatory process surrounding healthcare reform still leaves many questions unanswered.

Insurance Market Reforms: Insurance market reforms contained in the Affordable Care Act require changes to employer-sponsored benefit plans, a number of which become effective for plan years beginning on or after September 23, 2010. Additional insurance market reforms will be phased-in over time. Plans that were in existence on March 23, 2010, and remain "grandfathered" are exempt from some, but not all, of these insurance market reforms.

Grandfathered Health Plans: The grandfather provision in the Affordable Care Act was central to the claim that individuals can keep their existing healthcare coverage. The statute itself was silent about what changes would cause a health plan that was in place on March 23, 2010, to lose its grandfather status. However interim final regulations published on June 17, 2010, set forth strict criteria for maintaining grandfather status.⁹⁶ The regulations also contain an anti-abuse feature to stop employers from certain business reorganizations or transfers among divisions or between employers to avoid losing grandfathered status. Grandfathered plans must provide a written notice to all participants and beneficiaries about the grandfathered status of the plan. For employers facing rising healthcare costs, the regulations significantly restrict their ability to make cost-saving changes while maintaining their grandfather status.

Adult Dependent Coverage (Applies to Grandfathered Plans): On May 13, 2010, the DOL issued interim final regulations⁹⁷ implementing the dependent coverage provisions of the Affordable Care Act. The new regulations provide that effective for plan years beginning on or after September 23, 2010, any group health plan or group health insurance issuer that provides coverage to dependent children must make coverage available to dependent children until they have attained the age of 26. Prior to the child's 26th birthday, the plan may not restrict coverage of children based on financial dependency, residency, student status, employment status, or any combination of those factors, nor may plans vary the level or terms of dependent coverage based on age. The regulation creates a special enrollment opportunity and notice requirement for children who lost coverage or were not eligible for coverage under the plan's existing age limits as of the effective date.

Prohibition on Rescissions (Applies to Grandfathered Plans): Group health plans and insurers are prohibited from rescinding, or canceling, health coverage of an enrollee except in the case of fraud or intentional misrepresentation of material fact. The IRS, DOL and HHS issued interim final regulations on June 28, 2010.⁹⁸

Prohibition on Pre-existing Condition Exclusions (Applies to Grandfathered Plans): Group health plans and insurers are prohibited from imposing pre-existing condition exclusions for children under the age of 19. Beginning in 2014, plans are prohibited from including pre-existing condition exclusion for any participant. The IRS, DOL and HHS issued interim final regulations on June 28, 2010.⁹⁹

Prohibition on Lifetime Benefit Limits (Applies to Grandfathered Plans): Group health plans and insurers are prohibited from imposing a lifetime dollar limit on essential health benefits. The IRS, DOL and HHS issued interim final regulations on June 28, 2010.¹⁰⁰ The agencies have not provided additional guidance on the term “essential health benefits” beyond the broad categories listed in the statute.

Restriction on Annual Benefit Limits (Applies to Grandfathered Plans): Prior to 2014, group health plans may impose annual limits on the dollar value of essential health benefits only as determined by the Secretary of Health and Human Services. Beginning in 2014, annual dollar limits are prohibited for all essential health benefits. The agencies issued interim final regulations¹⁰¹ setting forth the minimum required annual limits as follows: \$750,000 for the plan year on or after September 23, 2010; \$1.25 million for the following plan year, and \$2 million for plan year after that. Plans can apply for a waiver from the annual restrictions if they can demonstrate that meeting the requirements would result in a significant decrease in access to benefits or cause a significant increase in premiums, as may be the case with so-called mini-med plans.

Preventative Care: Group health plans and insurers must cover certain preventative care services without cost-sharing, including preventative services rated A or B by the U.S. Preventative Task Force, recommended immunizations, preventative care and screenings for infants, children, and adolescents, and additional preventative care and screenings for women. The agencies published interim final regulations on July 19, 2010.¹⁰²

Internal/External Appeals Process & Procedure:¹⁰³ On July 23, 2010, the IRS, DOL and HHS issued interim final regulations¹⁰⁴ imposing new requirements on group health plans (both self-insured and insured) that dictate procedures for internal appeals of adverse claims decisions and require an independent external appeal

process for denied health plan claims. On September 20, 2010, the DOL's Employee Benefits Security Administration (EBSA) issued a technical release¹⁰⁵ document that gives health and issuers a grace period until the first plan year beginning on or after January 12, 2012, to comply with certain new internal claims and appeals procedure requirements.

Nondiscrimination in Favor of Highly Compensated Employees: The requirements of Section 105(h) of the Internal Revenue Code will be extended to fully insured non-grandfathered plans. The restriction currently only applies to self-insured plans. The nondiscrimination requirements of the Affordable Care Act could implicate a number of employment-related policies and agreements, and the penalties for noncompliance are steep. An excise tax of \$100 per day applies for each individual to whom the violation relates. Due to continued confusion regarding the provisions in the Affordable Care Act that prohibit insured group health plans from discriminating in favor of highly compensated individuals, the IRS, on December 22, 2010, decided to delay enforcement of this section until further guidance is issued.¹⁰⁶

Emergency Services: Group health plans and insurers must cover emergency services without prior authorization and in-network requirements. Interim final regulations on patient protections included guidance on the emergency services requirement.¹⁰⁷

Physician Selection: Group health plans and insurers that provide for or require the designation of a participating primary care provider must permit each participant to designate any participating primary care provider who is available to accept such individual. The plan must permit a participant to designate a pediatrician as the primary care provider for a child. Plans are prohibited from requiring authorization or referral for an OB-GYN. The Interim final regulations on patient protections issued on June 28, 2010¹⁰⁸ included guidance on these provisions.

Other 2010 – 2014 Changes

Early Retiree Reinsurance Program: The interim final regulations¹⁰⁹ implementing the provisions of the Early Retiree Reinsurance Program (ERRP), were issued on May 5, 2010. The ERRP provides temporary federal financial assistance for employer plans that continue to provide health coverage to early retirees, defined as individuals age 55 and older who are neither active employees nor eligible for Medicare, plus their spouses, surviving spouses and dependents.

Reasonable Break Time for Nursing Mothers: The Affordable Care Act amends the Fair Labor Standards Act (FLSA) to require employers to provide nursing mothers, up to one year after the

birth of their child, a reasonable break time each time the employee needs to express milk. Employers must provide a place for nursing mothers, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public. An employer with less than 50 employees is not required to comply if the requirements would impose a significant difficulty or expense. This change to the FLSA, which became effective upon enactment of the Affordable Care Act, does not require an employer to compensate an employee receiving such reasonable break time. The DOL has issued a fact sheet on the new requirement,¹¹⁰ and has solicited information from the public on its application.¹¹¹

Over-the-Counter Drugs: Beginning in 2011, over-the-counter drugs without a prescription are not eligible for reimbursement from a flexible spending account, health savings account, health reimbursement account or Archer medical saving account. The IRS has issued guidance on this new restriction.¹¹²

Flexible Spending Accounts: Employees who utilize flexible spending accounts (FSAs) will face new contribution limits. Beginning in 2013, salary reductions for FSAs will be limited to \$2,500.

W-2 Reporting: Employers must report the aggregate cost of applicable employer-sponsored coverage on Form W-2. Although the statute required compliance for W-2's issued for the 2011 tax year, the IRS has delayed mandatory compliance until the following year.¹¹³

Automatic Enrollment: The Affordable Care Act added a new Section 18A to the Fair Labor Standards Act of 1938 requiring employers with more than 200 full-time employees to automatically enroll new full-time employees in one of the employer's health benefits plans. The DOL issued question-and-answer guidance indicating that until regulations are issued and effective, employers are not required to comply with FLSA Section 18A. The DOL announced that it intends to issue final regulations by 2014.¹¹⁴

Employer Play or Pay Penalty—2014

Beginning in 2014, the Affordable Care Act imposes a so-called "individual mandate" that will require most legal U.S. residents to obtain health insurance or pay a penalty. At the same time, the law will provide government subsidies to help lower-income individuals obtain health insurance through state health insurance exchanges, virtual marketplaces in which some individuals and groups can shop for health insurance plans. The Affordable Care Act does not require employers to offer health coverage to their employees. However, large employers will be subject to a "play or pay" penalty beginning

in 2014 if they do not offer coverage to their full-time employees or if the coverage they do offer is deemed either unaffordable or insufficient. A *large employer* subject to the penalty is one with 50 or more full-time employees and full-time equivalents. *Full-time employees* are defined as those that work 30 or more hours a week calculated on a monthly basis. Employers must annually report information about their healthcare coverage, if any, to the federal government. Employers also may have to provide "free choice vouchers" to certain employees who prefer to purchase health insurance from the exchange instead of through their employer.

The regulators have yet to provide any guidance on the "play or pay" penalty or free choice vouchers, leaving employers with many questions about how these provisions will operate.

"Cadillac" Plan Excise Tax—2018

Beginning in 2018, the law imposes a 40% excise tax on employment-based health plans whose premiums exceed \$10,200 for singles, \$27,500 for family plans, or \$11,850 and \$30,950 for retirees and employees in high-risk occupations, indexed for inflation.

Anticipated Trends

Efforts to repeal the Affordable Care Act began as soon as the bill was signed into law and became a driving force in the 2010 midterm elections. Repealing the Affordable Care Act remains a priority for Congressional Republicans. However, the prospects for Congress repealing the law in the 112th Congress are dim. Piecemeal efforts to repeal or modify certain provisions, such as the controversial 1099-reporting requirement, are more viable than repeal, but still challenging in a divided Congress. Efforts to cut-off funding to implement healthcare reform faces similar obstacles. However, House Republicans have embarked on an aggressive campaign to challenge the Affordable Care Act through a series of oversight hearings. Meanwhile, a number of federal court cases have attacked the constitutionality of the law, particularly the legality of the individual mandate. Three federal district courts have upheld the law, while two other courts have ruled the individual mandate unconstitutional.¹¹⁵ A decision on the constitutionality of the Affordable Care Act undoubtedly is headed to the U.S. Supreme Court.

The healthcare reform law will continue to face challenges in Congress, the states and the courts. While it is unclear how these challenges will be resolved, it is certain that the impact of the law on employer-sponsored healthcare will be at the center of the debate. While these legislative and legal challenges play out, the federal agencies will continue their work to implement the law through regulations and guidance. Faced with the practical concerns raised by employers, insurers and other stakeholders, the regulators have

delayed enforcement of certain provisions and issued additional guidance on others. This suggests that regulators, to some degree, recognize the implementation challenges and may be willing to provide some of the regulatory flexibility that this sweeping legislation needs.

Even amidst the uncertainty surrounding the future of the Affordable Care Act, employers taking a long-term strategic approach to both healthcare reform and the health and productivity of their workforce will have a competitive advantage.

Healthcare Reform: What Do These Changes Mean for Employers?

As the Affordable Care Act faces challenges in both Congress and the courts, employers must navigate the complex new law in an uncertain legislative, regulatory and legal landscape.

- The law imposes new requirements on employers as they contend with ever-rising healthcare costs. According to a Towers Watson/National Business Group on Health survey, in 2011, total healthcare costs per active employee, on average, are expected to reach \$11,176, up from \$10,387 in 2010.¹¹⁶ Employers are paying 36% more for healthcare, and employees contribute over 45% more than they did five years ago.
- The healthcare reform law, coupled with rising healthcare costs in a globally competitive economy, is driving employers to reevaluate their benefits strategy. To meet these challenges, employers must redouble their efforts to control healthcare costs while improve worker health and productivity. The Affordable Care Act includes some provisions designed to increase the use of employer-sponsored wellness programs and growing number of employers are reevaluating wellness programs to make them more effective.¹¹⁷
- Employers must review and revise plan documents for compliance with near-term insurance market reforms. While employers contend with implementing the near-time mandates of the Affordable Care Act, they must also consider the long-term impact of the law on the compensation and composition of their workforce.
- Employers should carefully weigh the advantages of retaining grandfathered status versus the advantages of plan changes. In light of rising healthcare costs, the value of retaining such status will certainly diminish over time.
- The employer “play or pay” penalty does not become effective until 2014. However, employers already have begun to revisit

their benefits and workforce strategies in light of the penalty as they compare the cost of providing health coverage to the penalty for not doing so. While the excise tax may be a number of years away, an estimated 60% of companies will reach the status of a “Cadillac” plan by 2018.¹¹⁸

V. EXECUTIVE COMPENSATION

Two significant developments most likely to generate regulatory activity in the executive compensation realm are challenging economic times and allegations of corporate misconduct.¹¹⁹ Unfortunately, in recent times, various employers have been confronted with both challenges, and in the current environment, it is not surprising there has been a host of activity related to executive compensation. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), which was passed in large part in response to large bonuses paid to executives of financial institutions that received government bailout funds is the most recent evidence of this trend. The Dodd-Frank Act follows enactment of Section 409A of the Internal Revenue Code of 1986, as amended (Section 409A) and the Sarbanes–Oxley Act of 2002, which resulted from corporate and accounting scandals occurring in a limited number of companies, most notably Enron.

A. Legislation: Dodd-Frank

Signed into law in July 2010, Dodd-Frank has many significant new employment provisions, including those related to executive compensation.¹²⁰ Dodd-Frank affords stockholders the opportunity to provide feedback to the Boards of publicly traded companies, usually through their Compensation Committees. The so-called Say-on-Pay provisions contained in the Dodd-Frank legislation ensure that shareholders, through the use of non-binding advisory votes, have the opportunity to collectively voice their perspective on compensation paid to executive officers in connection with corporate transactions, such as mergers or acquisitions. Dodd-Frank also requires public companies to report on: (1) executive pay in relation to the company’s financial performance; (2) how the CEO’s annual compensation compares to that of an average employee (receiving a median level of compensation); (3) incentive-based compensation, and whether such compensation encourages inappropriate risk-taking behavior; and (4) whether employees are engaging in the hedging of securities. Dodd-Frank also requires a company’s compensation committee meet strict standards of independence and have the authority to engage its own independent advisors and consultants. Dodd-Frank further requires companies to adopt clawback policies that would in theory allow companies to recoup incentive-based compensation if such compensation is based on financial statements

that are later required to be restated. Penalties for noncompliance with the requirements of Dodd-Frank can be severe, up to and including the de-listing of a company from a stock exchange.

B. Securities and Exchange Commission Regulatory Agenda

The SEC is tasked with establishing regulations regarding Dodd-Frank. To date, the SEC has provided regulations related to Say-on-Pay (including how frequently such votes should occur), as well as with regard to shareholder votes related to the compensation provided to executive officers in conjunction with corporate transactions.¹²¹ It is anticipated guidance on the other provisions of Dodd-Frank will be issued over the course of the next year.

C. Other Legislation and Stockholder Proposals

Given the comprehensive scope and far-reaching impact of Dodd-Frank, there has not been a great deal of other executive compensation legislation introduced. That said, legislators continue to be concerned about the pay disparity between executive officers and average employees. Although Dodd-Frank requires disclosure about that disparity, legislators continue to struggle to develop legislation that will not only highlight that gap, but will effectively narrow it (*e.g.*, introducing bills that would limit the deductibility of executive pay).¹²² In addition, legislators are trying to further align executive pay with performance by proposing rules that would prohibit paying a severance to poorly performing executives.¹²³

The shareholder proposals that are currently being offered seek to further align long-term and/or performance-based incentives with shareholder value by requiring executive officers to hold such forms of compensation for extended periods of time (*e.g.*, requiring a certain amount of equity-related compensation to be held for years after an executive officer terminates his or her employment or retires,¹²⁴ and/or prohibiting equity awards from vesting solely on the basis of the company having achieved performance goals).¹²⁵ Some of the shareholder proposals being offered also reflect a desire for more shareholder activism in the corporate governance arena, by seeking to reduce the percentage of shareholders necessary to call a special meeting or to approve other actions.

D. Proxy Advisors

Over the course of the past 10 years, public companies have been compelled to provide investors with ever increasing amounts of complex and voluminous information regarding executive compensation. As a result, investors, especially large institutional investors, look to Proxy Advisors¹²⁶ for guidance on how they should vote on shareholder proposals related to corporate governance and executive compensation (*e.g.*, votes regarding board membership

and Say-On-Pay proposals). Generally speaking, such Proxy Advisors have made considerable progress in limiting the use of compensation practices, such as gross-ups and single-trigger change of control agreements, that are not perceived as aligning with the long-term enhancement of shareholder value.

E. Treasury Department and IRS

The IRS, in conjunction with the enactment of Section 409A, continues to sporadically issue guidance related to non-qualified deferred compensation arrangements.¹²⁷ Indeed, the IRS is scheduled to provide regulations on income inclusion, as well as with regard to reporting and withholding issues associated with violations of Section 409A. Currently, the IRS is not willing to provide individual companies with determination letters or rulings regarding 409A issues.¹²⁸ In the area of healthcare reform, the IRS is scheduled to provide regulations related to nondiscrimination rules in the near future.

F. What Should Employers Anticipate in the Future?

With the exception of the regulations to be issued by the SEC in conjunction with Dodd-Frank, not a lot of change is anticipated in the executive compensation arena in the near-term. There will be a continuing trend of industry-specific targeted legislation for executive compensation.¹²⁹ Public sentiment against and media coverage about executive compensation practices have recently focused on industries rather than executive compensation as a whole. That said, Proxy Advisors will continue to focus on the following:

- Further enhancing the link between pay and performance—taking into consideration not just an individual company's performance, but the performance of that company's peer group.
- Increasing the performance periods for long-term incentive compensation—extending the vesting/performance period to five or more years. It is perceived that such longer-term performance periods will minimize inappropriate risk-taking behavior.
- Further aligning executive decisions with shareholder value by enhancing stock ownership guidelines and compelling executives and board members to retain equity for a year or two after their relationship with the company ends.

G. What Do These Developments Mean for Employers and Compensation Committees?

Employers and compensation committees should be prepared for the new Dodd-Frank requirements and continued scrutiny of

executive compensation. These steps include:

- Review incentive and equity compensation plans and arrangements and conduct a risk assessment in connection with any existing or new incentive pay practices.
- Adopt a clawback policy for incentive compensation.
- Adopt stock ownership guidelines for members of the Board and Executive Officers.
- Regularly communicate with institutional investors regarding executive compensation practices during the fiscal year; do not wait until the time for proxy reporting to open lines of communication.
- Review executives' compensation practices and determine if rebalancing is necessary to increase the percentage of compensation to be performance-based.
- Consider whether longer performance periods for long-term incentives should be considered and any associated accounting impact.
- Review company performance for a variety of criteria, e.g., EBIDTA (earnings, before interest, depreciation, taxes and amortization), TSR (total shareholder return), profit, etc., against peer groups to determine if executive compensation practices will be questioned.
- Review current executive employment and separation agreements for employer-provided COBRA continuation for fully insured plans; consider impact of the nondiscrimination rules for employer-provided COBRA continuation for amended or new executive employment and separation agreements.

VI. WHISTLEBLOWERS

Legislative efforts in 2010 and 2011 show a continuing trend of new and expanding protections for whistleblowers. As recently as ten years ago, federal whistleblower protection existed mostly for companies involved in highly regulated industries. By contrast, it now appears that almost any company—large or small, publicly traded or privately held—faces the distinct possibility of being subject to one or more federal or state whistleblower statutes. What is more important, the federal government is devoting considerable resources to interpreting and enforcing these expansive new whistleblower protections.¹³⁰

Perhaps most notable among the new protections for whistleblowers is the Dodd-Frank Act. Unlike the Sarbanes-Oxley Act (“SOX”), which responded to the public outcry over Enron by emphasizing compliance through adoption of internal mechanisms

of corporate policing and governance, Dodd-Frank places a new emphasis on corporate policing through government investigation and bounties for the whistleblower. Thus, the whistleblower has assumed a new status and a new role as critical government informant. In the wake of this dramatic shift, all companies, whether publicly or privately held, should pay renewed and focused attention on to their internal compliance, ethics and anti-retaliation policies and procedures.

A. The Dodd-Frank Act

For example, Section 929A of the Act amends SOX by clarifying that SOX is applicable to privately held subsidiaries of publicly traded companies and extends the statute of limitations from 90 to 180 days. The Act also precludes the waiver of claims under SOX and other whistleblower/retaliation claims covered by Dodd-Frank and outlaws pre-dispute agreements to arbitrate those claims.

The most significant employment-related aspect of Dodd-Frank, however, is the creation of a whistleblower bounty program and enhanced anti-retaliation protections for those who blow the whistle on securities-related violations.¹³¹ Under the new bounty provision, which is contained in Section 922 of the Act, a whistleblower who provides “original information” is eligible to receive a substantial monetary reward if the information leads to a successful enforcement action. If the case results in sanctions totaling \$1 million or greater, the whistleblower is eligible to receive between 10% and 30 % of any penalty recovered in a judicial or administrative action as a result of the whistleblower’s information.

Original information is that which is based on the whistleblower’s “own independent knowledge or analysis.” To qualify as *original information*, the substance of the whistleblower’s complaint must not be known to the Securities and Exchange Commission (SEC) other than through the whistleblower and cannot be exclusively derived from an allegation made in a judicial or administrative hearing, government report, audit or investigation, or from the news media, unless the whistleblower is the source of that information.

Dodd-Frank also allows whistleblowers to remain anonymous and to provide information exclusively through counsel up until the time when they receive a reward. The SEC will maintain the whistleblower’s confidentiality, except as necessary to provide information to other law enforcement and regulatory agencies.

It is important to note that, under Section 922 of Dodd-Frank, anyone who makes a protected report regarding a potential securities violation can state a claim. In fact, in its recently proposed rules for enforcing Dodd-Frank, the SEC makes clear that a whistleblower protected by Dodd-Frank could be a company’s

customer, officer, director, shareholder, agent, employee, consultant or contractor, service provider, consultant or even a competitor. Some commentators have noted that a whistleblower could even be an individual working for a competitor.

Dodd-Frank also contains a provision protecting from retaliation whistleblowers who report to the SEC. The provision creates a new private right of action and offers remedies including reinstatement, double backpay and attorneys' fees and costs. Section 1057 of Dodd-Frank also contains an anti-retaliation provision protecting individuals who work in the consumer financial products sector.

B. Proposed SEC Regulations

In November 2010, the SEC issued proposed regulations implementing the securities whistleblower incentives and protection program contained in Dodd-Frank. Though many in the business community clamored for a rule SEC regulations requiring that an employee report problems internally before being able to receive a reward for reporting to the SEC, the proposed rules contain no such provision.¹³²

In its release, the SEC did acknowledge that it does not intend to "discourage whistleblowers who work for companies that have robust compliance programs" from first making their reports internally. To that end, the proposed rules provide that a whistleblower would still be eligible for a reward if he or she complained internally first, so long as the whistleblower complains to the SEC within 90 days of the internal complaint. Under the proposed rules, the SEC would also be allowed to reward internal complaints by paying higher amounts to those who first report the matter internally.

The proposed rules also preclude certain people from collecting under the bounty program, including:

- People who have a pre-existing legal or contractual duty to report their information;
- Attorneys who attempt to use information obtained from client engagements to make whistleblower claims for themselves (unless disclosure of the information is permitted under SEC rules or state bar rules);
- Independent public accountants who obtain information through an engagement required under the securities laws;
- Foreign government officials; and
- People who learn about violations through a company's internal compliance program or who are in positions of responsibility for an entity, and the information is reported to them with the expectation that they will take appropriate steps to respond to the violation.

This last exclusion does not apply if the company does not disclose the information to the SEC within a reasonable time or acts in bad faith. In these circumstances, even individuals working in a compliance function can be protected "whistleblowers" within the meaning of Dodd-Frank.

The SEC also would not pay culpable whistleblowers awards that are based upon either the monetary sanctions that such people themselves pay in the resulting SEC action, or on sanctions paid by entities whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated. The purpose of this provision is to prevent wrongdoers from benefiting by, in effect, blowing the whistle on themselves.

The available time period for comment on the SEC's proposed regulations expired December 17, 2010, and the SEC must issue its final regulations by April 21, 2011. However, the SEC has said that, because the new statutory provisions apply to any original information provided to the SEC on or after July 22, 2010, implementing rules will be proposed and adopted earlier than this nine-month mark.¹³³

C. Additional Whistleblower Developments

The Food and Drug Administration (FDA)

On January 4, 2011, President Obama signed into law new legislation that would, among other things, provide whistleblower protections to employees involved with the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food. Specifically, Section 4.02 of the FDA Food Safety Modernization Act contains a provision protecting employees who, at their own initiative or *in the ordinary course of their duties* make an internal or governmental report regarding a violation, or an act or omission the employee reasonably believes to be a violation, of any provision under the Act. The FDA Act also protects employees who testify or otherwise participate in a proceeding regarding such a violation or who object to or refuse to participate in any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believes to be in violation of any provision of the Act.

This section provides aggrieved employees with the ability to file a complaint with the DOL, and, if the complaint is not resolved in a specified amount of time, a civil action in federal court. To prevail on a claim under this section, an employee would need to prove only that his or her protected actions constituted a "contributing factor" to the employer's adverse employment decision. To rebut such claims, an employer must demonstrate "by clear and convincing evidence" that it would have taken the same unfavorable personnel

action regardless of the employee's protected activity. Remedies for violations of this section include reinstatement to the same position, backpay, other compensatory damages if applicable, costs and attorneys' fees. An employee who brings an action in bad faith could face a \$1,000 penalty.

Healthcare Reform

The healthcare reform legislation passed in 2010, the Affordable Care Act, discussed in more detail in the Employee Benefits Section of this Report, Part Two, Section IV above, also contains new protections for whistleblowers. The Affordable Care Act amends the Fair Labor Standards Act (FLSA) to protect employees who: (1) object to activities they "reasonably believe" violate the Affordable Care Act; (2) report possible violations of the Act to an employer, the federal government, or a state's attorney general if the employee "reasonably believes" that a violation has occurred; or (3) testify or assist in investigations into possible violations. This amendment to the FLSA applies to all employers, regardless of industry or size. Under the burden-shifting paradigm set forth in the statute, an employee need only show by a preponderance of the evidence that his or her protected conduct was a contributing factor to the employer's adverse action, which the employer can then overcome only by clear and convincing evidence that it would have taken the action against the employee in any event.

The Affordable Care Act also establishes a new definition of "original source" for purposes of claims brought under the False Claims Act.

Environmental Statutes

The Occupational Safety and Health Administration (OSHA) has published a new rule, effective January 18, 2011, revising the procedures for handling whistleblower claims arising under the Energy Reorganization Act (ERA) and six environmental statutes: the Safe Drinking Water Act (SDWA); Federal Water Pollution Control Act (FWPCA); Toxic Substances Control Act (TSCA); Solid Waste Disposal Act (SWDA); Clean Air Act (CAA); and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The stated purpose of the final rule is to make the employee protection provisions "as consistent as possible with the more recently promulgated procedures for handling retaliation complaints under other whistleblower provisions administered by [OSHA]."

Among other things, the final rule clarifies that under the six environmental statutes, it is unlawful for an employer to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against any employee because the employee

has commenced or has testified, participated or assisted in a proceeding under one of the enumerated environmental statutes. Under the ERA, which protects nuclear safety whistleblowers, employers may not discharge or otherwise retaliate against an employee who: notifies the employer of an alleged violation; refuses to engage in an unlawful practice if the employee has identified the alleged illegality to the employer; or testifies before Congress or at any federal or state proceeding regarding the ERA.

An employee who believes he or she has been retaliated against under the ERA has 180 days to file a complaint with OSHA. The statute of limitations under the environmental statutes is far shorter—only 30 days. While the rules allow for private settlements prior to a final agency decision, under the ERA, the CAA, the SDWA and the TSCA, such settlements must be reviewed and approved by DOL. Approval of settlements under the other statutes is not required, but is strongly recommended.

Once a complaint is filed, the Assistant Secretary for Occupational Safety and Health has 30 days to render a decision. If the Assistant Secretary finds reasonable cause to believe retaliation occurred, he or she can order that the employer reinstate the employee to his or her former position, pay backpay and compensatory damages and, under the TSCA and the SDWA, pay punitive damages. The employer may also be required to pay the employee's costs and attorney's fees.

D. What Do These Whistleblower Developments Mean for Employers?

Given the many new sources of protection for whistleblowers, it is now more important than ever to encourage internal reporting of possible violations and to prevent retaliation against whistleblowers. After all, the stronger a company's ethical culture and internal compliance systems, the more likely it is to avoid whistleblower claims altogether. By following some practical steps, companies can put themselves in the best possible position for dealing with potential whistleblower or retaliation claims and can go a long way toward preventing such claims.

- **Create a Culture of Ethics and Compliance:** Companies can help prevent complaints of corporate misconduct by fostering a culture of integrity, ethics and lawful business practice. Such efforts may include promulgating and enforcing a code of ethics or code of conduct. Reminders of the principles set forth in those codes can appear in employee newsletters and messages from senior management. Companies may also consider evaluating ethics and integrity as part of performance evaluations and should pay particular

attention to evidence of honesty and integrity at the hiring stage.

- **Review Internal Compliance Programs:** Companies should review their internal compliance and ethics programs, particularly with regard to the legislation referenced above that includes new whistleblower provisions.
- **Remind Employees About Reporting Procedures:** As part of their in-depth review of compliance procedures, employers should evaluate their existing whistleblower reporting systems. Employers can work to build confidence in their reporting mechanisms by taking all complaints seriously and responding in a manner that is swift, thorough and appropriate. It is also important to ensure that reporting mechanisms are well-advertised by, for example, posting reminders in employee newsletters, sending ethics-related e-mails, or creating hotline posters. In these messages, companies should emphasize that a tipster can remain anonymous, that hotline reports bypass managers and supervisors and that the company will in no way retaliate against whistleblowers.
- **Prevent Retaliation:** It is absolutely essential that no one retaliate against a whistleblower in any way and that managers and supervisors understand that retaliation can take many forms—not just a termination or demotion. Companies should ensure that their policies clearly articulate zero tolerance for any reprisals or retaliation against an individual who reasonably makes a complaint in good faith.
- **Train Managers in Retaliation and Whistleblower Policies:** Companies must train managers on three fundamental issues: (1) how to recognize whistleblower complaints; (2) how to respond to such complaints; and (3) how to avoid any retaliation against the individual who complained. Managers need to have enhanced awareness that when an employee reports possible ethical or other violations to them, they have a duty to involve both compliance and human resources immediately. This allows the company to address the substance of the report and to work with front-line managers to ensure that no retaliatory action is taken against the whistleblower.

VII. PRIVACY

A. Health Information and Credit History

Department of Health and Human Services

The Department of Health and Human Services (HHS) is responsible for implementing and enforcing the Health Insurance

Portability and Accountability Act of 1996 (HIPAA), and its implementing regulations (collectively, the “HIPAA Privacy Rule” and the “HIPAA Security Rule”) as well as the Health Information Technology for Economic and Clinical Health Act (HITECH Act), which was enacted on February 17, 2009, and supplements the HIPAA Privacy and Security Rules.¹³⁴ These laws and regulations apply to individually identifiable health information created or received by, or on behalf of, covered healthcare providers and covered health plans.

In the employment context, HIPAA’s scope, as a practical matter, is relatively limited applying only to individually identifiable health information created or received by, or on behalf of, a self-insured group health, dental, vision, pharmacy benefits, or long-term care plan; healthcare reimbursement flexible spending account; or employee assistance program. For employers in the healthcare sector, however, HIPAA’s impact is far broader because it applies, in addition, to all patient information handled by the workforce.

HHS Regulatory Agenda

Although state security breach notification laws first went into effect in 2005, and forty-six states had enacted such laws by 2010, federal law did not require security breach notification until September 2009 when interim final regulations, promulgated by the HHS to implement the HITECH Act, became effective.¹³⁵ These regulations required security breach notification when an unauthorized use or disclosure of protected health information (PHI) posed a significant risk of financial, reputational, or other harm to an individual. Several members of Congress and privacy advocates objected to the “harm standard,” contending that it improperly raised the threshold for security breach notification required under the HITECH Act.

In July 2010, the HHS withdrew the interim final regulations; replacement regulations currently are under review by the Office of Management and Budget (OMB).¹³⁶ It is anticipated that these replacement regulations will eliminate the “harm standard,” which would substantially expand employers’ and providers’ obligation to provide security breach notification. If, for example, an employee on her last day of work were to accidentally remove (PHI) from the employer’s premises with some personal files but, upon discovery, promptly returned the information, the employer would be required to provide security breach notification even though there would be no risk of harm.

In addition to the security breach notification regulations referenced above, OMB also is evaluating final regulations promulgated by the HHS to implement the HITECH Act and

supplement the HIPAA Privacy and Security Rules. While these regulations will principally affect healthcare providers, they would impose additional obligations on employers. These include: (1) amending existing agreements with “business associates,” HIPAA parlance for third-party service providers who create or receive PHI on a covered entity’s behalf; (2) distributing revised HIPAA privacy notices to plan participants; and (3) revising policies governing plan participants’ right to access PHI.¹³⁷ Most significantly for employers, the new regulations will expand HHS’s power to impose penalties for HIPAA violations.

HHS Enforcement Agenda

In February 2011, nearly eight years after the HIPAA Privacy Rule went into effect, the HHS imposed its *first* civil monetary penalty under HIPAA, a whopping \$4.3 million against a healthcare provider that had failed to timely respond to the access requests of forty-one patients.¹³⁸ Two days later, HHS announced a \$1 million settlement payment by a venerable Massachusetts hospital whose employee had inadvertently left records related to 192 patients on a subway seat.¹³⁹ This was the fourth seven-figure settlement obtained by HHS in the past two years.

Anticipated Trends

The HITECH Act substantially increased the penalties that the HHS can impose for HIPAA violations, to a maximum of \$50,000 per violation and \$1.5 million annually.¹⁴⁰ HHS’s recent enforcement actions demonstrate the agency’s intent to flex its new-found muscle. Although all enforcement actions to date have involved healthcare providers, employers should expect that the HHS may initiate enforcement actions against them as well.

B. Equal Employment Opportunity Commission

EEOC Regulatory Agenda

GINA

The EEOC’s regulations implementing the employment provisions of the Genetic Information Non-Discrimination Act of 2008 (GINA),¹⁴¹ briefly highlighted in Part Two, Section III, above, demonstrate that GINA is as much, if not more, privacy legislation than anti-discrimination legislation.¹⁴² The GINA regulations broadly construe the Act’s prohibition against an employer’s acquisition of genetic information to include, for example, a manager’s actively listening to a conversation between coworkers involving genetic information or accessing an employee’s restricted social media account. The regulations also impose broad obligations on employers to protect the confidentiality of genetic information. Given that GINA defines *genetic information* to include not only the

genetic results of an employee and his family members, but also the manifested disease or disorder of a relative to the fourth degree, the implications of the EEOC’s GINA regulations will be far-reaching. The impact of GINA regulations extend to numerous employment policies and procedures, such as fitness-for-duty examinations to employer-provided wellness programs.

Institution of Class Action Type Lawsuits: “Credit Privacy”

Four states—Hawaii, Illinois, Oregon and Washington—have recently imposed restrictions on employers’ access to, and use of, applicants’ and employees’ credit information for employment purposes.¹⁴³ More than thirty-seven states have pending bills that would impose similar restrictions, and legislation also is pending in Congress. In the meantime, as previously discussed in the Equal Employment Opportunity section of this Report, Part Two, Section III above, the EEOC has used nonregulatory means to demonstrate its general opposition to employers’ use of credit history in employment decisions. On October 20, 2010, the EEOC dedicated its first public meeting in more than one year to the subject of employers’ use of credit history for employment decisions.¹⁴⁴ Two months later, the Commission filed its second lawsuit since the commencement of the Obama Administration, alleging that the defendant-employer’s use of credit history for employment decisions had a disparate impact on African-Americans and Hispanics.

C. What Do These Privacy Developments Mean for Employers

- Employers should inventory the information they collect about applicants and employees and consider whether the collection is both lawful and necessary to achieve a legitimate business purpose.
- Employers should review how sensitive employee information, such as genetic information and protected health information, is used within the organization and to whom that information is disclosed outside of the organization to ensure compliance with evolving statutory and regulatory requirements.
- Human resources professionals need to coordinate with their information technology (IT) team to ensure that the organization has implemented reasonable and appropriate physical, technical and administrative safeguards for sensitive personnel information.
- Human resources professionals also should coordinate with their IT colleagues to develop a security incident response plan that will inform employees on how to identify and

report security incidents and provide the organization with a road map for responding.

- Employers should provide security awareness training, which can apply not only to sensitive personal information but also to confidential business information, in order to provide employees with guidance on how they can help the organization enhance its information security.

VIII. WORKPLACE SAFETY

A. Occupational Safety and Health Administration

The Occupational Safety and Health (OSHA) is headed by the Assistant Secretary of Labor for OSHA, Dr. David Michaels. Prior to being appointed to head OSHA by President Obama, Dr. Michaels was a research epidemiologist and interim Chair of the Department of Environmental and Occupational Health at the George Washington University School of Public Health. In that position, he worked on the Project on Scientific Knowledge and Public Policy (SKAPP), bringing together an interdisciplinary group of scientists to examine the use and misuse of science in two forums in which public policy is shaped: the courts and the regulatory arena. Previously Dr. Michaels served in the Clinton Administration as the Department of Energy's Assistant Secretary for Environment, Safety and Health. During his tenure he coordinated an initiative to compensate workers who were exposed to radiation, beryllium, and other hazards at nuclear facilities.

The Deputy Assistant Secretary (DAS) for OSHA, an appointed position that does not require Senate confirmation, is Jordan Barab. Mr. Barab previously served as a Special Assistant at OSHA at the end of the Clinton Administration. His DOL biography notes he "helped the Agency to promulgate the ergonomics workplace safety and health standard that was repealed by Congress in March 2001." Mr. Barab worked for the House Education and Labor Committee as Senior Labor Policy Advisor for health and safety from 2002 to 2007, where he authored proposed legislation that would have required OSHA to issue a combustible dust standard. Prior to that, Mr. Barab worked at the U.S. Chemical Safety and Hazard Investigation Board, was a Health and Safety Specialist for the AFL-CIO, and directed the health and safety program for the American Federation of State, County and Municipal Employees for more than 16 years. Prior to his political appointment, Mr. Barab maintained a blog entitled "Confined Space," which was highly critical of OSHA activities.

B. OSHA Regulatory Agenda

During the Administration of George W. Bush, OSHA cancelled 24 pending regulatory rulemaking actions that were in various

stages of development.¹⁴⁵ Since that time, as reflected in its Fall 2010 Regulatory Agenda OSHA has instituted seven pre-rule action items and five proposed rules. Another fourteen rulemakings are pending at the final rulemaking stage, although only three of them involve substantive safety and health issues.

Injury and Illness Prevention Program (I2P2)

OSHA is developing a rule requiring employers to implement an Injury and Illness Prevention Program. This new Standard, part of DOL's "Plan, Prevent, Protect" strategy, would require employers to have a written program for planning, implementing, evaluating, and improving processes and activities that protect employee safety and health. Although OSHA has had voluntary Safety and Health Program Management Guidelines (54 FR 3904-3916), in place since 1989, it is now asserting they should be mandatory. OSHA notes in support of its position that the American National Standards Institute/American Industrial Hygiene Association Standard Z10 and Occupational Health and Safety Assessment Series 18001 require written programs. OSHA also notes that twelve states have similar rules. OSHA has not set a date for publication of a Notice of Proposed Rulemaking but it is being strongly advocated by Dr. Michaels.

Combustible Dust

Following several high profile accidents, a Chemical Safety Board report recommending that OSHA have a specific standard devoted to Combustible Dust and Congressional oversight hearings, OSHA implemented a Combustible Dust National Emphasis Program on March 11, 2008. OSHA published an Advance Notice of Proposed Rule Making (ANPRM) on October 21, 2009. Stakeholder meetings were held in Washington, D.C. on December 14, 2009, in Atlanta, GA on February 17, 2010, and in Chicago, IL on April 21, 2010. A web chat for combustible dust was also held on June 28, 2010. The next step in this proposed rulemaking will be to initiate procedures under the Small Business Regulatory Fairness Act of 1996 (SBREFA)¹⁴⁶ in April 2011. Both Dr. Michaels and Mr. Barab have advocated in favor of this Standard.

Confined Spaces in Construction

In January 1993, OSHA issued a general industry rule to protect employees who enter confined spaces.¹⁴⁷ This standard does not apply to the construction industry because of differences in the nature of the worksite in the construction industry. In discussions with the United Steel Workers of America on a settlement agreement for the general industry standard, OSHA agreed to issue a proposed rule to extend confined-space protection to construction workers appropriate to their work environment. OSHA proposes to publish a Final Rule in November 2011.

General Working Conditions for Shipyard Employment

During the 1980s, OSHA initiated a project to update and consolidate the various OSHA shipyard standards that were applied in the shipbuilding, ship repair, and shipbreaking industries. The operations addressed in this rulemaking relate to general working conditions such as housekeeping, illumination, sanitation, first aid, and lockout/tagout. An estimated 100,000 workers are potentially exposed to these hazards each year. The proposed rule was published December 20, 2007, and public hearings were held in 2008. In its Fall 2010 Regulatory Agenda OSHA anticipated publishing a final rule in January 2011, but the rule has not yet been published.

Electric Power Transmission and Distribution and Electrical Protective Equipment

OSHA finalized its Electric Power Transmission and Distribution Standard for General Industry workplaces involved in the production and maintenance of power in 1993. Those requirements of the Standard were not, however, applicable to construction industry employees, and thus, in 2003 OSHA began a rulemaking. In addition, OSHA will be revising miscellaneous general industry requirements, including provisions on electrical protective equipment and foot protection. This rulemaking also addresses fall protection in aerial lifts for work on power generation, transmission, and distribution installations. OSHA anticipates publishing a final rule in May 2011.

MSD Recordkeeping

On January 25, 2011, OSHA announced that it was temporarily withdrawing its proposed rule to restore a column to the OSHA Injury and Illness (Form 300) Log that employers would use to record work-related musculoskeletal disorders (MSD) to seek greater input from small businesses on the impact of the proposal.¹⁴⁸ The MSD recordkeeping proposal could serve as a possible precursor to some form of ergonomics regulation. OSHA plans to hold teleconferences for small businesses to provide input on the proposed MSD column for employer injury and illness logs.¹⁴⁹

C. OSHA Enforcement Agenda

President Obama's proposed budget for 2012 included funding for increased agency enforcement. According to OSHA, the budget includes funds for twenty-five additional inspectors who would "expand the agency's enforcement presence." The agency estimates it will conduct 41,000 inspections from October 1, 2011, to September 30, 2012, a 6.5 percent increase from the number of inspections conducted during fiscal 2010. The Site-Specific Targeting (SST)

Program focuses inspections on businesses that report high injury rates. For the first time in 2011, SST will target businesses with 20 or more employees. Previously, the minimum number of employees was 40. In 2012, three new National Emphasis Programs (NEPs) will start: Primary Metals, Diacetyl Substitutes, and Isocyanates. Other emphasis programs will continue, including Recordkeeping, which focuses on employers that underreport injuries and illnesses and also examines safety incentive programs that discourage workers from reporting injuries.

Severe Violators Enforcement Program

OSHA's Enhanced Enforcement Program (EEP) program was created to focus resources on "those employers who are indifferent to their obligations under the OSH Act." In April 2009 congressional hearings, OSHA agreed that the EEP was not working as intended and needed to be improved to target "truly bad actors," such as those with willful or repeat violations and/or those linked to workplace fatalities. Accordingly, in June 2010 OSHA implemented its Severe Violators Enforcement Program (SVEP) to replace the EEP. Under SVEP, if an employer has a triggering event, which may be as limited as three Repeat citations, the employer will be subject to potential inspections at all of its facilities, enhanced settlement requirements, and mandatory follow-up inspections. As of the end of 2010, OSHA categorized 89 businesses as SVEP cases, of which 69 were small businesses with less than 100 employees.

Enhanced Penalties

In October 2010, OSHA revised its penalty assessment process. OSHA increased its minimum assessments, expanded Repeat violations from three to five years of history, eliminated certain deductions, and determined that all penalty deductions would no longer be applied serially. OSHA estimated that its actions would increase the penalty for each citation it issued by approximately \$3,000.

D. What Do These OSHA Developments Mean for Employers?

Employers need to be prepared to deal with an active regulatory agenda, aggressive OSHA enforcement and multi-agency cooperation and sharing of information, particularly between OSHA and the EPA. Employers should expect increased citations and penalties, potentially under new inspection programs. As part of an employer's compliance efforts, the following critical elements should be considered:

- Closely monitor agency developments, including proposed rulemaking and other opportunities for input on areas of

focus by OSHA as well as carefully monitoring enforcement efforts (*i.e.* new citations) and settlements.

- Review injury and illness recordkeeping practices to ensure compliance.
- Conduct refresher training for all managers and supervisors on the company policies related to government inspections of the worksite.
- Review OSHA compliance efforts and safety programs.
- Carefully evaluate and consider privileged audits of injury and illness recordkeeping and safety compliance.

Based on recent enforcement efforts, a comprehensive response to OSHA regulations, guidelines, and directives, clearly appears to be the most effective and efficient approach to minimize an employer's risk of OSHA violations.

IX. IMMIGRATION

A. U.S. Department of Homeland Security

Led by Secretary of Homeland Security Janet Napolitano since the dawn of the Obama Administration, the Department of Homeland Security (DHS) has embarked on an unprecedented campaign to root out the employment of undocumented workers through aggressive enforcement of new and existing regulations aimed at U.S. employers. While Secretary Napolitano hails from Arizona, known recently for its aggressive anti-illegal immigrant legislation,¹⁵⁰ the DHS's focus during her tenure has been one of targeting businesses who hire undocumented workers, rather than the undocumented workers themselves.

Among others, the DHS is composed of three organizations that formed the legacy Immigration & Naturalization Service: (1) U.S. Citizenship & Immigration Services (USCIS); (2) U.S. Customs & Border Protection (CBP); and (3) U.S. Immigration & Customs Enforcement (ICE). It is through these three agencies that the DHS is enforcing its regulatory agenda.

DHS Regulatory Agenda

Failure in Congress to pass the Comprehensive Immigration Reform Act of 2006 (S. 2611) and its successors¹⁵¹ opened the door for the Bush Administration's regulatory onslaught against illegal immigration. While notable for the unprecedented scope of activity aimed at curbing illegal immigration, the Bush Administration's efforts were largely directed at the undocumented workforce itself. Since 2009, the Obama Administration's main enforcement initiatives have been aimed at the nation's employers in an apparent attempt to eliminate the perceived demand for illegal labor in the United States.

E-Verify Developments

The centerpiece of DHS's enforcement strategy has been and continues to be the E-Verify employment eligibility screening tool. Going back a decade and a half, The Illegal Immigration and Reform and Immigration Responsibility Act of 1996 (IIRIRA) required that the Attorney General implement "employment eligibility confirmation" pilot programs. This was the genesis of E-Verify.

Up until recently, participation in E-Verify was completely voluntary. However, over the past few years, many states began making E-Verify mandatory for their public contractors, or (and/or for simply being employers doing business in their states), and the federal government enacted its own amendment to the Federal Acquisition Regulation mandating E-Verify use for many of its contractors and some of their subcontractors.¹⁵²

The DHS has made it clear that it intends to push to expand the E-Verify mandate to cover all employers in the United States.¹⁵³

ICE I-9 Audit Activity

Much as its E-Verify cousin has become the DHS's tool of choice for preventing undocumented workers from entering the workforce, the Form I-9 is the centerpiece of the DHS's focus for eliminating current undocumented workers from the workforce.

During the Obama Administration's tenure, ICE has audited more than 3,200 employers suspected of employing illegal workers, debarred 225 companies and individuals from participating in federal government contracting, and imposed approximately \$50 million in financial sanctions-more than the total amount of audits and debarments during the entire previous administration.¹⁵⁴ This has largely been done through the I-9 audit process, by which ICE ensures strict compliance by U.S. employers with requirements to hire work-authorized labor.

It was recently announced that ICE has created an employment compliance inspection center in Crystal City, Virginia. This center will be home to fifteen auditors who will support ICE's worksite enforcement strategy. They will help ICE field offices around the country expedite Form I-9 audits of businesses selected for inspection. In the press release announcing this development, it was noted that "[f]orm I-9 audits are one of the most powerful tools the federal government has to ensure that businesses are complying with U.S. employment laws."¹⁵⁵

USCIS Adjudication Trends

As detailed in Littler's Global Immigration Counsel blog,¹⁵⁶ recent policy guidance has complicated the process of obtaining H-1B visas for foreign workers. As the principal visa category

for bringing highly skilled foreign workers to the United States, increasing restrictions on the H-1B category greatly impact the ability for U.S. employers to recruit and hire critical talent.

On January 8, 2010, the so-called “Neufeld Memo” was issued by Donald Neufeld, Associate Director, Service Center Operations for USCIS.¹⁵⁷ The Neufeld Memo addresses the requirements for establishing the employer-employee relationship between the petitioning employer and the foreign national employee to be working pursuant to the H-1B visa. Its restrictive interpretations of what constitutes an employer-employee relationship have caused employers a great degree of trouble regarding H-1B employees, especially regarding those situations involving off-site or third-party placements of the H-1B employee.¹⁵⁸

Accordingly, consulting companies and staffing agencies in particular face significant hurdles in meeting these new regulatory interpretations. The importance of these types of employers to the high-tech industry means that companies doing business in that sector of the economy will surely feel the effects of this drastic change in protocol by USCIS.

Similarly, recent USCIS decisions appear to indicate a trend toward a more narrow interpretation of what is an “affiliated or related nonprofit entity” to an institution of higher education for purposes of the exemption from the annual cap on new H-1B visas. The question arises as to whether, in light of this trend, nonprofit hospitals with higher education affiliations will continue to meet the USCIS’ standard for “affiliated or related” so as to be eligible for cap-exempt petitioner status, for purposes of H-1B petitions for medical residents and other categories of employee. This new and more restrictive interpretation of prior guidance signals trouble for the nation’s legion of non-profit hospitals who do not have an affiliated medical school, and who rely on the H-1B program to ensure their medical residency programs are viable and effective.

New Export Control Attestations for H-1B, L-1 and O Visa Categories

On November 23, 2010, the USCIS published new visa petition Form I-129 (Petition for a Nonimmigrant Worker). The updated Form I-129 was published pursuant to recently implemented USCIS regulations that impose increased obligations under two older laws: The Export Administration Regulations (EAR) (15 C.F.R. Parts 770-774) and the International Traffic in Arms Regulations (ITAR) (22 C.F.R. Parts 120-130).¹⁵⁹

Prior to the November 2010 release of the updated Form I-129, which requires certification of compliance with EAR and ITAR, many employers may not have been familiar with these regulations.

Immigration law intersects with these export control issues because the release or exposure of information relating to ITAR and EAR regulated technology to foreign nationals is considered a “deemed export” so that, even if an employer does not actually export controlled technology out of the United States, export license compliance may still be needed due to employing foreign nationals in positions where they will be exposed to controlled technology.

Part 6 of the revised Form I-129, *Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States*, requires petitioners to certify that they reviewed EAR and ITAR and that the “technology or technical data the petitioner will release or otherwise provide access to the beneficiary [visa holder]” either does not require a license from the U.S. Departments of Commerce or State, or that access will be denied until the required license or other authorization to release is granted.

Technology and technical data that are controlled for release to foreign persons are contained on the EAR’s Commerce Control List,¹⁶⁰ which is overseen by the Commerce Department’s Bureau of Industry and Security. The ITAR’s U.S. Munitions List¹⁶¹ is overseen by the State Department’s Directorate of Defense Trade Controls.

Wage and Hour Implications to H-1B Visa Holders and Employer Sponsors

The DHS and its subsidiary agencies are not the only ones involved in stricter immigration regulation. The U.S. Department of Labor (DOL) has also entered the fray, with its role in overseeing wage obligations of H-1B employers through the Labor Condition Application (LCA) process. It has become clear that the DOL is conducting its most extensive audit of H-1B wage obligations in history. Through audit of H-1B employer records and review of questionnaires sent directly to H-1B employees, the DOL has levied fines against H-1B employers and backpay awards to H-1B employees reaching into the millions of dollars. One notable example is the GlobalCynex, Inc. audit. GlobalCynex Inc. is an information technology company located in Virginia that negotiated an agreement to pay almost \$1.7 million in back wages to more than 340 H-1B employees after an investigation by DOL found that the company did not pay required wages to those employees.¹⁶²

B. The States and Immigration Reform

Recent years have seen a tidal wave of state legislation on the subject of immigration, some of which passed and some of which did not. In particular, several states throughout the country took steps to mandate E-Verify usage by their public contractors and, in some cases,

for private employers. This “piggy-backing” on the efforts of the DHS and its agencies in setting a regulatory landscape for immigration enforcement, bears careful scrutiny as the number of states mandating E-Verify participation at some level continues to increase.¹⁶³

Arizona was notable as the first state to mandate E-Verify for all new hires regardless of the employer’s size or sector.¹⁶⁴ Georgia recently upped its efforts, with its House of Representatives passing legislation to expand mandatory E-Verify usage to private employers. This past January, Florida saw new Governor Rick Scott sign Executive Order 11-02 immediately upon taking office, mandating all state agencies under the direction of the governor to verify employment eligibility of all current and prospective employees through E-Verify. Further many states, like Florida and South Carolina, currently have legislative initiatives to require E-verify of all employers in their state. These states join Colorado, Idaho, Mississippi, Minnesota, Missouri, Nebraska, North Carolina, Oklahoma, Rhode Island, South Carolina, Utah and Virginia in requiring some level of E-Verify participation by the employers in those states.¹⁶⁵

C. What Do These Immigration Developments Mean for Employers?

Employers need to be prepared to deal with an active DHS regulatory and policy agenda in the E-Verify arena accompanied by state-specific requirements regarding its use, increasingly restrictive regulatory interpretations in visa processing, and all-out I-9 audit and enforcement strategies at ICE. As part of an employer’s compliance efforts, the following should be critical elements of an employer’s compliance activities:

- Closely monitor state-based regulatory and statutory initiatives requiring the use of E-Verify. The Littler Monitor, an online subscription service providing analysis of enacted legislation and regulations, is a tool available to monitor such developments.
- Carefully and thoroughly audit existing I-9 records to ensure compliance with regulations, including revising and updating I-9 policies to provide for strict adherence to requirements and proper completion of I-9s for new hires.
- Assess exposure of the foreign national workforce to changes in visa processing, especially in mission-critical employee categories that historically have a high number of H-1B work visa holders.
- Monitor wage obligations incurred in visa sponsorship and effectively ending those obligations upon the termination of the employment relationship with the foreign national.

PART THREE: Practical Solutions—Littler’s Seven Steps to Compliance

With the federal government’s regulatory machine revving its engine, employers should not sit back and wait for the coming avalanche of new regulations.

Aside from highlighting the various checklists for compliance with individual agency or department developments discussed in this Report and summarized in Appendix A, included below are seven comprehensive technology-driven steps employers should take now to prepare for the inevitable increase in regulation of overall employer conduct.

Step One: Assess Your Organization’s Regulatory Compliance Environment and Awareness

During the last decade legal compliance issues have received increased attention from Boards of Directors and CEOs. While employment and labor law compliance is inextricably a part of the human resource function with support and oversight from the legal department, a centralized “compliance” officer or team has become more common. The first step to preparing for the regulatory avalanche is to assess where in your organization responsibility currently resides. While decisions and regulations of the EEOC, NLRB, and DOL are historically monitored by HR, increasingly other regulatory agencies and controls impact employment and labor law compliance. For example, the SEC and IRS have multiple regulations that impact everything from employee compensation to restrictions on political contributions. Federal law and regulations must also be integrated with state requirements. Global organizations have even a more complex compliance challenge with cross-border requirements. Employers should designate an individual or team to map out how employment and labor law compliance is currently addressed in the organization, identify the compliance resources available, and then set up a mechanism to track incoming new regulatory requirements and develop a coordinated response.

Step Two: Use Technology to Efficiently Monitor Regulatory Changes and Document Responses

Having designated an individual or team to be responsible for monitoring regulatory changes (federal and state), this task alone could quickly become overwhelming and not cost efficient even for large organizations. However, this is a need that applies to countless employers and justifies the use of technology. Littler has long provided a subscription-based website, The Littler Monitor, that tracks enacted state and federal statutes and regulations and provides a quarterly analysis of developments along with necessary

action items. The Littler Monitor provides analysis of *enacted* legislation and final regulations on a website available to client subscribers. Littler also has a tool to track *pending* employment-related bills and regulations and can provide weekly and monthly reports on a subscription basis as well. The reports provide updated status of pending legislation and regulation and allow employers to determine as these new laws and rules make their way through the administrative and legislative process which areas they need to start preparing to implement. Whichever system is selected, employers should be able to focus on following the regulatory and legislative developments in the jurisdictions where they do business, and by doing so employers can then monitor for the developments to track public meetings, official directives, formal and informal regulatory and enforcement announcements and whatever else develops as bills and regulations are crafted. For employers who want even more details, substantial real time information is published daily through eight Littler Blogs, including the Washington D.C. Update which is one the most frequently consulted employment related blogs on the Internet. Subscriptions to the Littler Blogs is a value added service of the law firm. A list of Blogs and other online resources is available in Appendix B.

Step Three: Consider Becoming Involved in the Regulatory Process

One of the classic myths is that regulatory developments are predetermined or that agencies are fully informed about how proposed regulations or directives will impact the workplace. Rather than relying entirely on passive compliance, consider what can be done to impact the formation of directives and regulations. Multiple opportunities for input and reactions exist. These range from active participation through employer organizations to direct involvement in public hearings and Internet postings. Any public position or testimony should be closely coordinated with your Government Affairs/ Public Relations Departments or for smaller organizations seek the authorization of the executive team before making such public comments. Currently the Obama Administration has aggressively invited involvement by requiring all agency regulations and directives to be assessed regarding their impact on job creation and retention. Beyond the formation of regulations, employer organizations often evaluate pending and new laws and regulations to determine ripeness for legal challenges. Depending on the issue and the size of the employer, normally such challenges are less expensive and politically more powerful coming from associations as opposed to individual companies.

Step Four: Identify the Impact of Changing Regulations on Your Policies, Practices and Business Objectives

Being able to quickly and easily receive via a website subscription notice of changes in regulations, guidelines, and enforcement will be meaningless unless it is juxtaposed with an employer's policies, practices, and business objectives. Technology can assist in making sure the right people have been alerted to the new developments and asking for a response. Whether this is as simple as a checklist or as comprehensive as an audit, this is a critical practical step in the compliance process.

Step Five: Update or Create New Policies and Practices as Required

Once a change has been recognized and evaluated, the next step is making needed changes in policies and practices. Again technology can greatly simplify this task while reducing the cost. On a subscription fee basis, Littler maintains a tracking system that codes developments green, amber, and red. Green is an agency development that does not require action or concern. Amber signifies a development that needs monitoring and may justify future action. Red requires immediate action. This may include modifying a policy or practice or creating new ones. Following the alert of enacted or soon to be implemented regulations policies will need to be updated and prepared for distribution. Updated policies can also be provided on a subscription fee basis depending on jurisdiction and need. Whatever system is used, it is necessary to have an audit or deep working understanding of employment and labor law compliance efforts. This allows impacted policies and practices to be quickly identified and changed. More importantly, it facilitates changing compliance practices and procedures which may not be documented in the language of the policies. Littler is currently beta testing a technology-driven system that combines notice of changes with an employer's policies with subsequent suggested changes. This system should be available to firm client's within several months.

Step Six: Implementing the Policy and Practice Through Training and Technology

While many legal requirements are fulfilled by changing a policy and posting the change on an intranet, underlying compliance often requires more. While some managers and employees adjust their behavior automatically upon receiving a written policy, others do not quickly internalize change. Historically training programs and internal complaint procedures have been used to increase compliance. Today engaging e-learning systems can quickly distribute the needed understanding to large number of geographically dispersed managers. Depending upon the nature of the change and the policies

affected, e-learning can also be efficiently used for interacting with employees. Additionally, managers and employees can be reminded about complaint procedures and encouraged to use them when appropriate. Indeed at the end of the e-learning program employees can be asked to make a commitment to report perceived violations. Littler has legally engineered state-of-the-art compliance training programs through ELT, Inc. For managers an Integrity Suite of courses has been created. Much like a coordinated series of video games, new or updated modules can be insured. This training can be quickly distributed and course completion tracked electronically. Littler has been developing the content for new modules as regulatory change has been occurring. On certain topics like wage and hour requirements, it is likely the DOL will recommend such training or even make it a requirement.

Step Seven: Monitor Compliance and Periodically Confirm Compliance

Many organizations have good initial compliance systems, but underestimate their longevity and maintenance. A classic example is a payroll system that electronically records starting and ending times as well as meal breaks. Over time systems wear down, improper overrides occur, and requirements change. Periodic compliance checks are highly recommended. Most of the time the deterioration comes not from technology but the human aversion to consistency. An independent contract classification system does everything properly only to find out that in practice and over time documentation lags and some local managers decide they need to exert more direct control. The solution is to periodically monitor compliance and make needed adjustments. Many audit checklists are available. Open Compliance and Ethics Group (www.OCEG.org) provides a listing of compliance guidelines in twelve areas of employment and labor law. A compliance audit should be considered including whether it is necessary to structure it so that the attorney-client privilege can be claimed. For a simple version of a compliance checklist, refer to Littler's 2011-12 National Employer, Chapter 14.

The Littler Seven Step Program is not a pre-set solution to the compliance challenge. Instead it is seven ways of examining compliance solutions to ensure that they are comprehensive and accomplish their mission. In that regard the reader is urged to recognize that change is impacting work, the workforce, and the workplace. Technology has reached a level of sophistication and availability that is revolutionizing the world.

Legal OnRamp is to legal compliance what LinkedIn is to corporate networking and Facebook is to social interaction.

Legal OnRamp is an online collaboration system for in-house counsel and invited outside lawyers. Littler is working with Legal OnRamp to develop and commercialize its employment and labor law compliance content on Legal OnRamp extranets and member website. The initial effort to technologically empower the Littler Seven Step Compliance System has been done on basic and pre-existing software. The beta version is envisioned to involve no more than five larger employers and will be hosted by Legal OnRamp. Once the system is beta tested and fully operational, it will be available through Legal OnRamp as well as accessed directly through the law firm.

As this Report is being published 629,622,400 people are enrolled on Facebook and social media in all of its forms is serving as catalyst for change in the Middle East. It is projected that within only nine years 44% of the U.S. workforce will be virtual for over half their working hours. Old methods of complying with the avalanche of regulations, guidelines, administrative decisions, and new enforcement efforts are becoming increasingly inefficient and unable to keep pace with the change. Whether it is the Littler Program or other technology-assisted solutions, compliance and technology are becoming inextricably interconnected. By 2020 we forecast that regulatory compliance systems will include smart technology with customized recommendations for policy changes, training, and implementation monitoring for organizations with over a million employees to those with as few as five. We boldly predict that legal counsel and human resource professionals will either know about and use these systems or they will be obsolete and most likely unemployed. We urge you to join the coming technology enabled revolution in workplace law compliance!

ENDNOTES

- 1 Morello and Halsey, *Historic Snowstorm in D.C. Leaves a Mess to be Reckoned With*, WASH. POST, Feb. 7, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/06/AR2010020600683.html>.
- 2 Pub. L. No. 111-2.
- 3 For more information, see Littler Report *The Employee Free Choice Act: A Critical Analysis*, LITTLER REPORT, July 2008, available at <http://www.littler.com/PressPublications/Lists/Littler%20Reports/DispReport.aspx?id=26>.
- 4 For more information, see Littler's Blog Washington D.C. Employment Law Update, available at <http://www.dcmplemploymentlawupdate.com/2010/11/articles/employment-wage-and-hour-law/paycheck-fairness-act-fails-to-clear-senate-hurdle/>.
- 5 For more information, see Littler's Blog Washington D.C. Employment Law Update, available at <http://www.dcmplemploymentlawupdate.com/2010/08/articles/workplace-safety/senate-introduces-bill-to-amend-osh-act-improve-miner-safety/>.
- 6 5 U.S.C. §§ 551 *et seq.*
- 7 75 Fed. Reg. 2 (Dec. 20, 2010), available at http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCd=1200&Image58.x=32&Image58.y=14.
- 8 Pub. L. No. 111-148, as amended by the Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152.
- 9 Pub. L. No. 111-5.
- 10 Pub. L. No. 111-203.
- 11 Remarks prepared for delivery by Secretary of Labor Hilda Solis, American Society of Safety Engineers Conference, June 29, 2009. Available at the DOL website: http://www.dol.gov/sec/media/speeches/20090629_ASSEC.htm.
- 12 FY 2010 Department of Labor Budget in Brief, available at <http://www.dol.gov/dol/budget/2012/bib.htm>.
- 13 76 Fed. Reg. 3821 (Jan. 21, 2011).
- 14 See, e.g., speech of Secretary Hilda L. Solis at the AFL-CIO Constitutional Convention on September 14, 2009, available at <http://www.aflcio.org/aboutus/thisistheafcio/convention/2009/sp091409.cfm>.
- 15 See 29 U.S.C. § 204.
- 16 Remarks by Deputy Labor Secretary Seth Harris to the Center for American Progress, available at http://www.americanprogress.org/issues/2010/05/protecting_workers.html.
- 17 In addition to providing a referral to the complainant, the WHD will also provide the complainant with a form to request "certain relevant case information and documents" to share with the referral attorney. These documents include the complainant's own statement, the WHD's back wage computations for the complainant, and copies of any documents the complainant provided to the Wage and Hour Investigator. The form also allows the worker or authorized attorney representative to request the case narrative from the file. Importantly, employers are not notified when the attorney referral letter is sent to employees or if any information is released to the employee or the employee's attorney. Rather, the employer will need to file a written FOIA request to determine whether information has been provided to an employee or the employee's counsel, and to obtain the same information that was provided to the employee or employee's counsel without a FOIA request.
- 18 For a list of the opinion letters issued late in the Bush administration and their disposition by the Obama Administration, see www.dol.gov/WHD/opinion/flsa.htm.
- 19 FLSA 2010-1.
- 20 FLSA 2010-2.
- 21 611 F.3d 141 (2d Cir. 2010).
- 22 2011 U.S. App. LEXIS 2834 (9th Cir. Feb. 14, 2011).
- 23 Employers also should be cognizant of state wage and hour initiatives that have placed increased pressure on compliance. For example, New York recently amended its Labor Laws to include a number of new notice and recordkeeping requirements. A potential resource available to assist employers in tracking state initiatives and decisions is the Littler Monitor, an online subscription service that tracks employment law-related legislative and regulatory developments.
- 24 For more information, consult our Labor Relations Counsel blog post on this topic found at: <http://www.laborrelationscounsel.com/agency-rulemaking/proposed-rule-would-mandate-posting-of-NLRA-rights/>.
- 25 356 NLRB No. 9 (Oct. 22, 2010). For more information, consult Littler's Labor Relations Counsel blog post on this case found at <http://www.laborrelationscounsel.com/nlrb-decisions/nlrb-enhances-penalties-for-labor-law-violations/>.
- 26 356 NLRB No. 8 (Oct. 22, 2010). For more information, consult Littler's Labor Relations Counsel blog post on this case found at <http://www.laborrelationscounsel.com/nlrb-decisions/nlrb-enhances-penalties-for-labor-law-violations/>.
- 27 356 NLRB No. 49 (Dec. 6, 2010). For more information, consult Littler's Labor Relations Counsel blog post on this case found at <http://www.laborrelationscounsel.com/nlrb-decisions/boards-dana-decision-approves-broader-scope-for-card-check-and-neutrality-agreements/>.
- 28 356 NLRB No. 82 (Jan. 28, 2011). For more information, consult Littler's Labor Relations Counsel blog post on this case found at <http://www.laborrelationscounsel.com/nlrb-decisions/nlrb-majority-announces-new-theory-of-employer-liability-the-preemptive-firing/>.
- 29 356 NLRB No. 63 (Feb. 14, 2011). For more information, consult Littler's Labor Relations Counsel blog post on this case found at <http://www.laborrelationscounsel.com/nlrb-decisions/do-employees-have-a-statutory-right-to-make-secret-audio-recordings-in-the-workplace/>.
- 30 For more information, consult Littler's Labor Relations Counsel blog post on this case found at <http://privacyblog.littler.com/2011/02/articles/social-networking-1/settlement-in-nlrbs-amr-facebook-case-contains-message-for-employers-about-social-media-policies/>.
- 31 For more information, consult Littler's Labor Relations Counsel blog post on this topic, found at: <http://www.laborrelationscounsel.com/efca/nlrb-to-streamline-process-of-seeking-injunctions-for-terminations-during-organizing-campaigns/>.
- 32 For more information, consult Littler's Labor Relations Counsel blog post, found at: <http://www.laborrelationscounsel.com/union-access/nlrb-issues-holiday-gift-to-organized-labor/>.
- 33 For more information, consult Littler's Labor Relations Counsel blog post, found at: <http://www.laborrelationscounsel.com/unfair-labor-practices/nlrb-general-counsel-directs-inclusion-of-new-default-language-in-settlement-agreements/>.
- 34 For more information, consult Littler's Labor Relations Counsel blog post found at <http://www.laborrelationscounsel.com/collective-bargaining/nlrb-encourages-additional-remedies-in-first-contract-bargaining-cases/>.
- 35 Employer reporting is on the Form LM-10. LM-10s must be filed for each fiscal year in which the employer entered into an agreement or arrangement for persuader activity, and for each fiscal year in which it made any persuader payments. LMRDA § 203. Consultant reporting is on Form LM-20 ("Agreement and Activities Report"), and Form LM-21 ("Receipts and Disbursements Report"), with the latter detailing all labor relations advice provided by the persuader to other employers, even if that other advice is not persuader activity itself and otherwise not reportable.
- 36 A more detailed background on reporting and disclosure requirements and the DOL's proposed new rule is summarized in the Littler Blog, *OLMS to Contact Employers and Their Attorneys Regarding Persuader Agreement Reporting Obligations*, available at <http://www.laborrelationscounsel.com/publications/olms-to-contact-employers-and-their-attorneys-regarding-persuader-agreement-reporting-obligations/>.
- 37 For more information, consult Littler Labor Relations Counsel blog post on this topic, found at <http://www.laborrelationscounsel.com/labor-management-relations/resolution-to-defeat-nmb-election-rule-fails-in-senate/>.
- 38 See S.J. Resp. 30 and *Air Transport Ass'n v. National Mediation Bd.* (D.D.C. 2010).
- 39 Workplace Flexibility 2010 is a campaign to support the development of a comprehensive national policy on workplace flexibility, discussed at <http://www.workplaceflexibility2010.org/>.
- 40 A more detailed background on the Chair, Commissioners and EEOC General Counsel is contained in the EEOC Press Release announcing the recent confirmations at <http://www.eeoc.gov/eeoc/newsroom/release/12-23-10.cfm>.
- 41 <http://www.eeoc.gov/laws/regulations/index.cfm>.

- 42 See http://www.eeoc.gov/laws/regulations/comment_retrospective.cfm.
- 43 The final GINA regulations are summarized in the Littler's Blog, Washington D.C. Employment Law Update (herein "Littler D.C. Update") available at <http://www.dcmplemploymentlawupdate.com/2010/11/articles/agency-rulemaking/eeoc-issues-final-gina-regulations/>. A comprehensive summary also is included in Littler's ASAP, EEOC Issues Long-Awaited Final Regulations On the Genetic Information Nondiscrimination Act, (Nov. 2010) which is available at <http://www.littler.com/PressPublications/Lists/ASAPs/DispASAPs.aspx?List=edb4a871%2D9e73%2D4eae%2Dbf81%2D3d045b6ede6d&ID=1555>.
- 44 76 Fed. Reg. 16978 (Mar. 25, 2011). A summary of the final ADAAA regulations is discussed in the Littler D.C. Update, available at <http://www.dcmplemploymentlawupdate.com/2011/03/articles/agency-rulemaking/final-rule-implementing-employment-provisions-of-the-adaaa-released/>.
- 45 A summary of the proposed ADAAA regulations is discussed in the Littler D.C. Update at <http://www.dcmplemploymentlawupdate.com/2009/09/articles/discrimination-in-the-workplace/eeoc-releases-proposed-regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act/>.
- 46 For further discussion of the ADAAA regulations see, *EEOC Issues Regulations Under the ADA Amendments Act*, LITTLER ASAP Mar. 2011, available at <http://www.littler.com/PressPublications/Lists/ASAPs/DispASAPs.aspx?id=1600&sapType=National>.
- 47 On May 10, 2010, EEOC Chair Berrien addressed the Senate Committee on Health, Education, Labor and Pensions, expressing concern regarding recent court developments and referred to an EEOC hearing held on July 2009 to address these issues, which thereafter led to the NPRM on age discrimination. While urging a legislative solution, EEOC Chair Berrien stated, "The Commission will continue to use all available means at its disposal—including issuing regulations and policy guidance, providing outreach and training, conducting administrative enforcement, and litigating ADEA cases—to safeguard equal employment opportunity for older workers." See http://www.eeoc.gov/eeoc/events/berrien_protecting_older_workers.cfm. More recently, on November 17, 2010, a Commission hearing was held to address concerns of older workers as more fully discussed at <http://www.eeoc.gov/eeoc/meetings/11-17-10/>.
- 48 Abstracts of proposed federal rules and scheduled timetables are available on Reginfo.gov, produced by the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), and the General Services Administration (GSA), Regulatory Information Service Center (RISC). The RFOA abstract is available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=3046-AA87>.
- 49 *Id.* at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=3046-AA76>.
- 50 544 U.S. 228 (2005).
- 51 554 U.S. 84 (2008).
- 52 See footnote 48, *supra*. The abstract of the recordkeeping regulations is available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=3046-AA89>.
- 53 *Id.* at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=3046-AA81>.
- 54 See EEOC website at <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.
- 55 See <http://www.eeoc.gov/eeoc/newsroom/release/1-11-11.cfm>.
- 56 At his swearing in ceremony, General Counsel Lopez referred to his commitment to "further develop the national law firm model to fight discrimination." <http://www.eeoc.gov/eeoc/newsroom/release/4-8-10.cfm>. The EEOC initially adopted the approach of beginning to use the national law firm model based on the EEOC's systemic task force report issued in April 2006. See <http://www.eeoc.gov/eeoc/newsroom/release/4-4-06.cfm>.
- 57 See discussion in the EEOC Press Release dated Jan. 15, 2011, announcing the settlement at <http://www.eeoc.gov/eeoc/newsroom/release/1-5-11a.cfm>.
- 58 See <http://www.whitehouse.gov/omb/budget/Appendix>.
- 59 See <http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm#goal3>.
- 60 See EEOC Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission, March 2006 at <http://www.eeoc.gov/eeoc/taksforce.cfm>.
- 61 See EEOC FY 2010 Performance and Accountability Report at http://www.eeoc.gov/eeoc/plan/2010par_appendices.cfm.
- 62 In his weekly radio address, on March 11, 2011, President Obama reiterated his commitment to the issue of equal pay, including passage of the Paycheck Fairness Act. See <http://www.whitehouse.gov/blog/2011/03/12/weekly-address-women-s-history-month-fair-pay>.
- 63 See www.whitehouse.gov/sites/default/files/rss.../equal_pay_task_force.pdf.
- 64 *Id.*
- 65 See summary of October 10, 2010, EEOC meeting on use of credit history as a screening tool at <http://www.eeoc.gov/eeoc/meetings/10-20-10/index.cfm>.
- 66 See summary of November 20, 2008, EEOC meeting on use of criminal history records in the hiring process at <http://www.eeoc.gov/eeoc/meetings/11-20-08/index.cfm>.
- 67 See, e.g., *EEOC v Freeman*, Case No. 8:09-cv-02573-RWT (D. Md.) (pending pattern or practice lawsuit on behalf of Black, Hispanic and male job applicants based on alleged exclusion from hire based on credit and criminal history); *EEOC v Kaplan Higher Education Corporation*, Case No. 1:10-cv-02882 (N.D. Ohio) (pending pattern or practice race discrimination lawsuit involving rejection of job applicants based on credit history).
- 68 See <http://www.eeoc.gov/eeoc/newsroom/release/2-16-11.cfm>.
- 69 See EEOC Press Release dated Jan. 5, 2011, at <http://www.eeoc.gov/eeoc/newsroom/release/1-5-11a.cfm> and EEOC Press Release dated Sept. 29, 2009 revising settlement in *EEOC v Sears Roebuck and Co.* at <http://www.eeoc.gov/eeoc/newsroom/release/9-29-09.cfm>.
- 70 See, e.g., *EEOC v Princeton Healthcare Sys.*, Case No. 3:10-cv-04126, discussed at <http://www.eeoc.gov/eeoc/newsroom/release/8-11-10.cfm>, and *EEOC v United Row Towing*, Case No. 1:10-cv-06259, discussed at <http://www.eeoc.gov/eeoc/newsroom/release/9-30-10j.cfm>.
- 71 See DOL Regulations—Live Q & A Session with OFCCP, available at <http://www.dol.gov/regulations/chat-ofccp-static-201012.htm>.
- 72 See DOL website, available at http://www.dol.gov/ofccp/addresses/Director_address_to_NILG_Aug042010.htm.
- 73 See the Department of Labor's FY 2012 Budget in Brief, available at <http://www.dol.gov/dol/budget/2012/bib.htm#ofccp>.
- 74 The abstract is available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=1250-AA03>.
- 75 See OFCCP FY 2012 Congressional Budget Justification, available at <http://www.dol.gov/ofccp/budget/>.
- 76 The abstract is available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=1250-AA00>.
- 77 The abstract is available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=1250-AA01>.
- 78 *Id.*
- 79 See abstract available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=1250-AA02>.
- 80 See the Department of Labor's FY 2012 Budget in Brief, available at <http://www.dol.gov/dol/budget/2012/bib.htm#ofccp>.
- 81 *Id.*
- 82 *Id.*
- 83 See OFCCP FY 2012 Congressional Budget Justification, available at <http://www.dol.gov/ofccp/budget/>.
- 84 *Id.*
- 85 OFCCP Directive 292, available at <http://www.dol.gov/ofccp/regs/compliance/directives/dir292.htm>. For more information on the Directive, see Littler D.C. Update, available at <http://www.dcmplemploymentlawupdate.com/2010/12/articles/federal-contracts-1/ofccp-to-discontinue-active-case-management-process/>.
- 86 OFCCP Directive 295, available at <http://www.dol.gov/ofccp/regs/compliance/directives/dir295.htm>.
- 87 41 C.F.R. pt. 60-20.
- 88 41 C.F.R. pt. 60-50.
- 89 See Keynote Speech to the National Industry Liaison Group, available at http://www.dol.gov/ofccp/addresses/Director_address_to_NILG_Aug042010.htm.
- 90 76 Fed. Reg. 62 (Jan. 3, 2011). For more information on the proposed rescission, see Littler Update, available at <http://www.dcmplemploymentlawupdate.com/2010/12/articles/agency-rulemaking/ofccp-proposes-rescission-of-compensation-discrimination-guidance-documents/>.

- 91 *Id.*
- 92 Pub. L. No. 111-203.
- 93 Pub. L. No. 111-148. For more information on how healthcare law impacts the workplace, visit Littler's Healthcare Employment Counsel blog at <http://www.healthcareemploymentcounsel.com>.
- 94 Pub. L. No. 111-152.
- 95 For more information on the Affordable Care Act, see Ilyse W. Schuman, Steven J. Friedman & David M. Sawyer, *Health Care Reform—What Are Key Considerations for Employers?*, LITTLER INSIGHT, Mar. 2010, available at <http://www.littler.com/PressPublications/Pages/Insights.aspx>.
- 96 75 Fed. Reg. 34,538—34,570 (June 17, 2010). For more analysis, see Ilyse Schuman & Melissa Kurtzman, *Healthcare Reform: Long-Awaited “Grandfathered” Regulations Released - What Do Employers Need to Know?*, LITTLER ASAP, June 2010, available at <http://www.littler.com/PressPublications/Pages/ASAPs.aspx>.
- 97 75 Fed. Reg. 27,122-140 (May 13, 2010).
- 98 75 Fed. Reg. 37,188 (June 28, 2010).
- 99 *Id.*
- 100 *Id.*
- 101 *Id.*
- 102 75 Fed. Reg. 41,726 (July 19, 2010).
- 103 For more information on the tax implications of this rule, see Russell Chapman, *New Health Care Claims and Appeal Rules Will Include a Tax Bite*, LITTLER ASAP, Aug. 2010, available at <http://www.littler.com/PressPublications/Pages/ASAPs.aspx>.
- 104 75 Fed. Reg. 43,330—43,364 (July 23, 2010).
- 105 U.S. Dep't of Labor Employee Benefits Security Administration, Technical Release No. 2010-02, available at <http://www.dol.gov/ebsa/newsroom/tr10-02.html>.
- 106 Internal Revenue Service Notice 2011-1, available at <http://www.irs.gov/newsroom/article/0,,id=220809,00.html?portlet=6>.
- 107 75 Fed. Reg. 37,188 (June 28, 2010).
- 108 *Id.*
- 109 75 Fed. Reg. 24,450—24,470 (May 5, 2010).
- 110 U.S. Department of Labor, Wage and Hour Fact Sheet #73: Break Time for Nursing Mothers, available at <http://www.dol.gov/whd/regs/compliance/whdfs73.pdf>.
- 111 75 Fed. Reg. 80,073 (Dec. 21, 2010).
- 112 IRS Notice 2010-59 available at <http://www.irs.gov/irs/article/0,,id=227301,00.html>.
- 113 IRS Notice 2010-69 available at <http://www.irs.gov/newsroom/article/0,,id=220809,00.html?portlet=6>.
- 114 See Q&A-3 of the FAQs issued on December 22, 2010, available on the EBSA website at www.dol.gov/ebsa/healthreform.
- 115 For more information, see <http://healthcareemploymentcounsel.com/healthcare-reform/insurance-reform/florida-judge-orders-stay-of-his-decision-finding-affordable-care-act-invalid/>.
- 116 16th Annual Towers Watson/National Business Group on Health Employer Survey on Purchasing Value in Health Care, available at <http://www.towerswatson.com/united-states/research/3946>.
- 117 *Id.*
- 118 *Id.*
- 119 *Id.*
- 120 See the full text of the Dodd-Frank Act, available at www.sec.gov/about/laws/wallstreetreform-cpa.pdf.
- 121 See SEC Release Nos. 33-9178 and 34-63768.
- 122 See, for example, H.R. 382.
- 123 See S. 3149, S. 2813 and H.R. 2861. Note that these bills were presented prior to the enactment of Dodd-Frank and include provisions that were incorporated into that Act; however, the prohibition of severance payments for executives who are terminated for poor performance was not included in the Act.
- 124 See proxy statements filed for Boeing, Verizon Communications, J.P. Morgan Chase & Co., Dow Chemical, Goldman Sachs Group, Chevron, McKesson, and United Technologies International Business.
- 125 Pfizer, Verizon Communications, Cardinal Health, and Walgreens.
- 126 For example, Institutional Shareholder Services (ISS).
- 127 See IRS Notice 2010-6 and 2010-80.
- 128 See IRS Rev. Proc. 2011-3, which provides that the IRS will not issue rulings or determination letters for “Section 409A.—Inclusion in Gross Income of Deferred Compensation Under Nonqualified Deferred Compensation Plans. The income tax consequences of establishing, operating, or participating in a nonqualified deferred compensation plan within the meaning of § 1.409A-1(a); whether a plan is described in § 1.409A-1(a)(3)(iv) or (v); whether a plan is a bona fide vacation leave, sick leave or compensatory time plan described in § 1.409A-1(a)(5); and whether a plan provides for the deferral of compensation under § 1.409A-1(b).”
- 129 See section 956 of Dodd-Frank (limitations imposed on incentive compensation for high-level executives of financial institutions) and section 162(m)(6) of the Internal Revenue Code of 1986, as amended (restriction on the deductibility of compensation paid to executives of health insurance providers).
- 130 See DOL Congressional Budget Justification, available at www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V2-11.pdf (showing a \$6 million increase for OSHA's proposed 2012 budget for the Whistleblower Protection Program).
- 131 The significance of the executive compensation provision is not intended to be minimized and Part Two, Section V., above of this Report is devoted to a discussion of executive compensation as impacted by Dodd Frank.
- 132 On December 15, the Association of Corporate Counsel sent a letter signed by in-house counsel for dozens of prominent corporations, urging the SEC to reconsider adopting an internal reporting requirement. Specifically, the ACC requested that the SEC issue regulations requiring that an individual first report alleged misconduct internally and give the company a reasonable amount of time to respond to such complaints before reporting to the SEC.
- 133 See the SEC's updates on the Whistleblower Program created by Dodd-Frank, available at <http://www.sec.gov/spotlight/dodd-frank/whistleblower.shtml>.
- 134 See Department of Health & Human Services, <http://www.hhs.gov/ocr/privacy/index.html>.
- 135 See Department of Health & Human Services, <http://www.hhs.gov/ocr/privacy/hipaa/administrative/breachnotificationrule/index.html>.
- 136 See Department of Health & Human Services, <http://www.hhs.gov/ocr/privacy/hipaa/administrative/breachnotificationrule/finalruleupdate.html>.
- 137 See Department of Health & Human Services, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/nprmhitech.pdf>.
- 138 See February 4, 2011 Notice of Final Determination from Department of Health & Human Services to Cignet Health Center, located at <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/cignetpenaltyletter.pdf>.
- 139 See Press Release, Massachusetts General Hospital Settles Potential HIPAA Violations (Feb. 24, 2011), available at <http://www.hhs.gov/news/press/2011pres/02/20110224b.html>.
- 140 45 C.F.R. §§ 164.400 *et seq.*
- 141 42 U.S.C. §§ 2000f *et seq.*
- 142 See <http://www.gpo.gov/fdsys/pkg/PLAW-110publ233/content-detail.html>.
- 143 See e.g., Illinois General Assembly, located at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=096-1426>.
- 144 See Equal Employment Opportunity Commission, located at <http://www.eeoc.gov/eeoc/meetings/10-20-10/index.cfm>.
- 145 *Bush Forces a Shift in Regulatory Thrust*, WASH. POST, Aug. 15, 2004 at Page A01.
- 146 Under provisions of SBRFA, when an OSHA proposal is expected to have a significant impact on a substantial number of small entities, the agency must notify the U.S. Small Business Administration's (SBA) Office of Advocacy. The Office of Advocacy then recommends small entity representatives to be consulted on the rule and its effects. OSHA next convenes a Small Business Advocacy Review Panel, consisting of officials from the agency, the SBA's Chief Counsel for Advocacy, and the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs. The panel hears comments from small entity representatives and reviews the draft proposed rule and related analyses prepared by OSHA. A written report of this interagency panel is submitted to OSHA within 60 days. OSHA reviews the report, makes any appropriate revisions to the rule and publishes the proposed rule along with the

- panel's report in the *Federal Register*. The SBA's Chief Counsel participates in the small business advocacy review panels and identifies the small entities that the panel should consult. The chief counsel also submits comments on agency proposals. These comments can be viewed on the [Office of Advocacy's home page](#). Concerns about proposed regulations can be addressed to the SBA's Chief Counsel for Advocacy, 409 3rd. St., S.W., Suite 7800; Washington, DC 20416; or faxed to the Chief Counsel at (202) 205-6928. For more information see <http://www.osha.gov/dcsp/smallbusiness/sbrefa.html>.
- 147 29 C.F.R. § 1910.146.
- 148 See http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=19158.
- 149 See <http://www.dol.gov/opa/media/press/osha/OSHA20110404.htm>. OSHA's temporary withdrawal of the MSD recordkeeping proposal followed the Agency's withdrawal of its proposed interpretation of the phrase "feasible administrative or engineering controls" as it is used in the General Industry and Construction Occupational Noise Exposure standards. Announcing the withdrawal of the proposed interpretation, Assistant Secretary Michaels stated that: "We are sensitive to the possible costs associated with improving worker protection and have decided to suspend work on this proposed modification while we study other approaches to abating workplace noise hazards." http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=19119.
- 150 Legal Arizona Workers Act, available at <http://www.azleg.gov/search/ooq/qfullhit.asp?CiWebHitsFile=/legtext/48leg/1r/bills/hb2779c.htm&CiRestriction=2779&CiBeginHilite=%3cb%3e&CiEndHilite=%3c/b%3e&CiHiliteType=Full>.
- 151 See, e.g., Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (STRIVE Act) (HR 1645).
- 152 See Federal Contractors: Be Aware of New E-Verify Requirements in Contracts, Littler ASAP available at <http://www.littler.com/PressPublications/Lists/ASAPs/DispASAPs.aspx?id=1425>.
- 153 Testimony of U.S. Citizenship and Immigration Services Associate Director Theresa C. Bertucci Before the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, E-Verify: Preserving Jobs for American Workers, available at http://www.dhs.gov/ynews/testimony/testimony_1297289680937.shtm.
- 154 <http://www.ice.gov/news/releases/1010/101006washingtondc2.htm>.
- 155 <http://www.ice.gov/news/releases/1101/110120washingtondc.htm>.
- 156 <http://www.globalimmigrationcounsel.com>.
- 157 Memorandum to Service Center Directors, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements. Additions to Officer's Field Manual (AFM) Chapter 31.3(g)(15) (AFM Update AD 10-24)*, HQ 70/6.2.8 (Donald Neufeld, Assoc. Director, Serv. Ctr. Operations Jan. 8, 2010).
- 158 See *Recent USCIS Memo on Employer-Employee Relationship Requirements for H-1B Visa Petitions: Regulation by Memorandum?*, LITTLER ASAP (Mar. 2010) available at <http://www.littler.com/PressPublications/Lists/ASAPs/DispASAPs.aspx?List=edb4a871%2D9e73%2D4eae%2Dbf81%2D3d045b6ed6d&ID=1479>.
- 159 See Littler's Global Immigration Counsel Blog at <http://www.globalimmigrationcounsel.com/2011/01/articles/us-immigration/uscis-delays-full-implementation-of-updated-form-i129/>.
- 160 15 C.F.R. pt. 774.
- 161 22 C.F.R. pt. 121.
- 162 <http://www.bizjournals.com/washington/stories/2008/10/27/daily87.html>.
- 163 Comprehensive coverage of immigration-related legislation at the state level can be found on Littler's Global Immigration Counsel Blog at <http://www.globalimmigrationcounsel.com/articles/us-immigration/state-legislation/>.
- 164 Legal Arizona Workers Act, available at <http://www.azleg.gov/search/ooq/qfullhit.asp?CiWebHitsFile=/legtext/48leg/1r/bills/hb2779c.htm&CiRestriction=2779&CiBeginHilite=%3cb%3e&CiEndHilite=%3c/b%3e&CiHiliteType=Full>.
- 165 A discussion of each state's requirements regarding E-Verify can be found in Littler's NATIONAL EMPLOYER, Chapter 12, 2011-2012 edition.

APPENDIX A: CHECKLISTS

Many of the below recommendations may overlap with the Littler Seven Step Compliance program recommended in Part Three of this Report. The Littler Seven Step Compliance program provides a comprehensive roadmap for those tasked with monitoring multi-agency developments to follow, while the below development steps are more specific action items for employers to take in response to specific agency actions.

Wage and Hour Developments

The increasingly challenging regulatory environment in the near term requires four fundamental responses by the employer: (1) Get more involved in the regulatory development process; (2) re-assess the resources allocated to attaining and maintaining wage and hour compliance; (3) re-calculate within its compliance programs the risk-benefit analysis of when compliance is attained, and (4) use technology to increase compliance while reducing cost. Each response is addressed in more detail below.

- Reassess organization's commitment to compliance. This includes monitoring developments from the DOL, monitoring litigation developments, and monitoring state developments will all be important and conducting internal trainings and audits is also important.
- Respond promptly and effectively to new requirements promulgated by the DOL. Employers should budget and staff for this increased undertaking.
- Assess risks with increased caution. For job classifications as to which there is any question as to the employees' exempt status, some relative risk control measures may be appropriate, such as reducing the hours worked, providing some compensation for weekend work, or creating a middle-tier of salaried employees with overtime. Non-exempt pay practices should be closely scrutinized, with particular attention to recording all work time down to adding time clocks to provide more accurate recording of hours worked. All systems that reflect employees' hours of work, such as email, log in/log out, and transactional databases need to be reviewed side by side to ensure that they provide a consistent record of employees' hours of work. Employers should be taking steps to ensure that all pay processes, including the calculation of the overtime rate, the rounding of time, the timeliness of delivering paychecks, and any deductions from paychecks are in total compliance.
- Use technology to increase compliance while reducing cost. For Wage and Hour compliance one of the revolutionary innovations has been legally engineered online training programs for managers and a shortened version for employees. This is a way to get your wage and hour policies circulated, explained, and receive a commitment for compliance.

Labor Law Developments

The NLRB's agenda, General Counsel pronouncements, actions by the DOL regarding labor relations and developments by the National Mediation Board clearly indicate that the following actions should be considered:

- Prepare for a labor environment in which employees are more often aware of their Section 7 rights, and in which the NLRB, DOL, and NMB interpret those rights more broadly than ever before.
- Review policies and procedures to ensure that written rules do not prohibit or discourage employees from engaging in "protected conduct," and that managers are not disciplining employees for behaviors that likely qualify for protection. In many cases it now appears the NLRB will find that general policies requiring good conduct in the workplace violate Section 7, unless the policy—or at least the employer's personnel manual—includes an express disclaimer indicating that no policy will be interpreted or enforced in a way that penalizes employees for engaging in protected conduct. Employers should consider the potential benefits of adopting such disclaimer language now, rather than risking that the Board will find the policy unlawful.
- Employers that are either facing an organizing drive or bargaining for a first contract after a successful organizing drive should take into account the enhanced penalties and more aggressive enforcement stance the Board and the General Counsel have adopted.
- Ensure that every member of the management team, from front-line supervisors to policy-making executives, receives specific training and ongoing legal support before attempting to operate during an organizing drive or in a newly unionized environment.

EEO Developments

Employers need to be prepared to deal with an active regulatory agenda and multi-agency cooperation and sharing of information, particularly between the EEOC and the OFCCP, in dealing with EEO-related issues. Employers also should expect increased charge activity and more aggressive and potentially expanded investigations, which in various cases may include nationwide requests for information. As part of an employer's compliance efforts, the following should be critical elements of an employer's EEO compliance activities:

- ☑ Update recordkeeping practices to comply with revised reporting requirements for EEO-1 reports, Title VII, the ADA and GINA.
- ☑ Conduct refresher training for all recruiters and anyone else involved in the hiring and selection process in government contractor workplaces regarding OFCCP's definition of an Internet Applicant and the records necessary to defend any statistically significant selection patterns for each step of the employer's process.
- ☑ Review pre-employment practices, including screening devices that may disqualify applicants for employment, including credit and/or criminal history, and monitor actions by the EEOC and the OFCCP addressing such practices, recognizing that at a minimum blanket and across-the-board policies will create significant risks for employers.
- ☑ Carefully evaluate and consider privileged audits of pay and promotion practices, particularly dealing with potential gender discrimination based on the planned focus by the EEOC and the OFCCP on such practices, recognizing that potential pay practices involving minorities also may be closely scrutinized. This might include a statistical analysis conducted as much as possible under the attorney-client privilege.
- ☑ Insure that the company is ADA and GINA compliant, including updating policies to ensure compliance with the new regulations, revising any policies that may have blanket provisions involving potential termination after specified time periods and provide training and/or guidelines on the required interactive process in dealing with alleged disabilities.
- ☑ Monitor any required changes for affirmative action plans, policies, and record-keeping practices based on proposed rules impacting on obligations involving veterans, the disabled and construction contractors.
- ☑ Review recruitment and posting policies to ensure that recruitment activities specifically include outreach to employees and potential applicants in the labor market who are disabled or veterans.

Retirement Plan Developments

Employers should be prepared for the onslaught of initiatives to shore up defined benefit plans, encourage savings under defined contributions plans, and make plan costs more transparent. Employers should also be ready for increased IRS and DOL audit activity. The best practices to deal with these initiatives include:

- ☑ Rethink the retirement plan structure for the workplace of today and tomorrow rather than merely continuing with a structure that worked in prior years.
- ☑ For plan sponsors with defined benefit pension plans, adopt a funding strategy that will minimize large fluctuations in annual funding amounts.
- ☑ Consider 401(k) plans with automatic enrollment to encourage employee deferrals.
- ☑ Consider adding a Roth component to a 401(k) plan.
- ☑ Review plan governance structure to best guard against an adverse DOL audit finding. In this regard, it is prudent to organize and prepare Plan Administrative and Investment Committees for their fiduciary roles and duties, including assisting in periodic meetings, reviewing requests for proposals, advising on service agreements and advising on law change.
- ☑ Compile and review required plan documents (including plan, trust agreements, amendments, resolutions, service agreements and summary plan descriptions). Update documents if necessary.
- ☑ In lieu of waiting for the IRS or DOL to discover compliance issues during an audit, use voluntary IRS and DOL compliance programs, which include the: (1) DOL late filer program; (2) DOL late employee contributions program; and (3) IRS voluntary programs for operational defects including Employee Plans Compliance Resolution System (EPCRS), self-correction and Voluntary Correction Program (VCP).

Healthcare Reform Developments

As the Affordable Care Act faces challenges in both Congress and the courts, employers must navigate the complex new law in an uncertain legislative, regulatory and legal landscape.

- ☑ Employers need to reevaluate wellness programs to make them more effective. With the healthcare reform law, coupled with rising healthcare costs in a globally competitive economy, employers must redouble their efforts to control healthcare costs while improving worker health and productivity.
- ☑ Employers must review and revise plan documents for compliance with near-term insurance market reforms. While employers contend with implementing the near-time mandates of the Affordable Care Act, they must also consider the long-term impact of the law on the compensation and composition of their workforce.
- ☑ Employers should carefully weigh the advantages of retaining grandfathered status versus the advantages of plan changes. In light of rising healthcare costs, the value of retaining such status will certainly diminish over time.
- ☑ The employer “play or pay” penalty does not become effective until 2014. However, employers already have begun to revisit their benefits and workforce strategies in light of the penalty as they compare the cost of providing health coverage to the penalty for not doing so. While the excise tax may be a number of years away, an estimated 60% of companies will reach the status of a “Cadillac” plan by 2018.

Executive Compensation Developments

Employers and compensation committees should be prepared for the new Dodd-Frank requirements and continued scrutiny of executive compensation. Employers should:

- Review incentive and equity compensation plans and arrangements and conduct a risk assessment in connection with any existing or new incentive pay practices.
- Adopt a clawback policy for incentive compensation.
- Adopt stock ownership guidelines for members of the Board and Executive Officers.
- Regularly communicate with institutional investors regarding executive compensation practices during the fiscal year; do not wait until the time for proxy reporting to open lines of communication.
- Review executives' compensation practices and determine if rebalancing is necessary to increase the percentage of compensation to be performance-based.
- Consider whether longer performance periods for long-term incentives should be considered and any associated accounting impact.
- Review company performance for a variety of criteria, e.g., EBIDTA (earnings, before interest, depreciation, taxes and amortization), TSR (total shareholder return), profit, etc., against peer groups to determine if executive compensation practices will be questioned.
- Review current executive employment and separation agreements for employer-provided COBRA continuation for fully insured plans; consider impact of the nondiscrimination rules for employer-provided COBRA continuation for amended or new executive employment and separation agreements.

Whistleblower Developments

Given the many new sources of protection for whistleblowers, it is now more important than ever to encourage internal reporting of possible violations and to prevent retaliation against whistleblowers. After all, the stronger a company's ethical culture and internal compliance systems, the more likely it is to avoid whistleblower claims altogether. By following some practical steps, companies can put themselves in the best possible position for dealing with potential whistleblower or retaliation claims and can go a long way toward preventing such claims. Employers should:

- ☑ Create a culture of ethics and compliance: Companies can help prevent complaints of corporate misconduct by fostering a culture of integrity, ethics and lawful business practice. Such efforts may include promulgating and enforcing a code of ethics or code of conduct. Reminders of the principles set forth in those codes can appear in employee newsletters and messages from senior management. Companies may also consider evaluating ethics and integrity as part of performance evaluations and should pay particular attention to evidence of honesty and integrity at the hiring stage.
- ☑ Review internal compliance programs: Companies should review their internal compliance and ethics programs, particularly with regard to the legislation referenced above that includes new whistleblower provisions.
- ☑ Remind employees about reporting procedures: As part of their in-depth review of compliance procedures, employers should evaluate their existing whistleblower reporting systems. Employers can work to build confidence in their reporting mechanisms by taking all complaints seriously and responding in a manner that is swift, thorough and appropriate. It is also important to ensure that reporting mechanisms are well-advertised by, for example, posting reminders in employee newsletters, sending ethics-related e-mails, or creating hotline posters. In these messages, companies should emphasize that a tipster can remain anonymous, that hotline reports bypass managers and supervisors and that the company will in no way retaliate against whistleblowers.
- ☑ Prevent retaliation: It is absolutely essential that no one retaliate against a whistleblower in any way and that managers and supervisors understand that retaliation can take many forms, not just a termination or demotion. Companies should ensure that their policies clearly articulate zero tolerance for any reprisals or retaliation against an individual who reasonably makes a complaint in good faith.
- ☑ Train managers in retaliation and whistleblower policies: Companies must train managers on three fundamental issues: (1) how to recognize whistleblower complaints; (2) how to respond to such complaints; and (3) how to avoid any retaliation against the individual who complained. Managers need to have enhanced awareness that when an employee reports possible ethical or other violations to them, they have a duty to involve both compliance and human resources immediately. This allows the company to address the substance of the report and to work with front-line managers to ensure that no retaliatory action is taken against the whistleblower.

Privacy Developments

- ☑ Employers should inventory the information they collect about applicants and employees and consider whether the collection is both lawful and necessary to achieve a legitimate business purpose.
- ☑ Employers should review how sensitive employee information, such as genetic information and protected health information, is used within the organization and to whom that information is disclosed outside of the organization to ensure compliance with evolving statutory and regulatory requirements.
- ☑ Human resources professionals need to coordinate with their information technology (IT) team to ensure that the organization has implemented reasonable and appropriate physical, technical and administrative safeguards for sensitive personnel information.
- ☑ Human resources professionals also should coordinate with their IT colleagues to develop a security incident response plan that will inform employees on how to identify and report security incidents and provide the organization with a road map for responding.
- ☑ Employers should provide security awareness training, which can apply not only to sensitive personal information but also to confidential business information, in order to provide employees with guidance on how they can help the organization enhance its information security.

OSHA Developments

Employers need to be prepared to deal with an active regulatory agenda, aggressive OSHA enforcement and multi-agency cooperation and sharing of information, particularly between OSHA and the EPA. Employers should expect increased citations and penalties, potentially under new inspection programs. As part of an employer's compliance efforts, the following critical elements should be considered:

- ☑ Closely monitor agency developments, including proposed rulemaking and other opportunities for input on areas of focus by OSHA as well as carefully monitoring enforcement efforts (*i.e.* new citations) and settlements.
- ☑ Review injury and illness record-keeping practices to ensure compliance.
- ☑ Conduct refresher training for all managers and supervisors on the company policies related to government inspections of the worksite.
- ☑ Review OSHA compliance efforts and safety programs.
- ☑ Carefully evaluate and consider privileged audits of injury and illness recordkeeping and safety compliance.

Immigration Developments

Employers need to be prepared to deal with an active DHS regulatory and policy agenda in the E-Verify arena accompanied by state-specific requirements regarding its use, increasingly restrictive regulatory interpretations in visa processing, and all-out I-9 audit and enforcement strategies at ICE. As part of an employer's compliance efforts, the following should be critical elements of an employer's compliance activities:

- ☑ Closely monitor state-based regulatory and statutory initiatives requiring the use of E-Verify. The Littler Monitor, an online subscription service providing analysis of enacted legislation and regulations is a tool available to monitor such developments.
- ☑ Carefully and thoroughly audit existing I-9 records to ensure compliance with regulations, including revising and updating I-9 policies to provide for strict adherence to requirements and proper completion of I-9s for new hires.
- ☑ Assess exposure of the foreign national workforce to changes in visa processing, especially in mission-critical employee categories that historically have a high number of H-1B work visa holders.
- ☑ Monitor wage obligations incurred in visa sponsorship and effectively end those obligations upon the termination of the employment relationship with the foreign national.

APPENDIX B: RESOURCE LIST

Regulatory Information Service Center—<http://www.reginfo.gov/public/do/eAgendaMain/>

Lists all of the stages of regulatory action covered in the current regulatory agenda, from the pre-rule state to completed actions. Users can choose the applicable agency to see the agency's regulatory agenda and status of all pending and finalized rules.

DOL Regulatory Information Page—<http://www.dol.gov/regulations/>

This page provides access to regulations proposed by the DOL. On the left side of the page, you can click on “DOL Federal Register Documents” <http://webapps.dol.gov/FederalRegister/> which lists proposed rules, final rules, etc.

EEOC Regulatory Information Page—<http://eoc.gov/laws/regulations/index.cfm>

This page lists new and proposed regulations promulgated by the EEOC.

Littler Webinar on Final ADA Regulations (April 4, 2011)—<http://www117.livemeeting.com/cc/littler/viewRecordings> [Recording ID: SRHJ68]

View the April 4th Littler Webinar, *A Practical Perspective: ADA Compliance Based on the Final Regulations and a Renewed Focus by the EEOC*. The program highlights the most pressing compliance issues under the ADA for employers and provides practical recommendations for handling those issues.

D.C. Employment Law Update Blog—<http://www.dcmplegalupdate.com/>

Authored by attorneys in Littler's Government Affairs Practice Group, this blog closely monitors, tracks and reports on legislation, regulations, federal agency activity, and executive orders that impact the labor and employment landscape. Based in Washington, D.C., the Government Affairs Team aims to keep employers informed of the new workplace agenda as it unfolds, and provide guidance on how best to prepare for and comply with these changes.

Wage and Hour Counsel Blog—<http://www.wageandhourcounsel.com/>

Authored by attorneys from Littler's Wage and Hour Practice Group, this blog closely monitors, tracks and reports on wage and hour legal developments, including court decisions, administrative agency opinions, and new or revised requirements or regulations. Insight is provided into not only how a new development impacts employers, but also into identifying recent trends within the area of wage and hour law. Comprised of attorneys located throughout the nation, the Wage and Hour Editorial Board is uniquely positioned to provide guidance about the multi-faceted and constantly developing area of wage and hour law.

Labor Relations Counsel Blog—<http://www.laborrelationscounsel.com/>

Authored by attorneys in Littler's Labor Management Relations Practice Group, this blog tracks and reports on developments in private and public sector labor relations, providing insight into issues that may have a significant effect on how employers do business. Coupled with the firm's more detailed publications, the Labor Relations Counsel blog targets for employers meaningful legal developments, including appellate court decisions, NLRB and NMB decisions, and administrative rules and regulations. During this time of enormous governmental change and shifts in strategy and style of powerful labor unions, Littler's history and depth of experience in labor relations gives its attorneys a distinctly broad perspective with which to provide insight and useful analysis of the latest developments.

Healthcare Employment Counsel Blog—<http://www.healthcareemploymentcounsel.com/>

Authored by attorneys from several Littler practice groups, the authors of this blog closely monitor, track and report on legislation, regulations, federal agency activity, and executive orders that shape our nation's healthcare policy. The goal is to keep employers in general—and members of the healthcare industry in particular—informed of these developments as they unfold, and provide guidance on how best to prepare for and comply with these changes.

Workplace Privacy Counsel Blog—<http://privacyblog.littler.com/>

Authored by attorneys from Littler Privacy & Data Protection Practice Group, this blog provides insight to assist business in their efforts to comply with privacy laws and avoid costly civil litigation and government enforcement actions. From background checks and cross-border transfers of information within multi-national corporations to employee blogging, more and more aspects of the employer-employee relationship are raising privacy concerns. Properly resolving those concerns presents an enormous challenge for employers as the web of local, state, federal, and international privacy and data protection laws and regulations becomes increasingly complex. This blog will help employers stay abreast of developments in this area.

The National Employer, 2011-2012 Edition

Littler's award winning compendium of federal employment and labor law provides employers with a basic overview of related laws with practical recommendations and checklists.

Global Immigration Counsel Blog—<http://www.globalimmigrationcounsel.com/>

Authored by attorneys from Littler's Immigration Practice Group, the Global Immigration Counsel blog closely monitors developments that impact the mobile workforce. This blog covers both U.S. immigration and global migration issues, providing insight and analysis on legal developments that warrant special attention.

Littler Monitor

Littler's online subscription service for clients. The Monitor provides analysis and action items for enacted legislation and final regulations in all 50 states, D.C. and on the federal level. For information on subscriptions, please contact your Littler attorney or Susan Woodhouse, swoodhouse@littler.com.

Legal OnRamp—<http://www.legalonramp.com/>

Legal OnRamp is an online collaboration system for in-house counsel and invited outside lawyers and third-party providers. There are lawyers participating from over 40 countries. Basic services are free, so all members are expected to contribute to the community.

ELT, Inc.—<http://www.elt-inc.com/>

ELT provides online training solutions to help employers manage their most important workplace compliance challenges, including sexual harassment training, union awareness training, ethics training, code of conduct training, EEO training, and wage and hour training.

Open Compliance and Ethics Group—<http://www.oceg.org/>

OCEG is a nonprofit organization that uniquely helps organizations drive Principled Performance® by enhancing corporate culture and integrating governance, risk management, and compliance processes

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