



# **LABOR AND EMPLOYMENT OBSERVER**

## **2012/2013**

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## MESSAGE FROM THE CHAIR

We are pleased to provide you with our 2012/2013 Observer, which looks back at the developments in labor and employment law over the past year and forward to what employers can expect in 2013. The Observer has articles on a variety of topics, including:

- Labor and employment cases on the Supreme Court's 2011/2012 and 2012/2013 dockets;
- Insights into how the National Labor Relations Board and the Equal Employment Opportunity Commission are operating;
- Trends in the enforcement of the Fair Labor Standards Act, Occupational Health and Safety Act, Family and Medical Leave Act, and Uniform Services Employment and Reemployment Rights Act;
- Developing issues in the intersection of social media and employment law;
- Employers' requirements under the Affordable Care Act; and
- Expectations for President Obama's second term.

We trust you will find the enclosed articles both interesting and informative. As always, we welcome your inquiries and look forward to serving your labor and employment needs in the new year.

Best regards,

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## A Second Obama Administration's Impact on Labor and Employment Issues



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With the re-election of Barack Obama and the prospect of continued political gridlock at the congressional level, the administration will likely turn to regulatory and administrative avenues in an effort to pursue workplace policy goals. The landscape is very different than it was just four short years ago.

### UNION ORGANIZING

President Obama devoted almost no political capital to organized labor's top legislative priority four years ago, which was passage of the Employee Free Choice Act (EFCA). The main thrust of EFCA was to enable unions to be certified as a bargaining representative without a secret ballot based on a check of signed authorization cards from a majority of eligible employees. EFCA would also have imposed deadlines for the negotiation of an initial collective bargaining agreement and required arbitration of initial contract terms if the parties did not reach agreement. The Republican conquest of the House of Representatives in 2010 doomed EFCA and it stands no chance of being passed in the incoming Congress.

What labor unions cannot obtain through legislation they are now attempting to achieve through administrative regulation or case adjudication. In June 2011, the National Labor Relations Board (NLRB) issued a proposed rule aimed at streamlining union elections. The rule is currently in limbo after being overturned by a District of Columbia district court judge on the grounds that the NLRB adopted the rule without the required quorum. Because the court rejected the rule on procedural grounds, there is nothing to prevent the NLRB from adopting an even stronger rule with a proper quorum. Expect a revitalized rule to resurface early in the second term to mandate the disclosure of information to employees, provide expedited election proceedings and delay litigation over voter-eligibility issues.

President Obama's appointments of pro-union members to the NLRB swung the political balance of the Board strongly in favor of organized labor. This has begun to be reflected in rulings that significantly expand employee rights and place limits on employer efforts to oppose unionization. These decisions include one declaring it illegal to prohibit employees from discussing active investigations of employee misconduct; one that requires employers to post notices of employees' bargaining rights, regardless of whether any employees are represented by a union (which was later enjoined); and another rejecting an employment policy that precluded employees from pursuing class or collective actions against employers. Employers have been scrambling to keep their employment handbooks and policy statements up to date to avoid being subjected to unfair labor practice charges. They will need to pay close attention to the NLRB's rulings and continue to adjust to a landscape that is likely to tilt further against them.

### JOB OUTSOURCING

During the campaign, President Obama repeatedly condemned provisions of the tax code allowing employers to take deductions for the expenses of dismantling plants to ship jobs overseas. Expect that to be a focus of the "fiscal cliff" negotiations to close corporate tax loopholes. Look for this to be coupled with a provision giving tax credit to employers who increase the number of full-time workers in the United States relative to those outside the United States. We anticipate this would mirror the proposed Patriot Employer Act (H.R. 5907, S. 1945) that President Obama co-sponsored while he was a senator.

### LGBT RIGHTS

President Obama's reelection campaign received a major injection of money and boost in enthusiasm from the LGBT community once the president endorsed same-sex marriage. Expect the new administration to build on this support by aggressively pushing the Employment Non-Discrimination Act (ENDA) to prohibit workplace discrimination on the basis of sexual orientation or transgender status. Passage of ENDA during the president's first term was deferred so that all efforts could be concentrated on the Affordable Care Act. By the time the administration was prepared to push ENDA, Republican control of the House of Representatives made passage impossible. In April 2011, President Obama refused to sign an executive order banning sexual orientation or gender identity discrimination by employers with federal contracts. As grounds for his refusal, he indicated that he preferred to focus on passing ENDA as a more comprehensive ban on sexual orientation and gender identity discrimination in any workplace.

If the Republican Party is serious about efforts to broaden its demographic base, it will be difficult for Speaker Boehner to prevent the bill from being voted upon. It will likely pass with the support of so-called Log Cabin Republican groups; but if not, expect the president to impose ENDA's obligations on federal contractors and subcontractors through an executive order. Enforcement would then be given to the Department of Labor Office of Federal Contract Compliance Programs where a vigorous effort could be mounted through a program of contractor audits and complaint investigations.

## **PAY EQUITY**

Four years ago we projected employers could expect a new push for the Lilly Ledbetter Fair Pay Act (H.R. 2831, S. 1843), which had been introduced to overturn a 2007 Supreme Court decision that limited the time for filing pay discrimination claims. This turned out to be the first bill signed into law by President Obama, and he campaigned on it repeatedly, noting that he placed equal pay initiatives at the forefront of his presidency. For example, he declared April 12, 2011 to be "National Equal Pay Day." President Obama also created the National Equal Pay Enforcement Task Force, which is a coordinated effort among the Equal Employment Opportunity Commission, the Department of Justice, the Department of Labor, and the Office of Personnel Management to crack down on violations of equal pay laws. Some of the task force initiatives under the Obama administration include implementing a method by which the government can access employers' compensation data, as well as educating employees and employers regarding their rights and obligations regarding wage discrimination.

Expect to see much more on this front over the next four years, including resurgence of the Paycheck Fairness Act. The Paycheck Fairness Act originally surfaced within the first Obama administration, but was rejected before the House and Senate along party lines in June 2012. Among other things, this bill would amend the Equal Pay Act of 1963, which currently permits discrepancies in pay if they are based upon a factor "other than sex." The Paycheck Fairness Act would require compensation discrepancies be based upon a factor other than sex that is also job-related and consistent with business necessity, a much more difficult standard for employers to meet. The Paycheck Fairness Act would also permit employees to recover unlimited compensatory and, if applicable, punitive damages. Additionally, it would permit "opt-out" rather than "opt-in" class actions so employees would not have to affirmatively agree to be included in a class action to recover monetary damages.

Despite the Republican Party's need to broaden its appeal to women voters, the Paycheck Fairness Act will likely result in

a filibuster effort in the Senate or a refusal to allow it to come to the floor in the Republican-controlled House. If this occurs, watch for aggressive efforts by the president to implement the basic requirements of this legislation by imposing them through an executive order on federal contractors and subcontractors.

## **ADDITIONAL REGULATION OF FEDERAL CONTRACTORS**

Under the Obama administration the Office of Federal Contractor Compliance Programs (OFCCP) has been particularly aggressive in efforts to revamp affirmative action. The OFCCP recently proposed 10 major rule changes, including rules aimed at affirmative action hires of veterans and the disabled, and a revised audit policy that seeks more detailed data on employee compensation. Although a report questioning the feasibility of such a system likely delayed its implementation, expect it to come roaring back in the second term. Also, expect more aggressive audits of contractors and more efforts made to implement systemic reform and impose significant financial penalties.

If the Obama administration is successful in passing legislation to address infrastructure issues, you can expect that executive agencies will continue to require the use of project labor agreements when they engage in large-scale construction projects. Such project labor agreements would require every contractor and subcontractor on a federal construction project to agree to negotiate with one or more appropriate labor organizations to establish the terms and conditions of employment.

## **EMPLOYEE CLASSIFICATION**

The Department of Labor and the IRS have been stepping up their efforts to address the misclassification of employees as independent contractors. Cooperative arrangements have been made with some state enforcement agencies to bring further resources to this effort. Employers who misclassify employees do not pay social security or Medicare taxes on so-called independent contractors. In any "fiscal cliff" negotiations to reign in the cost of these entitlement programs, watch for the Obama administration to push hard for legislative reform that would impose additional financial penalties on employers for misclassifying their workers.

## **OSHA**

OSHA enforcement has been stepped up in the first Obama administration from what it had been in the prior four years, with an increased emphasis on obtaining compliance through the coercive impact of larger fines and enhanced levels of citation. This should continue. In addition, OSHA has begun

regulatory review in many areas setting the stage for new regulations. Expect OSHA to issue final rules updating exposure limits and requiring employers, including small businesses, to implement an injury and illness prevention program to find and correct hazards in their own workplaces.

## HEALTH CARE

The Affordable Care Act, widely known as Obamacare, survived Supreme Court review largely intact. Congressional Republicans realize they will not be able to repeal it now, despite 33 unsuccessful efforts to do so in the last Congress. Minor changes may be included during the budget reconciliation process, and the courts could strike down portions of the obligation for religious employers to include contraception benefits in their health plans, but for the most part employers need to ready themselves for the implementation of the law. Beginning January 1, 2014, tax credits for small businesses will increase, penalties will be leveled against employers who do not offer health care benefits to their full-time employees and a host of other changes will kick in. Many of these changes will be governed by regulations yet to be proposed. Employers can look forward to a host of new regulations in this area over the coming year and benefit consulting firms can expect a big boost in their business as employers attempt to comply.

## IMMIGRATION REFORM

Almost all prognosticators anticipate that any effort at comprehensive immigration reform will be a major focus of the new Congress. Business groups are expected to press their Republican allies to ensure that reform efforts at the federal level preempt state and local laws that can be a thorn in the side of business. The H1B visa process is likely to be revised so highly skilled workers can be brought into the country more easily and those students graduating from American universities with advanced degrees in the STEM disciplines (science, technology, engineering and mathematics) can qualify for permanent residency and eventual citizenship.

## SUMMARY

The landscape of labor and employment law continually changes through the actions of the legislature, the regulators and the courts. For the next two years, at least, we can expect the focal point of change will shift to the regulatory arena. The president's regulatory authority is enhanced when dealing with federal contractors and subcontractors. All employers, but especially those who do business with the federal government, will need to keep a close watch on regulatory developments either in the form of formal rulemaking or in the form of case law decisions by administrative agencies.

## Will There be Comprehensive Immigration Legislation After the 2012 Presidential Election?



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The recent presidential election stressed the importance of the minority community, especially the Latino voters, in influencing the outcome of the election. The Latino community comprises approximately 10 percent of the electorate, and it has been estimated that more than 70 percent voted for President Obama.<sup>1</sup> Moreover, this number is expected to significantly increase for the next presidential election.<sup>2</sup> It has been reported that President Obama won the support of the Latino community with his DREAM Act<sup>3</sup>, whereas Governor Romney's self-deportation rhetoric was not received well by the Latino voters. As a result, the Republican Party has realized that it must broaden its base beyond white voters and has embraced the call, along with the Democrats, for immigration legislation as a priority. CNN's David Gergen said it best on election night, there is reason for optimism about immigration reform in the next Congress, because "Democrats want it and Republicans now need it."

The DREAM Act (acronym for Development, Relief, and Education for Alien Minors) is an American legislative proposal first introduced in the Senate on August 1, 2001. There have been several versions, but basically the DREAM Act would provide conditional permanent residency to certain undocumented residents of good moral character who

- 1 According to the National Immigration Forum, Latinos, who in this election made up approximately 10 percent of the electorate, voted for President Obama by a margin of 71 to 27 percent. For Asians (making up three percent of the electorate), the margin was 73 to 26 percent. More than nine in 10 (93 percent) African-Americans voted for President Obama. (Forum Blog & Updates Nov. 8, 2012).
- 2 According to the Pew Hispanic Center projections, Hispanics will account for 40 percent of the growth in the eligible electorate in the United States between now and 2030, at which time 40 million Hispanics will be eligible to vote, up from 23.7 million now. Paul Taylor, Ana Gonzalez-Barrera, Jeffrey Passel and Mark Hugo Lopez, Pew Hispanic Center, *An Awakened Giant: the Hispanic Community is Likely to Double by 2030*, Nov. 14, 2012.
- 3 When Congress failed to pass the Dream Act, President Obama issued it as a Presidential Declaration. Basically, the Dream Act provides that undocumented immigrants can avoid deportation if they can prove they were brought to the United States before they turned 16 and are younger than 30, have been in the country for at least five continuous years, have no criminal history, graduated from a U.S. high school or earned a GED or served in the military.

graduate from U.S. high schools, arrived in the United States as minors and lived in the country continuously for at least five years prior to the bill's enactment. If they completed two years in the military or two years at a four-year institution of higher learning, they would obtain temporary residency for a six-year period. Within the six-year period, they may qualify for permanent residency if they have "acquired a degree from an institution of higher education in the United States or have completed at least 2 years, in good standing, in a program for a bachelor's degree or higher degree in the United States" or have "served in the armed services for at least 2 years and, if discharged, have received an honorable discharge."

Members of Congress have introduced several forms of this bill in both the House of Representatives and the Senate. The Act was considered and debated throughout 2010 and members in the House passed one version of the bill on December 8, 2010 by a vote of 216-198. On May 11, 2011, Senate Majority Leader Harry Reid reintroduced the DREAM Act in the Senate. Some Republicans who had supported the bill in the past objected that such a bill should not be granted without increasing immigration enforcement. On June 15, 2012, President Obama announced that his administration would stop deporting young undocumented immigrants who match certain criteria previously proposed under the DREAM ACT and on August 15, 2012 the U.S. Citizenship and Immigration Services (USCIS) began accepting applications under the Obama administration's new Deferred Action for Childhood Arrivals program.

Instead of waiting to first resolve the fiscal cliff, both parties are now involved in a dual over new immigration legislation. On September 18, 2012, House Judiciary Committee Chairman Lamar Smith (R-Texas) and nearly 50 members of Congress introduced the STEM Jobs Act (H.R. 6429). STEM was approved by the House of Representatives on November 30, 2012, by a vote of 245-139.

STEM eliminates the diversity lottery green card program and reallocates up to 55,000 green cards a year to new green card programs for foreign graduates of U.S. universities with advanced STEM degrees (science, technology, engineering and math). These green cards are first made available to foreign graduates with doctorates and any remaining green cards are then made available for foreign graduates with master's degrees. Many have nicknamed the STEM Act as the "BRAINS Act."

The bill creates a new green card category for aliens who have received STEM doctorates from U.S. universities. Foreign students will be eligible for STEM green cards if they:

- Have received a doctorate from an eligible U.S. university in computer science, engineering, mathematics or the physical sciences (other than biological sciences);
- Agree to work for at least five years for the petitioning employer or in the United States in a STEM field;
- Have taken all their course work (including Internet courses) while physically present in the United States; and
- Are petitioned for by an employer who has gone through labor certification to show there are not sufficient American workers able, willing, qualified and available for the job.

The bill also creates a new green card category for aliens who have received STEM master's degrees from U.S. universities. If any green cards are not used by aliens with doctorates, they will then be made available to foreign graduates with master's degrees. To be eligible, an alien must:

- Have received a two year master's degree from an eligible U.S. university in computer science, engineering, mathematics or the physical sciences (other than biological sciences);
- Have majored in college in a STEM field;
- Agree to work for at least five years for the petitioning employer or in the United States in a STEM field.

## ***"President Obama has stated several times that he expects to tackle immigration reform in 2013."***

At the time of publication of this Observer, the Democrats have blocked STEM from being introduced in the Senate. The Democrats have announced that they disagree with the elimination of the diversity lottery part of the bill. The Diversity Visa Program, which is better known as the green card lottery, was designed to diversify the immigrant population in the United States by awarding permanent residency visas to applicants from countries with low rates of immigration to the United States in the previous five years. Each year, 50,000 people are selected, and 80 percent of visas are allotted to nationals from Europe and Africa. At this time it is not clear what the next steps, if any, will be for STEM. We do know that

President Obama has stated several times that he expects to tackle immigration reform in 2013. In fact, he echoed this in his November 14 White House news conference:

... and my expectation is that we get a bill introduced and we begin the process in Congress very soon after my inauguration. And, in fact, some conversations I think are already beginning to take place among senators and congressmen and my staff about what would this look like. And when I say comprehensive immigration reform, it's very similar to the outlines of previous immigration reform. I think it should include a continuation of the strong border security measures that we've taken. Because we have to secure our border. I think it should contain serious penalties for companies that are purposely hiring undocumented workers and -- taking advantage of them.

And I do think that there should be a pathway for legal status for those who are living in this country, are not engaged in criminal activity, are here to -- simply to work. I've -- it's important for them to pay back taxes. It's important for them to learn English. It's important for them to potentially pay a fine, but to give them the avenue whereby they can resolve their legal status here in this country, I think is very important. Obviously making sure that we put into law what -- the first step that we've taken administratively dealing with the DREAM Act kids is very important as well.

Immigration reform has a history of failure. The Immigration Reform and Control Act of 1986 made it illegal to hire or recruit illegal immigrants. In 2006, the U.S. House of Representatives passed the Border Protection, Anti-terrorism and Illegal Immigration Control Act of 2005, and in 2006 the U.S. Senate passed the Comprehensive Immigration Reform Act of 2006. Neither bill became law because their differences could not be reconciled in conference committee. The Comprehensive Immigration Reform Act of 2007 — its full name was Secure Borders, Economic Opportunity and Immigration Reform Act of 2007 (S. 1348) — was a bill discussed in the 110th U.S. Congress that would have provided legal status and a path to citizenship for the approximately 12 to 20 million illegal immigrants currently residing in the United States. The bill was portrayed as a compromise between providing a path to citizenship for illegal immigrants and increased border enforcement: it included funding for 300 miles (480 km) of vehicle barriers, 105 camera and radar towers, and 20,000 more Border Patrol agents, while simultaneously restructuring visa criteria around high-skilled workers. The bill was

introduced in the U.S. Senate on May 9, 2007, but was never voted on, though a series of votes on amendments and cloture took place.

Has the 2012 presidential election created a new atmosphere of cooperation that will lead to the Comprehensive Immigration Reform Act of 2013? Only time will tell.

## Hurricane Sandy Offers Wake Up Call for Updating Wage and Hour Policies



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With the hurricane hitting the East Coast and creating havoc for businesses trying to rebuild as quickly as possible, it is important to remember there are no emergency exceptions to wage and hour laws. When a company goes into crisis mode, it is still important to maintain the normal safeguards and policies that ensure the proper calculation of work time and payment of overtime. In addition, all employers should have policies in place to address the unique concerns that arise when businesses are shut down or employees are unable to work due to inclement weather.

### PAYMENT FOR ABSENCES DUE TO WEATHER

First, federal law is clear that employers are only obliged to pay nonexempt workers for actual hours worked. If inclement weather shuts down a place of employment, the employer is typically not required to pay any wages to nonexempt employees, absent a contractual agreement. Exempt employees, however, must be paid for their entire work week if they perform any work during the week and they are prevented from working through no fault of their own (i.e., the business is closed because of weather).

Consider allowing or even requiring employees to use vacation or other accrued time for weather-related absences. Absent a contract or conflicting state laws, an employer typically has flexibility in this area as long as the policy is applied consistently.

## VOLUNTEER WORK/WORKING FROM HOME

Exempt employees who are paid a salary can be required to work wherever and whenever the company requires. If an exempt employee is required to work at a different location or to log extraordinary hours during a natural disaster, no additional payment is required other than the customary salary. Of course, an employer can choose to reward exempt employees who go “above and beyond” during a crisis with a bonus or extra time off at a later time.

Nonexempt employees must be paid for all hours worked. For example, if a nonexempt employee works from home because his or her work site is damaged, this is compensable time and must be tracked. Similarly, nonexempt employees who perform out of the ordinary tasks for the benefit of the employer (like cleanup or repairs) must be paid for this time. An employee typically cannot volunteer to perform work for the benefit of his or her own employer.

Ensuring proper recordkeeping under normal circumstances is a challenge, but in the middle of a natural disaster doing so can be almost impossible. It is critical employers have a plan in place so employee work time can be properly recorded from home or alternate work sites, even if the office is without power, damaged or destroyed. The employer bears the burden of accurately recording all employee work time, and there are no exceptions for weather events.

## PAYCHECKS

Many states have deadlines for providing paychecks to employees, and they typically do not make exceptions for natural disasters. Some states have a financial penalty for each day a paycheck is late. Accordingly, every employer should have a backup payroll strategy in the event the primary method is unavailable due to weather.

If you have other facilities that are operational, consider having checks processed or mailed from other sites to avoid delays. If you want to hand deliver checks to employees without direct deposit, consider designating a safe meeting spot to hand out paychecks.

Every company needs a contingency plan so it can continue operations in the event of a natural disaster. As explained above, a critical component of that plan should be ensuring the company continues to comply with all wage and hour laws during emergencies, and procedures are in place to continue the timely processing of payroll.

## Legislation Provides for Greater USERRA Enforcement



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On September 12, 2012, the United States Senate Committee on Veterans' Affairs approved S. 3322, a piece of legislation that would strengthen enforcement of the Uniformed Services Employment and Reemployment Rights Act (“USERRA”).

USERRA bars discrimination against members of the uniformed forces because of their past, current, or future military obligations. It mandates, in part, that service members, reservists and National Guard members returning to civilian employment after a period of active duty must be reemployed in the same or similar job with the status, pay, and benefits they would have attained if they had never been absent for military duty. The statute also proscribes discrimination in hiring, promotion and termination practices and preserves workers' benefits. All employers, regardless of size, are subject to the requirements of USERRA.

Currently, USERRA permits the United States Attorney General only to file a single-plaintiff case against an employer. If passed, the new legislation will broaden the USERRA's scope by allowing the Attorney General to investigate and file suits alleging a pattern or practice of USERRA violations. This effectively authorizes the Attorney General to seek relief for multiple plaintiffs in a single lawsuit against an employer. The amendment also would permit a veteran to intervene as a plaintiff in a lawsuit initially filed by the Attorney General. The bill is currently pending before the Senate.

## Think Nonunionized Employers Need Not Worry About the NLRB? Think Again.



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The past year has seen a significant effort by the National Labor Relations Board (NLRB) to insert itself into the operations of nonunionized workplaces, giving employers throughout the country cause for concern. Historically, the NLRB has focused on unionized workplaces or on those at which an organizing effort is afoot and generally has left union-free employers alone. That appears to be changing, perhaps due to the Board's desire to keep itself relevant in the face of an overall decline in union membership.

In 2012, the NLRB issued decisions in four areas that, until recently, many employers assumed were beyond the NLRB's reach: class action waivers, confidentiality of internal investigations, at-will employment policies and social media policies.

***"In 2012, the NLRB issued decisions in four areas that, until recently, many employers assumed were beyond the NLRB's reach."***

### CLASS ACTION WAIVERS

The NLRB rang in the new year with its January 3, 2012 decision in *D.R. Horton Inc.* that it is illegal to require employees to waive their right to file joint, class or collective claims addressing their wages, hours or working conditions.

In January 2006, the company at issue began requiring all new and current employees to sign a Mutual Arbitration Agreement (MAA) as a condition of their employment. The MAA provided, in relevant part, that all disputes and claims relating to the employee's employment would be determined exclusively by binding arbitration, and the arbitrator would only have the authority to hear the employee's "individual claims."

The issue came before the NLRB because in January 2008, a superintendent attempted to file a collective action under the Fair Labor Standards Act, alleging he and other similarly situated superintendents had been misclassified as exempt. When the superintendent gave notice of his intent

to initiate arbitration, the company pointed to the MAA's prohibition against collective or class actions. In response, the superintendent filed an unfair labor practice charge with the NLRB, alleging this prohibition violated the National Labor Relations Act (NLRA) by interfering with employee access to the NLRB and by attempting to prevent employees from engaging in concerted activity for their mutual aid and protection.

The Board agreed on both points, holding that engaging in collective legal action "to redress workplace wrongs or improve workplace conditions [is] at the core of what Congress intended to protect by adopting the broad language of Section 7 [of the NLRA]." Moreover, the Board continued, an employer may not attempt to prevent employees from turning to the NLRB by requiring them to arbitrate all grievances regarding wages, hours and working conditions.

### AT-WILL EMPLOYMENT POLICIES

Many employers include in their employee handbook a policy that all employees are employed at-will. Administrative Law Judge (ALJ) Gregory Meyerson took a close look at this standard, and seemingly innocuous, policy in *American Red Cross Arizona Blood Services Region and Lois Hampton*. There, the employer's policy expressly required the employee to acknowledge that the at-will employment relationship could not be "amended, modified or altered in any way." The ALJ found employees could reasonably interpret that language to mean that they were prohibited from advocating to change their at-will status through a collective bargaining agreement. Therefore, the ALJ concluded, the policy violated Section 7 of the NLRA.

By contrast, the NLRB acting general counsel released two advice memos on October 31, 2012 in which he blessed two at-will employment clauses that did not contain language stating that the at-will nature of employment was unalterable. Instead, one of the clauses in question stated that only the president of the company had the authority to change the at-will employment relationship. The other stated that no company representative had the authority to "enter into any agreement contrary to the foregoing 'employment at will' relationship," but did not require employees to acknowledge the clause. Taken together, these opinions suggest at-will employment policies are not in the Board's cross-hairs *per se*, but employers should be cautious not to include language in such policies asking employees to acknowledge that the at-will nature of their employment is cast in stone.

## CONFIDENTIALITY OF INTERNAL INVESTIGATIONS

On July 31, 2012, the NLRB laid down a general rule that requiring confidentiality during an internal investigation into an employee complaint constitutes an unfair labor practice.

In *Banner Health System d/b/a Banner Estrella Medical Center*, a divided Board held that “to justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees’ Section 7 rights.” The two-member majority rejected Banner’s argument that the prohibition was justified by its interest in protecting the integrity of internal investigations, and ordered Banner to post a notice that the policy had been found to violate federal law.

A “blanket approach” to requiring confidentiality during internal investigations will not suffice, the Board held. Rather, an employer must consider each investigation individually, and decide whether confidentiality is required because witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover-up.

In light of this decision, employers should jettison any general policy against employees discussing with each other ongoing investigations into employee misconduct. This holds true even if the policy carries no threat of discipline for violators. However, employers should continue to insist upon confidentiality in connection with investigations into particularly sensitive complaints, such as those of sexual harassment, discrimination or fraud. Moving forward, employers should work with counsel in analyzing each investigation individually to determine the level of confidentiality required.

## SOCIAL MEDIAL POLICIES

For a discussion of the Board’s approach to social media policies, see “Social Media and the Workplace: 2012 and Beyond” on page 10 of this newsletter.

These examples illustrate the NLRB’s vigor in addressing any and all practices that could be construed as limiting employees’ rights under the NLRA. It remains to be seen how the courts will come down on these questions.

## Social Media and the Workplace: 2012 and Beyond



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2012 remained the year of continued questions and answers at the intersection between social media and employment law. Employees continue to use social media for personal and professional reasons in astonishing numbers, both inside and outside the “work day,” and both inside and outside the “work place.” Traditional work day and work place boundaries have given way to new realities today, and employers use social media to make employment-related decisions with increasing frequency. In this article, we take a nostalgic walk through the issues raised in this area in 2012, and play a little Nostradamus when it comes to what we might see in 2013.

There are several sources of obligations and potential exposure employers must consider when making employment-related decisions, from Title VII to federal and state statutes on the issue of monitoring electronic communications, to laws protecting an employee’s right to engage in “legal activities.” But the biggest obstacle for employers in 2012, and the one still generating the most press, has been the National Labor Relations Board (NLRB). The NLRB has jurisdiction to interpret and enforce the National Labor Relations Act, which was enacted in 1935 to protect trade unionists from unfair labor practices by employers, and afford employees a greater ability to organize and collectively bargain. Approximately 60 years later, the social media era began, when society (including the labor workforce) began to see the ease and benefit of engaging in collective activity without ever leaving one’s computer keyboard.

In 2012, the NLRB’s Office of General Counsel issued two separate guidance memoranda on social media issues, which, together with the healthy smattering of complaints of decisions also issued on that administrative level, have framed two issues. The first: When can employers make an adverse employment decision based on an employee’s statement or conduct on social media? The second: What are the do’s and don’ts when it comes to an employer’s social media policies? The answer to the first question, like so many of those lawyerly answers you love: “It depends.”

As you likely know by now, Section 7 of the Act provides that employees of both union and nonunion workplaces “shall have the right ... to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]” As a corollary to that benefit, Section 8 of the Act makes it an “unfair labor practice” for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this Act[.]” Just as courts have grappled with the application of such traditional claims as defamation and harassment to conduct that takes place through social media, the NLRB has started to look at whether adverse employment actions (e.g., refusal to hire, discipline or terminate) taken as a result of an employee’s social media postings or conduct constitutes an interference with the right to engage in concerted activities for the employee’s mutual aid or protection.

The takeaway here is that employers should not be “trigger happy” when it comes to taking such adverse action, but rather should engage in an analytical exercise with the help of counsel.

## **Step 1 – Is the employee’s social media posting or other activity concerted activity?**

It is critical to remember that Section 7 of the Act only protects employee conduct if it is concerted. In that regard, the NLRB defined the term concerted in two cases in the mid-1980s, known as *Meyers I* and *Meyers II*. In those cases, the NLRB determined employee activity is concerted if it is engaged in “with or on the authority of other employees, and not solely by and on behalf of the employee himself.” The Board added that there must be “some linkage to group action in order for conduct to be deemed ‘concerted’ within the meaning of Section 7.”

The following are examples of employee activity that the NLRB has deemed to be concerted:

- Postings by an individual to survey co-workers about workplace issues, which resulted in conversations among co-workers.
- An individual sharing a concern with co-workers about an employer’s administration of income tax withholding.

On the other hand, the following activity was not deemed to be concerted because the social media activity did not involve other employees in issues relating to employment:

- Facebook conversation with a relative about a restaurant’s compensation and tip practices,

where the employee referred to customers as “rednecks” and stated he hoped they choked on glass as they drove home drunk.

- Employee posted comments on a senator’s Facebook wall, referring to his employer’s contracts with fire departments and complaining about certain practices.
- Employee posted comments that, although they prompted co-worker responses, involved only “personal griping” about an individual dispute between employee and his supervisor.

## **Step 2 – If the answer to Step 1 is “yes,” is the concerted activity protected concerted activity?**

Employee activity is protected if it generally refers to or implicates the terms and conditions of the workplace. The NLRB seems to have adopted a broad view of the types of postings and discussions that implicate working conditions, requiring one to analyze both the social media statements themselves, as well as the context in which such statements were made. The following are examples of activity that the NLRB has considered to be protected:

- Employee sought input from a fellow employee about a dispute with a co-worker advocate who indicated that employees should have the organization’s executive director settle their differences.
- Employee posted concerns about the impact that an employer’s choice of food and beverage at an auto sales event might have on commissions received from sales.

Examples of activity that were deemed not to constitute protected activity include:

- Newspaper reporter tweeting about public safety beat matters and city homicides, in language containing sexual references, and also criticizing area television station.
- Employee engaging in Facebook conversation about being “spooked” by being alone on an overnight shift as a recovery specialist in a mental institution and making derogatory comments about some of the resident mental patients.

### **Step 3 – If the answers to Steps 1 and 2 are “yes,” did the employee nevertheless lose the Act’s protection?**

At this stage, if the employee has technically engaged in protected concerted activity, one must still determine whether the employee nevertheless “crossed the line” by being so disloyal, and made a statement that was so reckless or maliciously untrue, as to lose the protection of the Act. That standard is rooted in two separate decisions issued by the U.S. Supreme Court in 1953 and the NLRB in 1979, and looks at whether employees “deliberately undertook to alienate their employer’s customers by impugning the technical quality of the product.” The NLRB identified four factors used to determine whether the employee crossed the line: “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.”

Notably, the Supreme Court recognized that one cannot ignore “the underlying contractual bonds and loyalties of employer and employee” and that “insubordination, disobedience or disloyalty is adequate cause for discharge.” However, employee conduct that is objectively innocuous and not overtly opprobrious will generally not result in a finding the employee has lost the Act’s protection.

### **Step 4 – If the answer to Step 3 is “no,” can the employer still meet its burden of demonstrating it would have taken the adverse action against the employee even in the absence of the protected concerted activity?**

This last step is akin to the burden imposed on employers in the normal course of an employment discrimination case. Thus, if the employee’s social media activity constitutes protected concerted activity (Steps 1 and 2), and if the employee’s conduct did not cross the line so as to lose the Act’s protection (Step 3), the employer may be able to avoid liability if it can show the employment decision made or adverse action taken was based on a legitimate business reason other than the employee’s protected concerted activity.

**The second issue framed by the NLRB’s work in 2012: What are the do’s and don’ts when it comes to an employer’s social media policies? The answer:** Do narrowly tailor the protection of your valuable business interests, and don’t be vague or overbroad. By now, most employers have long heeded the warning that policies must be in place to sufficiently proscribe harassment and discrimination, and prescribe effective complaint procedures for allegedly aggrieved employees to use.

As we near the close of 2012, it is equally critical that employers develop and implement appropriate and effective social media policies. But the NLRB has taken a little wind out of the sails of employers who believed they could prohibit and protect virtually everything. By way of some examples from the past year, the following social media policy provisions have been deemed to be impermissibly overbroad by the NLRB:

Prohibiting the release of “confidential information” or “non-public company information” generally, or unless there is a “need to know” to do the job.

- Requiring posts to be “completely accurate and not misleading.”
- Requiring an employee secure permission from the employer as a condition to engaging in what might be considered protected activity.
- Prohibiting generally the posting of photos, music, videos, quotes and personal information of others without obtaining the owner’s permission, and from using the employer’s logo or trademarks even for non-commercial use.
- Prohibiting “disparaging” or “defamatory” remarks, as well as “offensive, demeaning, abusive or inappropriate remarks” without further edification.
- Requiring employees think carefully about friending even their co-workers.
- Requiring employees to report “unusual or inappropriate internal social media activity.”
- Prohibiting employees from commenting on pending legal matters.
- Prohibiting topics “that may be considered objectionable or inflammatory.”
- Encouraging employees to resolve concerns by speaking through internal channels, rather than by posting complaints online.
- Prohibiting posts that may “harm the image and integrity of the company.”
- Prohibiting any and all communications to the media, or requiring prior authorization before doing so.
- Requiring employees to be “courteous.”

On the other hand, the NLRB noted with approval the following social media policy provisions:

- Prohibiting disclosure of specific examples of company information that does not relate to the employees themselves (or their terms and conditions of work).
- Requiring employees to respect all copyright and other intellectual property laws.
- Stating that employees should use their best judgment and exercise personal responsibility.
- Prohibiting online “harassment, bullying, discrimination, or retaliation that wouldn’t be permissible in the workplace.”
- Prohibiting posting anything in the employer’s name without the prior authorization of the employer.
- Requiring employees expressly state that postings about the employer’s products or services are the employee’s own opinions, and not the employer’s position.

This issue of what is considered permissible versus impermissible ultimately rests on a “reasonableness” analysis. Some esteemed commentators have opined that many of the NLRB’s positions regarding impermissible and overbroad provisions are way over the top, constitute agency overreaching and will not ultimately hold up in court. However, until someone in a black robe agrees with the “overreaching” contention, the NLRB is the only voice of authority in the auditorium. The common thread that appears to tie all of the NLRB’s statements seems to be the following from the NLRB’s May 2012 memorandum: “Rules that are ambiguous as to their application to [protected] activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict [protected] rights are unlawful.”

## A LOOK AHEAD TO 2013

Finally, we have an opportunity to look beyond this past year and make an educated guess as to what will be the “hot” issues for employers in the social media area as we begin 2013. Nostradamus aptly stated in 1566: “I do but make bold to predict (not that I guarantee the slightest thing at all).” So, with that caveat, we offer the following predictions.

First, courts are likely to develop a body of law on what it means to click the social networking “like” button. A Sheriff in Hampton, Va., fired six of his workers in 2012 when one of them liked the Facebook page of an individual running against the Sheriff. The employees sued, and on April 24 a federal

judge in the Eastern District of Virginia dismissed the lawsuit, holding that the employees were not entitled to free speech protection: “It is the Court’s conclusion that merely ‘liking’ a Facebook page is insufficient speech to merit constitutional protection.”

In another case, a discrimination claim was filed in 2012 with the EEOC by a man who alleges that the Library of Congress harassed and then ultimately fired him because his homosexuality did not comport with his supervisor’s views on sexual orientation and religion. The man’s homosexuality was gleaned only after it was learned that he liked a Facebook link to a group that supports gay adoptions. So, what does it mean to like something in social media, and to what extent does like equate with employee speech?

Second, it is abundantly clear employers will continue to test existing rules addressing monitoring an employee’s electronic communications and Internet usage, as it is equally clear that employees will continue to raise privacy challenges to employer action. More laws like the “Facebook Password Demand” laws will be proposed and enacted, and current prohibitions against employer monitoring and surveillance will be molded to adopt to the new electronic realities.

Third, we will likely begin to see competition and restrictive covenant issues take shape in various legal forums. Does an employee violate a non-solicitation covenant by putting new employment contact information on his or her LinkedIn profile page that is also viewed by your company’s customers? Does an employee impermissibly disclose “trade secrets” by discussing your company’s products and services on a blog or in a good-intentioned tweet?

Fourth, we will likely see new definitions and best practices emerge from the ever increasing boundaries of the above-referenced work day and work place. Avatar games and other online relationship activities will test common notions of harassment and discrimination when an online virtual relationship spills over into the real reporting line of a supervisor and subordinate. And, wage and hour rules developed principally in the 1930’s will be tested by employees who can perform work on any mobile device and get access to your systems from anywhere in the world, all while the employers have less of an ability to control (and keep track of) those hours “worked.”

Justin Timberlake’s character in *The Social Network* said: “We used to live on farms, then in cities .... Now we’re all living on the Internet.” The new realities in 2012 have had such an impact on the employer-employee relationship in 2012. It is certain that impact will continue to be felt as we move forward. Until then, relax, breathe and have a healthy and happy 2013.

## Patient Protection and Affordable Care Act: What Employers Need to Know



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When President Obama signed into law the Patient Protection and Affordable Care Act (PPACA) in 2010, it was met with much resistance. Even after the U.S. Supreme Court upheld the PPACA in the face of challenges to its constitutionality, repeal of PPACA still remained a possibility in the event of the election of Republican presidential candidate Mitt Romney. Although opposition to the PPACA continues to abound, President Obama's re-election to a second term has established the PPACA as a permanent fixture in this nation's health care landscape. Thus, employers need to be prepared to comply with the PPACA. This article provides a brief synopsis of the provisions of the PPACA that will be implemented in the years to come most relevant to employers.

### W-2 REPORTING

Beginning with the 2012 tax year, employers will be required to report the aggregate cost of employer-sponsored health coverage on their employees' W-2 Forms. While reporting was voluntary for the 2011 tax year, it is mandatory for the 2012 tax year. Pending further notice by the Internal Revenue Service, this requirement only applies to those employers who had to file 250 or more Form W-2s in the previous tax year. W-2 reporting is for informational purposes only and does not render an employee's health coverage taxable.

### LIMITS ON HEALTH FLEXIBLE SPENDING ACCOUNTS

Effective for plan years beginning after December 31, 2012, the PPACA will impose a \$2,500 limit on salary reduction contributions to an employee's health flexible spending account. This limit will be indexed for cost-of-living adjustments beginning in 2014.

### EMPLOYER NOTICE REQUIREMENTS

By March 1, 2013, employers subject to the Fair Labor Standards Act (FLSA) must provide notice to their employees of: (1) the existence of state health insurance exchanges and a description of their services; (2) the employee's eligibility for premium tax credits or cost-sharing reductions, if applicable; and (3) loss of excludable employer contributions if the employee purchases health insurance on the exchange. For new employees hired after March 1, 2013, notice must be provided at the time of hire.

### HEALTH INSURANCE EXCHANGES

Beginning on January 1, 2014, each state will be tasked with implementing state health insurance exchanges, which will be government agencies or nonprofit entities through which states will make available qualified health plans to individuals and small employers. Small employers are defined as those employers that employed 100 employees or less in the preceding calendar year. However, for plan years beginning before January 1, 2016, states may choose to limit exchange participation to employers with 50 employees or less. States will have the option of opening their exchanges to large employers, defined as those employers that employed at least 101 employees in the preceding calendar year. For plan years beginning before January 1, 2016, states may choose to define large employers as those with 51 or more employees.

Individuals who purchase insurance on an exchange may be eligible for health insurance subsidies. The premium tax credit will generally be available to individuals earning between 100 percent and 400 percent of the federal poverty level. Additional cost-sharing reductions will generally be available to individuals with household incomes between 100 percent and 400 percent of the federal poverty level, and who purchase a certain level of coverage on the exchange.

### EMPLOYER MANDATE

The employer mandate takes effect January 1, 2014. The mandate will be applicable to large employers, defined, for purposes of the mandate, as employers who employed at least 50 full-time employees during the prior calendar year. Full-time employees are those who work an average of 30 hours per work week. The number of full-time employees also includes "full-time equivalents." That is, 120 hours per month of part time labor equals one full-time employee. The employer mandate imposes two types of penalties upon large employers, both of which are listed below.

#### Failure to Offer Employer Sponsored Health Coverage

For an employer failing to offer employer-sponsored health insurance at all, if: (1) even one of its employees purchases insurance on the exchange; and (2) the employee is eligible for and receives a premium tax credit or cost-sharing reduction, that employer will be assessed a payment of \$2,000 multiplied by the number of full-time employees in excess of 30.

#### Failure to Offer Adequate Coverage

A separate fine will be assessed against employers who offer inadequate coverage, or coverage that is either unaffordable or fails to provide minimum essential value. Unaffordable coverage is coverage for which the employee's share of the

premium exceeds 9.5 percent of his or her household income, or, if the employer is unable to ascertain the employee's household income, 9.5 percent of the employee's W-2 wages. Coverage that fails to provide minimum essential value is coverage that does not cover at least 60 percent of the employee's medical expenses.

If an employer offers inadequate coverage and: (1) at least one employee purchases insurance on the exchange; and (2) the employee is eligible for and receives a premium tax credit or cost-sharing reduction, that employer will be assessed a fine of \$3,000 per each employee meeting these two requirements. The assessable payment for offering inadequate coverage is capped at the amount an employer would have had to pay if it failed to offer coverage at all.

## Employer Reporting

Employers subject to the employer mandate will be required to submit a form certifying whether they offer employer-sponsored health care to their full-time employees and their dependents.

## AUTOMATIC ENROLLMENT

Employers subject to the FLSA with more than 200 employees will be required to automatically enroll new full-time employees in their employer-sponsored health coverage. An employee must affirmatively opt out of employer-sponsored coverage in order for an employer to cease covering that employee. This provision will likely be implemented at some point after 2014.

***"The re-election of President Obama signals that the Patient Protection and Affordable Care Act is here to stay."***

## SMALL BUSINESS TAX CREDIT

In 2014, the tax credit for small businesses providing health care coverage to their employees will increase from 35 percent to 50 percent for businesses, and from 25 percent to 35 percent for tax-exempt organizations. In order to be eligible for the small business tax credit, an employer must employ less than 25 full-time equivalent employees for the taxable year, pay average annual wages of less than \$50,000 per full-time equivalent employee, and provide employer-sponsored coverage covering at least 50 percent of the cost of medical expenses under a plan.

## CONCLUSION

The re-election of President Obama signals that the Patient Protection and Affordable Care Act is here to stay. The PPACA will significantly change the nation's health care system. A recent study by the International Foundation of Employee Benefit Plans indicated that 84 percent of employers surveyed intended to continue health care coverage under the PPACA. This means that employers must be ready to fulfill their responsibilities under provisions of the Act already in effect, and they must also begin making preparations to comply with those provisions taking effect in the future.

## EEOC: A Year in Review



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The Equal Employment Opportunity Commission (EEOC) recently concluded its 2012 fiscal year having recovered a record high \$365.4 million dollars through its private sector administrative enforcement and recovered \$44.2 million dollars through its litigation program. It received nearly 100,000 new charges of discrimination, resolved a total of 111,139 charges, and saw a significant decrease in its inventory of pending cases. See EEOC's Performance and Accountability Report released November 16, 2012. Moreover, the EEOC continues to take a quality over quantity approach to its litigation, filing fewer but wider reaching lawsuits.

What does this mean for employers in the coming year? Where will the EEOC continue to focus its attention? A brief review of the EEOC's actions in 2012 tells us a bit about its plans for 2013 and beyond.

## HIRING PRACTICES: ARREST AND CONVICTION RECORDS

The EEOC continued to take a long hard look at hiring practices in 2012 and the issue is expected to remain on the EEOC's radar screen into 2013. In January 2012, the EEOC announced that Pepsi Beverages agreed to pay \$4.13 million dollars and provide job offers and training to resolve a discrimination charge involving Pepsi's criminal background check policy. The EEOC contended that Pepsi's policy disproportionately excluded black applicants from permanent employment.

Shortly thereafter, in April 2012, the EEOC issued its long-awaited updated Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions. The guidance sets forth the factors employers should take into account when considering arrest and conviction history. According to the EEOC:

- Employers may not disqualify an applicant based upon an arrest record;
- Blanket policies excluding those with convictions are not considered job related and/or consistent with business necessity; and
- Employers must develop a targeted screen considering at least the nature of the crime, the time elapsed and the nature of the job (the three factors identified in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)). Employers should then provide an opportunity for an individualized assessment for those people identified by the screen to determine if the policy, as applied, is job related and consistent with business necessity.

More recently, the EEOC has alleged that Dollar General Corporation's criminal background check policy, which excludes individuals with certain criminal convictions for specified periods, has a disparate impact on African-American job candidates and employees. The EEOC will likely file suit against Dollar General.

The EEOC's increased focus on criminal background check issues is not surprising. In its February 2012 Strategic Plan, the EEOC indicated it intends to increase the number of systemic cases in its litigation docket. Systemic cases involve "pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area." Its focus on criminal background check policies fits within that goal.

## **ADA: DISABILITY DISCRIMINATION AND LEAVE POLICIES**

Another area of recent focus for the EEOC involves leaves of absence as a reasonable accommodation under the Americans with Disabilities Act (ADA). Again, this area of focus should come as no surprise to employers given the 2008 Americans with Disabilities Act Amendments Act (ADAAA). Over the past few years, the EEOC has challenged employer maximum leave policies in a number of jurisdictions. Typically, in such cases, the employer has a policy stating

that employees unable to return to work after exhausting a set amount of leave time automatically would be terminated. The EEOC contends that such fixed leave policies violate the ADA as they result in a failure to engage in the interactive process. Just last month, the EEOC announced that a trucking company will pay \$4.85 million dollars to settle a nationwide class disability discrimination lawsuit filed by the EEOC. The employer's policy provided for automatic termination if an employee needed more than 12 weeks of leave. The EEOC contended that the employer should have determined whether it would be reasonable to provide additional leave as an accommodation.

***"Employers should review and potentially eliminate any maximum leave policies, even where those policies provide a seemingly generous fixed leave."***

## **PRACTICAL TIPS FOR COMPLIANCE IN 2013**

In light of the EEOC's stated desire to increase the number of systemic lawsuits it files, and its continued focus on hiring and disability discrimination, there are a few steps employers can take to minimize the risk of an EEOC investigation.

- Employers should review their hiring and background check policies generally. Blanket policy statements, such as "The Company will not employ individuals who have been convicted of X offense," are red flags for the EEOC and should be avoided unless absolutely necessary.
- Employers should avoid considering an applicant's arrest record.
- In instances where criminal convictions may be job related and/or consistent with business necessity, employers should evaluate: (1) the nature of the specific crime at issue; (2) the time elapsed since the individual was convicted of the crime; and (3) the nature of the job at issue.
- Employers should be wary of conducting credit checks on all applicants regardless of the position sought. This is another area of interest for the EEOC and various states have passed laws or are considering passing laws limiting an employer's ability to consider an applicant's credit history.

- Employers should review and potentially eliminate any maximum leave policies, even where those policies provide a seemingly generous fixed leave. Instead, employers should evaluate situations on a case-by-case basis before making any employment decisions.

## "Good Jobs For Everyone" Initiative Equals Increased Scrutiny of Employers



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For 2013, the Secretary of Labor has reiterated the Department of Labor's (DOL) vision of "Good Jobs for Everyone." The Wage and Hour Division (WHD) of the DOL administers and enforces a variety of laws related to payment of wages and working conditions, including the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). The WHD's 2013 Congressional Budget Justification supports the DOL's vision and also provides an inside look into its initiatives and areas of focus in 2013. To achieve the DOL's vision, the WHD identified five strategic goals for 2013: (1) prepare workers for good jobs and ensure fair compensation; (2) ensure workplaces are safe and healthy; (3) ensure fair and high quality work-life environments; (4) secure health benefits, and for those not working, provide income security; and (5) produce timely and accurate data on the economic conditions of workers and their families. Enforcement of WHD standards relate to the first three of these goals, and thus, these are the areas in which employers may see additional DOL focus in 2013.

***"During 2013 the DOL will place particular emphasis on wrongful classification of independent contractors, an area that has been a thorn in the DOL's side for some time."***

The WHD's goal of preparing workers for good jobs and ensuring fair compensation involves increasing wages, narrowing wage inequality and securing payment of overtime wages. In the upcoming year, the DOL will attempt to increase the percentage of prior violators who become complaint with the FLSA. The DOL also will focus on securing wages and

overtime by ensuring employees are properly classified and employees entitled to overtime payments are receiving those payments.

Also related to this focus area, during 2013 the DOL will place particular emphasis on wrongful classification of independent contractors, an area that has been a thorn in the DOL's side for some time. In its budget justification, the DOL noted that the last IRS Assessment on this issue (in 1984) estimated 15 percent of all employers misclassified independent contractors, about 3.4 million workers, for an annual revenue loss of \$1.6 billion to the IRS. A 2009 study from the Government Accounting Office suggested that between 10 and 30 percent of employers misclassify workers. The DOL is focused on this area because both the government and workers face significant consequences from misclassification — the government loses out on monies from tax and social security payments, and misclassified workers can lose out on payment of overtime compensation, and entitlement to unemployment compensation and protection under some civil rights laws.

For 2013, the DOL has committed itself to focusing on the following industries, which have a history of misclassification: janitorial, construction, home health care, childcare, transportation, warehousing, meat and poultry processing, subcontracting and other personal services industries. Although the DOL has identified that its focus will be in these areas, employers in other industries are not off the hook, particularly because the DOL is coordinating its enforcement efforts with state and other federal agencies by sharing information among the entities. This work-sharing arrangement creates the potential for non-compliant employers to face significant monetary penalties. As a result, all employers that utilize independent contractors should work with counsel to reevaluate their classifications to ensure compliance with the law.

Any employer that receives an inquiry from a state or federal agency, or is subject to an investigation, also should work closely with counsel to ensure it submits an accurate and thorough response, to satisfy the inquirer and decrease the potential that it will receive an inquiry or investigation from another agency.

In 2013, the WHD also will emphasize creating safe and healthy workplaces. Within this focus, the WHD plans to allocate additional resources to vulnerable workers, including those in the agricultural industry and younger and disabled workers. As related to the agricultural industry, the WHD is focused on continuing to ensure compliance with MPSA, the

Immigration and Nationality Act, and the Occupational Health and Safety Act, which sets standards for toilets, drinking water, hand-washing facilities and good hygiene practices. The WHD also will focus on educating employees working in the agricultural industry about child labor laws and employer requirements.

The WHD's additional goal of promoting workplace flexibility is directly linked with the FMLA. Under the FMLA, an eligible employee may take up to 12 weeks of unpaid leave to care for himself or herself or a family member with a covered medical condition. The employee's job is secure during the leave period.

The funds requested by the WHD will be used to enable the WHD to adopt a "more comprehensive approach to compliance," to release additional opinions about the FMLA's application to particular situations presented, and to respond to the additional complaints the WHD anticipates will result from its newly issued opinions. The WHD also estimates it will be able to undertake approximately 700 new compliance actions in this area during the first year new staff is brought on board to work on this issue. The DOL also hopes to be able to more timely address FMLA-related complaints brought to its attention, especially because, for many workers, the FMLA is their only available job protection.

If you are ahead of the curve and already looking to 2014, look out for the Supreme Court's opinion this coming year in *Genesis Healthcare Corporation v. Symczyk* (No. 11-1059). The Court's decision in this case very well could turn into a key area of focus for the WHD and the DOL in 2014.

## Important OSHA Activity in 2012, and What to Look for in 2013



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The Occupational Safety and Health Administration (OSHA) frequently has been criticized for inefficiency and a slow rulemaking process. During 2012, these criticisms were magnified, as many rules that were expected during the year have yet to be finalized. Many speculate the slow rulemaking in 2012 was a result of election-year politics. Despite the criticism, however, OSHA continued development of a number of notable initiatives, such as strengthening its whistleblower protection program and focusing upon the administration's enforcement programs. This article provides a summary of

some of this activity in 2012, and offers a preview of OSHA activity employers should look for in 2013.

***"OSHA's focus on its whistleblower protection program indicates that employers should ensure they have adequate procedures in place to protect employees who report unsafe practices."***

### A LOOK BACK AT OSHA'S 2012 ACTIVITIES

#### Whistleblower Protections

One of the most significant changes to OSHA in 2012, and which will no doubt carry into 2013, is the agency's emphasis on strengthening its whistleblower program. Assistant Secretary of Labor, Dr. David Michaels, announced new measures to address concerns regarding training, accountability and transparency in the whistleblower program. As of March 1, 2012, the whistleblower program was restructured to require officials with the program to report directly to OSHA's Office of the Assistant Secretary instead of the director of OSHA's enforcement programs. Moreover, OSHA's 2013 budget request includes a proposal for an additional \$4.8 million and 37 employees to be added to the whistleblower program in an effort to address backlogs and increasing caseloads. OSHA's focus on its whistleblower protection program indicates that employers should ensure they have adequate procedures in place to protect employees who report unsafe practices.

#### Unlawful Discrimination

In a March 2012 memorandum, OSHA highlighted problematic employment policies that provide employees with an incentive not to report injuries, e.g., entering employees who have not been injured in the previous year into a drawing to win a prize. Withholding incentives from workers who report injuries may unlawfully discriminate against them for exercising their right to report an injury. A better way to encourage safety in the workplace would be incentives that promote worker participation in safety-related activities, such as identifying hazards or participating in investigations. The memorandum also contained a warning for employers who discipline employees injured on the job. For example, some employers will discipline an injured employee for failing to properly report an injury, or for getting injured as a result of violating a safety rule. OSHA encourages employers to carefully scrutinize such decisions because they too may be considered discriminatory.

## Enforcement

OSHA has recently emphasized its enforcement initiatives. Seventy-five percent of OSHA's inspections in the 2012 fiscal year resulted in citations, and the percentage of inspections resulting from complaints has steadily increased over the last few years. As further evidence of increased enforcement efforts, OSHA amended the criteria for employer inclusion in the Site-Specific Targeting Program, which targets for inspection those general industry workplaces with higher-than-average injury and illness rates. Previously, the program only included those workplaces with a minimum of 40 workers; however, in 2012 that number was reduced to 20 workers. Moreover, in 2012, the number of employers on OSHA's "severe violators list" doubled since the inception of the list in 2010. Placement on the severe violators list will subject an employer to more frequent OSHA inspections and requires establishment of a safety program.

## WHAT EMPLOYERS SHOULD EXPECT FOR 2013

### Revisions to Injury and Illness Reporting and Recording Requirements

In an effort to update its reporting system, OSHA proposes to move from the Standard Industrial Classification system (SIC) to the North American Industry Classification System (NAICS). NAICS is the standard system used by federal statistical agencies in classifying business establishments. OSHA indicates that most industries will be unaffected by this change, although some establishments will be newly required to report, or newly exempt from reporting. In addition, OSHA has proposed requiring employers to report all work-related in-patient hospitalizations within eight hours, and all work-related amputations within 24 hours. Currently, employers are only required to report incidents in which three or more workers are hospitalized. OSHA has also included in its 2013 budget a \$1.75 million allotment for updating its data collection system to permit employers to file injury and illness information electronically. Each of these proposed changes has been under review for at least a year, so a 2013 implementation is a possibility.

## I2P2

An injury and illness prevention program, or I2P2, would require employers to find and fix workplace hazards before injury, illness or death occurs, even if the hazard is not covered by any particular OSHA standard. The proposed program has met with much opposition because of the enhanced burden it would place upon employers. Although many experts doubt that OSHA will be able to implement

such a program, the re-election of President Obama puts an I2P2 rule in a better position to be adopted in 2013. Thus, employers may want to begin preparing themselves now.

## Other Forthcoming Notable, Industry-Specific Rules

Looking forward, three regulations slated for 2012 have yet to come to fruition, so employers should look for them in 2013. A final rule to protect construction workers in confined spaces was proposed for June 2012, but has not been released. In June 2012, an OSHA official said the confined space rule was "really close" to being issued. OSHA also proposed a May 2012 date for a final rule regarding electric power generation and transmission, which would make the construction standard consistent with the general industry standard addressing the maintenance and repair of electric power lines and equipment. Finally, a proposed silica exposure standard has been under review since February 2011. The proposed standard would lower permissible exposure limits to silica dust and set new requirements regarding issues such as regulated work areas and engineering controls.

## CONCLUSION

Many speculate that the 2012 election year temporarily derailed a number of OSHA's initiatives. Now that the election is over, it is possible OSHA may move more quickly with some of these outstanding goals. Moreover, employers should certainly expect a continuation of the trend toward increased enforcement initiatives and whistleblower protections under a re-elected Obama administration.

## Hot Topics Under the FMLA: Guidance and Solutions for Employers when Dealing with Military Families and Same-Sex Marriage



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Although nearly two decades have passed since its enactment, the Family and Medical Leave Act (FMLA) continues to evolve through judicial interpretation. The Obama administration and the courts have continued to expand the scope and effect of the FMLA, specifically for military caregivers, and in the case of same-sex marriages.

## MILITARY CAREGIVER

In February 2012, the U.S. Department Labor (DOL) released a Notice of Proposed Rulemaking (NPRM) that proposed changes to the FMLA regulations related to military family leave. These proposed changes seek to implement and interpret the statutory amendments to the FMLA, pursuant to the National Defense Authorization Act for Fiscal Year 2010 (NDAA), signed by President Obama in October 2009.

**Military Qualifying Exigency Leave.** The FY 2010 NDAA expanded qualifying exigency leave so eligible employees with a spouse, child or parent in all military components, including the regular Armed Forces, would be eligible to take FMLA leave under qualifying circumstances. FY 2010 NDAA also added a new condition that the military member's deployment must be to a foreign country in order for an eligible employee to be able to take qualifying exigency leave.

Current FMLA regulations list eight categories of reasons for which an eligible employee may take a qualifying exigency leave: short-notice deployment, military events and related activities, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities and additional activities. The NPRM proposes to clarify that for exigency leave related to child care and school activities, the child for whom child care leave is sought need not be a child of the employee requesting leave. Therefore, the parent of a military member could take a protected leave to care for the child of the military member. The NPRM proposes to expand the maximum duration of the rest and recuperation leave from the current five days to 15 days. The NPRM further proposes to add attending funeral services as an example of post-deployment activity for which an eligible employee may take qualifying exigency leave.

**Military Caregiver Leave.** The 2008 FMLA amendments now enable an eligible employee who is the spouse, child, parent or next of kin of a covered service member to take up to 26 workweeks of FMLA leave, during a single 12-month period, to care for a covered service member with a serious injury or illness. The FY 2010 NDAA expanded the definition of covered service member to include veterans who were active members of the military within the past five years, and changed the definition of serious injury or illness to include a preexisting condition that was aggravated by the service in the military. All of these changes went into effect upon the enactment of the FY 2010 NDAA, with the exception of the extension of military caregiver leave to family members of veterans with a serious injury or illness for a veteran.

The NPRM proposes the following qualify as serious injury or illness: (1) a serious injury or illness of a current service

member that continues after the service member becomes a veteran; (2) a physical or mental condition for which the veteran has received a rating of 50 percent or higher; and (3) a physical condition or mental condition that substantially impairs the veteran's ability to secure gainful employment or would substantially impair said ability, absent treatment.

***"To the extent an employer receives a request for family military leave, the employer must ensure the request is evaluated under the current statutory requirements."***

## SAME-SEX MARRIAGE

Voters in several states have approved the legalization of same-sex marriage. In December, the U.S. Supreme Court announced that it would consider whether the Defense of Marriage Act (DOMA) unlawfully denies benefits to same-sex couples who are married in states that allow for such unions. The nullification of DOMA could have a wide ranging impact, including on the FMLA's provision for "caring for a spouse."

A preliminary review of the FMLA regulation might suggest that the Department of Labor already defines "spouse" in terms of applicable state law rather than the definition set forth in DOMA. Specifically, 29 C.F.R. § 825.122(a) provides:

Spouse. Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

However, in a 1998 opinion letter interpreting the language, the DOL made it clear that DOMA's definition of "spouse" limits FMLA rights to opposite-sex spouses. Specifically, DOMA states "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." Therefore, even if a state allows same-sex marriage, DOMA does not recognize the union. As a result, employees in same-sex marriages can be denied FMLA leave to care for their spouses.

But the number of employers who are voluntarily providing leave to domestic partners and same-sex spouses is increasing among Fortune 500 companies and leading businesses. It is important to keep in mind that, as the law currently stands, if an employee is allowed 12 weeks of leave under company policy to care for his same-sex spouse, but later needs an additional 12 weeks of leave for a health condition that qualifies for FMLA leave, the employer must

grant his request for FMLA leave. This is because the initial 12 weeks he took to care for his same-sex spouse do not currently qualify as FMLA leave, and therefore did not exhaust the employee's FMLA leave entitlement.

We look to obtain guidance from the Supreme Court in June 2013 regarding this issue. If the Supreme Court rules that DOMA violates the rights of same-sex couples who are legally married under the state laws where they live, then the FMLA arguably would provide leave for employees to care for same-sex spouses — at least in states where same-sex marriage is legal.

## An Overview of Employment-Related Decisions and Pending Cases from the U.S. Supreme Court's 2012 Terms



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This year the U.S. Supreme Court's seminal decisions on health care and state immigration law dominated the news cycle (*National Federation of Independent Business v. Sebelius*, 567 U.S. \_\_\_\_ (2012) (affirming the constitutionality of most provisions of the Patient Protection and Affordable Care Act, including the requirement that most Americans have health insurance by 2014); *Arizona v. United States*, 567 U.S. \_\_\_\_ (2012) (holding Arizona's law providing authority for local law enforcement to enforce immigration law was preempted by federal immigration law)). But in the two terms that cover 2012 the U.S. Supreme Court also issued multiple decisions and heard oral arguments for less publicized cases in the labor and employment arena.

### DECISIONS RENDERED IN 2012

Since January 2012, the Supreme Court decided various labor and employment cases that covered a range of topics. Some of the Court's notable decisions are discussed below.

#### **"Ministerial Exception" Bars Wrongful Termination Claims Against Churches**

In a landmark case for religious institutions, the Supreme Court unanimously ruled that the First Amendment bars discrimination lawsuits brought on behalf of ministers against their church employers. *Hosanna-Tabor Evangelical Lutheran*

*Church and School v. EEOC*, 132 S.Ct. 694 (January 11, 2012). Cheryl Perich was terminated by her church employer and thereafter filed a claim alleging she had been fired in violation of the Americans with Disabilities Act. The Supreme Court held that Perich was a minister and, as such, her disability discrimination claim against the church was barred. The *Hosanna-Tabor* decision is the first Supreme Court case to recognize the existence of a "ministerial exception," grounded in the First Amendment, that precludes application of employment discrimination laws to claims concerning the employment relationship between religious institutions and their ministers. According to Chief Justice Roberts, who delivered the Court's opinion, "[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important ... so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith and carry out their mission ... the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."

The *Hosanna-Tabor* case is a seminal case for religious institutions seeking to defend against employment discrimination lawsuits. Religious employers that can show a plaintiff is a "minister" have a clear basis for dismissing employment discrimination claims brought in administrative agencies and in courts. These employers should note, however, that by applying the ministerial exception, *Hosanna-Tabor* only bars suits brought by ministers and it only bars employment discrimination lawsuits.

#### **Suits Alleging Violation of FMLA Self-Care Leave Provision Not Available to State Employees**

In *Coleman v. Maryland Court of Appeals*, 132 S.Ct. 1327 (March 20, 2012), the Supreme Court ruled a state employer was immune from suit alleging a violation of the Family and Medical Leave Act's (FMLA) self-care provisions. In addition to providing leave to care for others, the FMLA entitles an employee to take up to 12 weeks of unpaid leave per year due to the employee's own serious health condition when the condition interferes with the employee's ability to perform at work. Coleman filed suit, alleging his employer, the Maryland Court of Appeals, a state entity, violated the FMLA by denying him self-care leave. The district court dismissed the suit on sovereign immunity grounds, and the 4<sup>th</sup> Circuit Court of Appeals affirmed. In upholding the 4<sup>th</sup> Circuit ruling, the Supreme Court reasoned that unlike the FMLA's family-care provisions, which the Court previously held could be pursued against state employers, the FMLA's self-care provision was not directed at an identified pattern of gender-

based discrimination and therefore related suits against state employers are barred by the state's sovereign immunity. Justice Ginsburg, in her dissent, argued that the underlying purpose of the FMLA's family-care and self-care provisions were the same and the state should be subjected to suit.

In light of the *Coleman* decision, state employees no longer have judicial recourse when they believe a violation of the FMLA's self-care provision has occurred. Further, the case highlights the Court's willingness to provide greater protections for state employees who care for others than it does for those who care for themselves.

### **No Jurisdiction for Federal Employees Challenging Adverse Employment Action**

In a 6-3 decision, the Supreme Court held in *Elgin v. Dept. of the Treasury*, 567 U.S. \_\_\_\_ (June 11, 2012), that the Civil Service Reform Act (CSRA) gives exclusive jurisdiction to the U.S. Court of Appeals for the Federal Circuit, that the Merit Systems Protection Board (MSPB) may hear claims of adverse employment action, and district courts do not have jurisdiction over claims related to the CSRA. A federal statute bars employment in the executive branch of male citizens who failed to register for the draft. Elgin, who had been discharged from his job, first challenged the decision before the MSPB but his case was dismissed on the ground that the MSPB lacked authority to review the constitutionality of a federal statute. Rather than appealing that decision, Elgin sued in federal district court.

The Supreme Court held that the district court lacked jurisdiction because it is "fairly discernable" from the CSRA's text, structure and purpose that Congress precluded district court jurisdiction over covered adverse employment actions, including those involving constitutional challenges to federal statutes. Justice Thomas, writing for the Court, noted that if the MSPB lacks power to hear such claims, the claims may be meaningfully addressed by the Federal Circuit. By its decision, the Court further limited the recourse of federal employees to the courts in adverse employment actions, allowing recourse only to a few specific courts.

### **Pharmaceutical Sales Representatives are "Outside Salesmen" and FLSA Exempt**

In a 5-4 ruling, the Supreme Court held that pharmaceutical sales representatives working primarily to get physicians to prescribe their employer's prescription drugs were "outside salesmen" and exempt from the Fair Labor Standards Act (FLSA) overtime pay requirements. *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156 (June 18, 2012). The Court's

majority refused to defer to the Department of Labor's (DOL) regulatory interpretations of the FLSA's overtime laws. Rather, interpreting the phrase "other disposition" from the DOL regulations, the Court found the employees made sales for purposes of the FLSA and were exempt because obtaining a nonbinding commitment from a physician to prescribe one of the employer's drugs was the most they were able to do to ensure the eventual disposition of the products that the employer sold. Since these sales representatives were determined to be outside salesmen, the employer was not required to pay overtime for hours worked over 40 during a workweek.

Wage and hour issues remain in the forefront for many employers, and it is an area that is highly litigated. The decision in *Christopher* signals that courts might be more flexible than the regulatory agencies in determining whether a given job position is considered exempt or nonexempt from the FLSA's wage and hour requirements.

### **Union Dues Increase Requires New Notice and Consent of Nonmembers**

In *Knox v. Service Employees International Union (SEIU)*, 132 S. Ct. 2277 (June 21, 2012), the Supreme Court addressed the notice and consent that must be given to dues-paying nonunion employees before a union could impose a special assessment. Nonunion employees brought a class action against the SEIU alleging the union violated their First Amendment rights and the procedural requirements announced in *Teachers v. Hudson*, 475 U.S. 292 (1986) (Hudson notice) when the union imposed a temporary increase in employee fees in order to use the funds in an electoral campaign. In a 7-2 decision (Justices Breyer and Kagan dissenting), the Court found the union's procedure was improper because it did not provide a new opportunity for nonmembers to decide whether they wished to contribute to this effort. Specifically, the Court held that when a union imposes a special assessment or dues increase to meet expenses that were not disclosed when the regular assessment was set, it must provide a new notice to all impacted employees, and it may not exact any funds from union nonmembers without their affirmative consent.

Twenty-four states, most recently Michigan, are "Right-to-Work" states where nonmember employees can no longer be required to pay union dues. Both *Knox* and continuing state efforts should signal to employers that the interplay between unions, members and/or nonmembers will continue to be a source of controversy throughout 2013.

## Jurisdiction over MSPB “Mixed Case” Appeals

In a unanimous decision, the Supreme Court ruled that federal employees may appeal discrimination-related complaints in federal district court. *Kloeckner v. Solis*, No. \_\_\_\_, slip op. (U.S. December 10, 2012). The ruling follows earlier lower court decisions that forced federal employees to appeal some Merit Systems Protection Board (MSPB) decisions through the U.S. Court of Appeals for the Federal Circuit. In this case, Carolyn Kloeckner was fired from the Labor Department in 2005 after complaining of sex and age discrimination and a hostile work environment. The MSPB dismissed her case on procedural grounds after a protracted legal dispute. Kloeckner tried to appeal her case in district court. But the 8<sup>th</sup> Circuit Court of Appeals ruled that her appeal could only be heard by the D.C.-based Federal Circuit because MSPB decided her case on a procedural matter.

Justice Kagan, who delivered the opinion for the Supreme Court, wrote federal employees bringing “mixed cases” involving both claims of discrimination and adverse personnel decisions (i.e., termination) should proceed to district court, rather than seek judicial review in the Federal Circuit “regardless of whether the MSPB decided her case on procedural grounds or on the merits.” The *Kloeckner* decision is notable because it demonstrates that federal employees alleging job discrimination have broader appeal rights than they would normally receive because, instead of seeking judicial review in the Federal Circuit, they may bring suit in district court under the applicable antidiscrimination law.

## CASES ARGUED IN 2012 AND PENDING

Since the Court’s 2012-2013 term began on October 1, 2012, the U.S. Supreme Court heard oral arguments for several employment-related cases. Although the decisions on these cases are not expected until early 2013, these issues are in the forefront of the Court’s docket, and the implications of these decisions can be far reaching.

### Affirmative Action in Higher Education

The Supreme Court heard oral arguments on October 10, 2012 in a case that could trigger one of the broadest social policy decisions of 2013. *Fisher v. Univ. of Texas at Austin* (No. 11-345) (Justice Kagan not participating). In *Fisher*, the Court will revisit its 2003 decisions on affirmative action in higher education that held race-conscious admissions policies are lawful for an undergraduate program but unlawful for a graduate program. Here, the plaintiff claims the university expressly and unlawfully considered race in rejecting her from admission to the University of Texas at Austin’s law school.

Although *Fisher* explicitly raises facts involving affirmative action in higher education, the case is likely to have a much broader application if the Court further limits the parameters of race-conscious policies designed to promote diversity. As such, the Court’s ruling in *Fisher* could have far reaching implications that impact workplace hiring and diversity initiatives.

### Scope of Title VII “Supervisor” Liability Imputed to Employers

On November 26, 2012, the Supreme Court heard oral arguments for *Vance v. Ball State University* (No. 11-556). In *Vance*, the Court will address the issue of who is a “supervisor” for purposes of imposing strict liability on an employer for harassment committed in the workplace. The specific question is whether an employer is strictly liable under Title VII of the Civil Rights Act of 1964 for harassment by (1) employees who have authority to oversee and direct the work of the alleged victim, or (2) only those who have the authority to “hire, fire, demote, promote, transfer, or discipline” the alleged victim. Currently there is a federal circuit split on this issue.

*Vance* is particularly significant because of the landmark cases of *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, where the Supreme Court ruled an employer is vicariously liable for severe or pervasive workplace harassment committed by a supervisor of the victim. Depending on how the Supreme Court rules, employers’ potential liability (and associated risks) for the actions of its employees may be significantly expanded.

### Mootness of FLSA Section 216(b) Collective Action

Oral arguments in *Genesis HealthCare Corp. v. Symczyk* (No. 11-1059) were heard on December 3, 2012. In *Genesis*, the Supreme Court will address the issue of whether a collective action (class action) under the FLSA becomes moot when the lone plaintiff receives an offer of judgment that fully satisfies the claim. The employer offered the plaintiff \$7,500 in alleged unpaid wages, plus attorneys’ fees, costs and expenses, which would have fully satisfied her individual claim, and she refused to accept it. In response, the employer moved to dismiss the FLSA claim. The trial court sided with the employer and dismissed the FLSA claim with prejudice, but on appeal the 3<sup>rd</sup> Circuit Court of Appeals ruled the offer of judgment did not moot the plaintiff’s claim under the FLSA. In doing so, the appellate court expressed concern that a contrary ruling would enable employers to “pick off” individually named plaintiffs in order to avoid FLSA collective action claims.

The Supreme Court's decision in *Genesis* may have a significant impact not only on FLSA collective actions, but also on other class action lawsuits where representative plaintiffs bring suit on behalf of a larger group of employees.

## CONCLUSION

In 2012, the U.S. Supreme Court issued multiple employment-related decisions and the Court heard arguments for other cases that could dramatically impact companies' benefits, payroll policies, litigation process and liability, hiring and leave policies, and complaint investigation processes, and could dictate how such companies account for associated risks. Employers should remain well-informed about these and other recent Supreme Court decisions and/or consult outside legal counsel as we continue to monitor, advise and adjust to ever-evolving case law.

## FROM THE ARCHIVES

Cozen O'Connor's Labor & Employment Group strives to keep clients abreast of significant developments in labor and employment law throughout the year through Labor & Employment Alerts. Below is a recap of Alerts that address particularly important legal developments in 2012.

## NLRB Issues Decision Protecting Union Coffers



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Historically, employers have been free to discontinue union dues check-off arrangements upon the expiration of a collective bargaining agreement. The National Labor Relations Board (NLRB) changed that long-standing rule on December 12, overturning 50 years of precedent and ruling that employers must honor dues check-off arrangements until the parties execute a new collective bargaining agreement or reach a bargaining impasse. The fact that this decision came just one day after Michigan joined the ranks of Right-to-Work states, by banning requirements that nonunion employees pay union dues, raises the question of whether the NLRB is seeking to give where state legislatures take away.

In *WKYC-TV, Inc.*, a divided Board determined that employers must continue to honor dues check-off provisions after contract expiration in order to preserve the status quo, thereby "ensuring that the trade-offs made by the parties in earlier bargaining remain in place." Union dues check-off provisions are a mandatory subject of bargaining, the NLRB reasoned. But unlike other mandatory bargaining subjects that do not survive the contract (such as no-strike clauses), dues check-off provisions do survive, because they do not "involve the contractual surrender of any statutory or nonstatutory right." Rather, they are simply a matter of "administrative convenience," the Board stated. In this way, dues check-off provisions are no different from "other voluntary check-off arrangements, such as employee savings accounts and charitable contributions ... [which] survive the contracts that establish them." Therefore, the NLRB determined, "it is anomalous to hold that they survive contract expiration, but that dues check-off arrangements ... do not."

In so holding, the NLRB overruled the 1962 *Bethlehem Steel* decision, which held an employer's dues check-off obligations terminate upon contract expiration. Given employers' long-standing reliance on *Bethlehem Steel*, the Board made clear that *WKYC-TV* will apply only prospectively. A copy of the *WKYC-TV* decision, including a vigorous dissent by Member Hayes, is [here](#).

## The New "New Jersey Trade Secrets Act": What Employers, Human Resources Directors and In-House Counsel Should Know



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In early 2012, New Jersey joined 46 other states in adopting a version of the Uniform Trade Secrets Act (UTSA). Signed into law by Governor Christie on January 9, the New Jersey Trade Secrets Act became effective immediately. While the Act codifies a significant portion of the common law, it includes some important changes. Under the Act, a trade secret is:

information, held by one or more people, without regard to form, including a formula, pattern, business data, compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype or process, that:

- (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

This definition broadens the protection previously offered under common law because the Act does not require a trade secret be business related or that it be continuously used in the operation of a business.

Misappropriation is defined as:

- (1) Acquisition of a trade secret of another by a person who knows or has reason to know the trade secret was acquired by improper means; or
- (2) Disclosure or use of a trade secret of another without express or implied consent of the trade secret owner by a person who:
  - a) used improper means to acquire knowledge of the trade secret; or
  - b) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was derived or acquired through improper means; or
  - c) before a material change of position, knew or had reason to know it was a trade secret and that knowledge of it had been acquired through improper means.

In consonance with common law, the Act prohibits a defendant from arguing that proper means to acquire a trade secret existed at the time of its misappropriation.

Companies will have three years after the date on which they know or should have known that misappropriation has occurred to bring a claim. This is a significant shift from the six-year limitations period under common law.

A remedy for misappropriation can take the form of monetary or injunctive relief. A court may enjoin any actual or threatened misappropriation or otherwise require a party to perform certain acts to protect a trade secret. An injunction may be issued conditioning future use of a trade secret upon payment of a reasonable royalty. The Act provides for punitive damages, up to twice the actual damages award, in the case of willful and malicious misappropriation.

The Act allows for the recovery of expert witness fees – a remedy that was unavailable under common law. A court may award “a reasonable sum to cover the service of expert witnesses” where willful and malicious misappropriation exists or in the case of bad faith litigation by any of the parties. Because expert fees could be substantial in any given case, this provision could increase the willingness of parties to assert trade secret claims.

The New Jersey Trade Secrets Act differs in some noteworthy ways from the UTSA, on which it was patterned. For example, unlike the UTSA, the New Jersey law does not provide examples of reasonable means by which a court should preserve the secrecy of an alleged trade secret. Additionally, the Act specifies that when a defendant is a public entity or public employee, the provisions of the state’s Tort Claims Act will trump any conflicting provisions of the New Jersey Trade Secrets Act. In contrast, the UTSA omits any special provisions for lawsuits involving public defendants.

While the new law was a major step to bring New Jersey law into alignment with other states’ laws, it does not offer any relief to companies that are careless in protecting their confidential information. Companies should be vigilant in identifying their trade secrets and other proprietary data and in taking reasonable protective steps. This can include developing policies and procedures to safeguard electronic data and limiting information access to those with a need to know. Companies with sensitive data should implement confidentiality and non-competition agreements to ensure valuable corporate assets are not lost to the competition.

## OSHA Publishes Revised Final Hazard Communication Rule



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The Occupational Safety and Health Administration (OSHA) released its [final](#) revised Hazard Communication Standard (HCS) in March 2012. The revised Standard, which aligns with the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals (GHS), will be fully implemented in 2016.

The revised HCS primarily affects manufacturers and importers of hazardous chemicals. The current HCS requires that chemical manufacturers and importers evaluate the chemicals they produce or import and provide hazard information to downstream employers and employees by placing labels on containers and preparing material safety data sheets (SDSs). All employers with hazardous chemicals in their workplaces are required to have a hazard communication program that includes employee training. The previous HCS established requirements for minimum information that must be included on labels and the SDSs but did not provide specific language to convey the information or offer a suggested format.

The revised HCS, however, makes significant changes to requirements on how hazard communication is to be carried out. Chemical manufacturers and importers of hazardous chemicals are required to re-evaluate chemicals according to the new criteria to ensure proper classification. These changes will help workers understand the chemical hazards that they might be exposed and become better trained in how to handle those chemicals safely. According to an OSHA fact sheet available [here](#), the significant changes include:

**Hazard classification:** The revised HCS provides specific and detailed criteria to address health and physical hazards as well as classification of chemical mixtures. Under the revised HCS, a chemical will be classified based on the type, degree and severity of the hazard it poses.

**Labels:** Labels must include a signal word such as "danger," a pictogram such as "skull and crossbones," a hazard statement, and precautionary statement for each hazard class and category.

**Safety data sheets:** The revised HCS requires a new format for SDSs with 16 specific sections.

**Information and training:** In addition to current training requirement, workers must be trained by December 1, 2013 on the label and SDS changes.

Among other revisions made to the HCS is the creation of a category termed "Hazards Not Otherwise Classified" (HNOC). The revised HCS also includes combustible dust in the definition of "hazardous chemical."

***"Employers are required to train their employees on the new labels and SDS changes by December 1, 2013."***

As a means of ensuring proper execution, OSHA instituted a gradual phase-in process for implementation of the revised HCS. Employers are required to train their employees on the new labels and SDS changes by December 1, 2013. By June 2, 2015, employers, chemical manufacturers, importers and distributors must comply with all provisions of the revised HCS, with the exception that distributors may continue to ship products labeled under the old system until December 1, 2015. Finally, by June 1, 2016, employers must update their alternative workplace labeling and hazard communication programs as necessary and provide additional training to employees for any newly identified physical or health hazards. During the transition period between December 1, 2013 and June 1, 2016, all employers, chemical manufacturers, importers and distributors must comply with either the revised HCS, or the current HCS or both.

## Third Circuit Establishes New Test for “Joint Employers” Under the FLSA



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A determination that a company is a “joint employer” can dramatically increase its potential exposure to liability under the Fair Labor Standards Act, because joint employers can be held responsible for each other’s violations of the law. On June 29, 2012, the U.S. Court of Appeals for the 3rd Circuit gave employers in Pennsylvania, New Jersey and Delaware much-needed clarification on the standard under which joint employer status will be evaluated in FLSA cases filed in federal court within those states.

At issue in the case, *In re: Enterprise Rent-a-Car Wage & Hour Employment Practices Litigation*, was whether Enterprise Holdings – the sole stockholder of 38 domestic subsidiaries – is a joint employer of the assistant managers who work for those subsidiaries. For the reasons discussed below, the court found that no joint employer relationship exists between Enterprise Holdings and its subsidiaries.

The plaintiff alleged that he, along with other assistant branch managers at Enterprise locations, was improperly classified as exempt from overtime under the FLSA. He sued Enterprise Holdings and a number of subsidiaries for failure to pay overtime. Enterprise Holdings moved for summary judgment on the grounds that it was not a joint employer with the subsidiaries, and therefore could not be held liable for their actions. The district court granted the motion, and the 3rd Circuit affirmed.

The court noted that the three-member board of directors for each subsidiary consisted of the same people who sat on Enterprise Holding’s three-member board. The court also pointed out that Enterprise Holdings provided certain administrative support to the subsidiaries, and provided them with business guidelines, employee benefit plans, rental reservation tools, job descriptions, best practices, compensation guides, and performance review forms, among other things. Key to the court’s decision was that “each individual subsidiary can choose to use any or all of these

guidelines or services in its own discretion; none of these guidelines or services are mandatory.”

**“A joint employer relationship exists for purposes of FLSA liability “where two or more employers exert significant control over the same employees,” meaning that “they share or co-determine those matters governing essential terms and conditions of employment.”**

In applying these key facts to determine whether a joint employer relationship was present, the court adopted the standard it established in *NLRB v. Browning-Ferris Industries of Pennsylvania* for cases brought under the National Labor Relations Act. Under this standard, a joint employer relationship exists for purposes of FLSA liability “where two or more employers exert significant control over the same employees,” meaning that “they share or co-determine those matters governing essential terms and conditions of employment.” The court emphasized that “ultimate control” over employees is not necessary for an entity to be found a joint employer.

In order to determinate whether significant control over employees is present, the court identified the following factors that courts should consider:

- the alleged employer’s authority to hire and fire the relevant employees;
- the alleged employer’s authority to promulgate work rules and assignments and to set the employees’ conditions of employment: compensation, benefits and works schedules, including the rate and method of payment;
- the alleged employer’s involvement in day-to-day employee supervision, including employee discipline; and
- the alleged employer’s actual control of employee records, such as payroll, taxes and insurance.

These factors are not meant to be an exhaustive list, the court emphasized, and should not be “blindly applied as the sole considerations necessary to determine joint employment.” Rather, if other indicia of significant control are present in a given case, the court should take those indicia into account when analyzing joint employer status.

**Take-away for employers:** The determination of whether a company is a joint employer for purposes of FLSA liability is a fact-intensive analysis that will vary from case to case. Courts within the 3rd Circuit will now apply the *Enterprise* factors to determine whether a company exerts sufficient control over another's employees to be considered a joint employer. Companies unsure of whether they are a joint employer for purposes of FLSA liability should consult their labor and employment counsel.

## The New Employee Wage Deduction Law in New York



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Employers in New York now have greater flexibility when it comes to permissible deductions from employee wages. A new amendment to New York Labor Law Section 193 – which took effect on November 6, 2012 – expands the list of reasons an employer can take deductions from wages other than the usual withholding taxes and insurance premiums, and now provides lawful approaches to many of the practical realities in the employer-employee relationship.

### SECTION 193 – THE OLD VERSION

For the past 46 years, employers in New York have faced a virtually insurmountable roadblock when it came to permissible deductions from an employee's earned wages. The old version of Section 193 provided that **no** wage deductions could be made **unless** they were either provided for by law or by government agency rule, or they were (i) expressly authorized in writing by the employee **and** (ii) for the benefit of the employee. Section 193, though, made clear that the only authorized deductions that would be deemed "for the benefit of the employee" were in all cases "limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for U.S. bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee."

The New York State Department of Labor (DOL) offered no great comfort to employers with the seemingly catch-all nature of the final clause "and similar payments for the benefit of the employee," as the DOL took a very narrowed interpretation of that clause. Thus, under the old version of Section 193, any deductions taken under that catch-all provision still had to be "similar" to those already enumerated deductions. Thus, for years employers were still unable to recoup inadvertent overpayments through future payroll deductions, or to allow an employee to repay voluntary loans through payroll deductions going forward, for fear they would be deemed in violation of the labor law and subject to the very onerous remedies (including double damages and attorneys' fees) that could be awarded.

Finally, change came.

### SECTION 193 – THE 2012 AMENDMENTS

On November 6, 2012, employers began enjoying greater rights to take deductions from employee wages, and now are better able to allow employees to use payroll deductions as a means for obtaining certain privileges that truly benefit the employee.

#### The Process for Wage Deductions

A few procedural and record-keeping requirements have been added.

- Any wage deduction must still be voluntary, and made only after the employer gives written notice to the employee of the terms and conditions of the deduction and the details of how the deduction will be made.
- If there is a substantial change in the terms or conditions of the deduction (including the amount of the deduction), the employer must notify the employee as soon as practicable before implementing the change.
- The employer must maintain the employee's written authorization for the deduction for the entire period of that employee's employment, and for six years after such employment ends.

#### The Expanded List of Authorized Wage Deductions

In addition to the existing (limited) list from the old version of Section 193, there are new permissible deductions that can be authorized in writing by an employee.

- Prepaid legal plans.

- Purchases made at events sponsored by a bona fide charity that is affiliated with the employer, provided at least 20 percent of the event's profits are contributed to such charity.
- Discounted parking or discounted passes, tokens, fare cards, vouchers or other items that enables an employee to use mass transit.
- Dues for a fitness center, health club or gym membership.
- For hospital, college and university employers, employee purchases at a cafeteria, gift shop and vending machine at the employer's place of business.
- Pharmacy purchases at the employer's place of business.
- Tuition, room and board, and fees for pre-school, nursery, primary, secondary and post-secondary educational institutions.
- Day care and other before-school and after-school expenses.
- Payments for housing provided at no more than market rates by nonprofit hospitals or their affiliates.

## Other Permissible Purposes for Wage Deductions

Employers may now utilize wage deductions to also accomplish certain goals that were previously prohibited under Section 193.

- An employer may deduct from wages to recover an overpayment of wages, where the overpayment is due to a mathematical or clerical error by the employer. In doing so, the employer must comply with regulations that will be promulgated by the DOL for this type of deduction, and that will provide for, among other things, the size of overpayment subject to this permissible deduction; the timing, frequency, duration and method of the employer's recovery; the notice required to be given to the subject employee; and a mechanism for the subject employee to dispute the attempted recovery.

- An employer may deduct from wages for the purpose of obtaining a repayment of advances of salary or wages. The employer must similarly comply with regulations that will be promulgated by the DOL for this type of deduction.

## Miscellaneous Provisions

The amendments to Section 193 also impose new miscellaneous obligations.

- Section 193 continues to prohibit an employer from making any deduction or requiring any employee payment "by separate transaction" unless the deduction or payment is permissible under this section. However, the amended Section 193 also allows a collective bargaining agreement to provide for permitted or required deductions or payment as otherwise permitted by Section 193.
- Any authorized deductions for purchases at charitable events; cafeteria, gift shop and vending machine purchases; and pharmacy purchases are also subject to certain aggregate amount restrictions under the new Section 193. Employers are also required to provide access to certain financial information in relation to these particular authorized deductions.
- An employee is entitled to revoke his or her authorization for a deduction in writing at any time (except those authorized in a collective bargaining agreement), in which case the employer must cease the deduction for which authorization was revoked as soon as practicable, but in no event after the earlier of four pay periods or eight weeks after the revoked authorization.

Finally, where the legislature giveth, it also potentially taketh. The Section 193 amendments provide a "sunset provision," that expressly states these amendments shall expire and automatically be deemed to be repealed in three years – i.e., on November 6, 2015. Hopefully, the new amendments will prove themselves to be a welcomed change in the workplace, and the New York legislature will see fit to renew (and possibly add to) these Section 193 amendments before the sun sets on them.

## Fluctuating Workweek Overtime Method Not Permissible Under Pennsylvania Law



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A federal court in Pennsylvania held in September 2012 that the “fluctuating workweek method” of calculating overtime compensation violates Pennsylvania’s Minimum Wage Act (PMWA), 34 Pa. Code. § 231.43(d)(3). See *Foster v. Kraft Foods Global, Inc.*, No. 2:09-cv-00453 (W.D. Pa. Aug. 27, 2012). Under the fluctuating workweek method, a nonexempt (or “overtime eligible”) employee is paid a fixed weekly salary, regardless of the number of hours worked. Then, for overtime, the employee is paid one-half times his or her regular rate (a calculation of the employee’s weekly salary divided by the number of hours actually worked in the week), multiplied by the number of overtime hours worked, as opposed to the traditional overtime calculation of one and one-half times the regular rate. Some employers utilize the fluctuating workweek method because it can result in significant overtime savings compared to the traditional “time and a half” model.

In *Foster*, the court noted federal regulations implementing the Fair Labor Standards Act explicitly permit use of the fluctuating workweek method. See 29 C.F.R. § 778.114. The court went on to note, however, that the PMWA and its implementing regulations contain no reference to a corresponding state fluctuating workweek method. Notably, the PMWA states that employers must pay employees “at a rate not less than 1 ½ times the rate established by the agreement or understanding as the basic rate ....” 34 Pa. Code. § 231.43(d)(3). The court noted that if “the Pennsylvania regulatory body wished to authorize one-half-time payment under Section 231.43(d), it certainly knew how to do so.”

The court also recognized a previous decision from the Western District of Pennsylvania which, based on nearly identical facts, also held that paying employees under the federal fluctuating workweek method nevertheless violates the PMWA. See *Cerutti v. Frito Lay, Inc.*, 777 F. Supp. 2d 920 (W.D. Pa. 2011).

**“Although the fluctuating workweek methodology is permissible under federal law, employers in Pennsylvania may face liability under the PMWA for continuing to use this method.”**

The *Foster* decision raises serious concerns about the continued use of the fluctuating workweek method in Pennsylvania. Although the fluctuating workweek methodology is permissible under federal law, employers in Pennsylvania may face liability under the PMWA for continuing to use this method. Accordingly, employers in Pennsylvania currently using the fluctuating workweek method are urged to contact our office to discuss how best to address this update in the law.

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