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# LABOR AND EMPLOYMENT OBSERVER

2014/2015





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# Labor and Employment Observer

## Message from the Chair

We are pleased to provide you with our 2014/2015 Labor and Employment Observer, which looks back at significant developments in labor and employment law over the past year and forward to what employers can expect in 2015. This year's Observer covers issues such as:

- How President Obama's recent executive actions could remake the workplace;
- Recent Supreme Court decisions significantly affecting labor and employment law;
- What employers can expect from the EEOC's enforcement agenda in the coming year;
- The impact of recent NLRB developments on both unionized and nonunionized workplaces;
- The current state of LGBT rights in the workplace;
- What the NLRB has to say about employees' use of social media;
- The developing state of federal pregnancy discrimination law;
- Continuing pressure and uncertainty surrounding unpaid internships;
- What every employer should know about the Affordable Care Act's whistleblower protections;
- How to navigate the challenges created by new state marijuana laws;
- What big data means for employers now and in the future;
- Insights into the developing avenues for employee monitoring, and whether employers should use them;
- The impact recent immigration developments are expected to have on employers;
- What employers must know about I-9 employment eligibility verification in the face of an ever-burgeoning remote workforce; and
- Critical issues presented by California's employee-friendly legal regime.

We trust that 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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## On the Horizon: Is Obama Remaking the Workplace While Leaving Congress Behind?



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What if you were the president of the United States and knew you had zero chance of getting any significant legislation through Congress? Would you give up or look for another way?

Ever since the 2010 elections brought divided government to Washington, the Obama administration has been actively looking to impact workplace policies without either the approval of Congress or its interference. In the last two years of this administration, we can expect this president to use whatever powers are at his command to circumvent Congress and impact the workplace.

Here is a roadmap of what to expect.

### The President as Purchaser-in-Chief

The federal government spends more than \$3.5 trillion a year and can set the terms on which it will do business with the private sector. This can impact more than 430,000 leases, contracts for the purchase of more than \$1.3 trillion in goods and services, and upwards of 125,000 supply service and construction contractors who collectively employ more than 28 million workers.

### Raising the Minimum Wage

Only Congress can raise the federal minimum wage for all workers, but the president can require all federal contractors to pay higher than the minimum to those employed on federal contracts. Effective January 1, 2015, all new contracts will require that employees will have to be paid a minimum of \$10.10 per hour — well above the \$7.25 federal minimum. This amount will be indexed to inflation in future years.

The regulation will directly impact 200,000 low wage workers currently working on government contracts, but it is expected to have ripple effects through the workplace in pushing up the wages of workers who earn more than the federal minimum but less than \$10.10 an hour. It has been estimated that there are 8 million such workers, 70 percent of whom are women and 45 percent of whom are people of color.

The regulation applies not only to direct federal contractors, but also to first-tier subcontractors whose contracts are necessary to carrying out the federal contract. Companies that submit offers for government contracts will also be covered.

### Encouraging Pay Transparency

The Obama administration is convinced that individual wages will be raised if employees become unionized or are helped to address individual claims of pay inequity. An executive order directed at federal contractors is designed to promote both of these outcomes. It prohibits federal contractors from discharging or in any other manner discriminating against an employee who has “inquired about, discussed or disclosed the compensation of the employee ...”

Critics have noted that the right to discuss or disclose pay is already protected by the National Labor Relations Act, but this new order extends rights higher up the food chain to supervisors or managers who are excluded from the NLRA. Only employees who have access to compensation data as part of their job responsibilities are excluded. Moreover, federal contractors can be forced to provide notice to employees regarding this right. No such notice has been mandated yet, but it may only be a matter of time.

A presidential memorandum also requires the Department of Labor to issue new regulations requiring contractors to provide the government with their compensation data broken down by race and gender. This will allow the Office of Federal Contract Compliance Program to better target compensation practices that appear to have a discriminatory impact.

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### LGBT Rights

Unable to pass ENDA, the Employment Non-Discrimination Act, to extend Title VII’s nondiscrimination provisions on the basis of sexual orientation, the Obama administration has taken the next best step open to it: require federal contractors to extend this right and provide an administrative remedy to enforce it. An executive order requires federal contractors not to discriminate against lesbian, gay, bisexual or transgender employees or applicants. Regulations issued by the Office of Contract Compliance Programs will go into

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effect on April 3 and will apply to all contracts entered into or modified after that date.

The administration faced significant pressure to provide exemptions for federal contractors that have religious affiliations, but purposely decided not to relieve them of the nondiscrimination obligation. Expect a number of legal challenges by religious groups and private businesses that allege that prohibiting discrimination based on LGBT status imposes a substantial burden on their free exercise of religion. Based on the Supreme Court's 2014 ruling in the *Hobby Lobby* case, a number of those challenges may succeed.

For more information on the rights of LGBT employees, see "Current State of LGBT Rights in the Workplace," p. 10.)

## Arbitration

Under another presidential executive order, large federal contractors will be prohibited from requiring their workers to enter into agreements to arbitrate certain kinds of employment claims. For this purpose a large federal contract is any one of \$1 million or more. Starting in 2016, such contractors will not be able to force their employees to agree in advance to arbitrate claims under Title VII or torts related to sexual assault or harassment.

Employers with existing arbitration programs may want to review them in advance of the implementation date. Nothing in the president's order prohibits employees from agreeing to waive jury trials or from agreeing to arbitrate claims under an agreement reached after the claim is asserted.

## A Trip to the Confessional

Companies bidding for most federal contracts expecting to exceed \$500,000 soon will be required to disclose portions of their claims history when bidding for new government work. This will cover administrative merits determinations, arbitral awards and civil judgment in the past three years. A compliance adviser will consider this history in making a recommendation to the contracting officer over whether to declare the company a responsible bidder.

Disclosure will be required of claims involving violations of:

- Fair Labor Standards Act
- Occupational Safety and Health Act
- National Labor Relations Act
- Davis Bacon Act
- Service Contract Act
- Executive Order 11246

- Rehabilitation Act § 503
- Vietnam Era Veteran's Readjustment Assistance Act of 1974
- Family and Medical Leave Act
- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Executive Order 12658 (the new minimum wage order for federal contractors)
- Equivalent state laws

## Construction Industry – Affirmative Action

Construction contractors will meet a new requirement in their affirmative action programs. Based on Section 503 of the Rehabilitation Act, they will now have to collect data and show their efforts to meet a goal of utilizing disabled workers as 7 percent of their workforce.

Minority and female hiring goals will also be updated under the president's order. These goals are currently based on the 1970 census and have not been updated in more than 30 years.

## The President as Regulator-in-Chief

Many federal statutes lay down broad rules or principles and then require the gaps to be filled in by administrative regulation. The Obama administration is expected to make broad use of its regulatory authority to impose new substantive requirements in the workplace.

Here are some examples currently in the works.

## Overtime Pay Exemptions

The Fair Labor Standards Act sets a baseline requirement that all non-exempt employees be paid at an overtime rate for hours worked over 40 in a workweek. The Secretary of Labor has the power under the statute to prescribe who is exempt from this requirement based on service as a bona fide executive administrative, professional, outside sales or computer employee. The regulations were last updated in 2004 under President George W. Bush.

The president has directed the Secretary of Labor to "modernize and streamline" these exemptions, and the secretary has begun the process. According to the Department of Labor's semi-annual agenda of regulations, the overhaul of the overtime exemptions is expected to be a major regulatory act with economically significant impact.

## Diversity — Minority and Women Owned Businesses

A little notice provision of the Dodd-Frank Act is designed to enhance diversity by requiring covered entities to expand their use of supply firms owned by women or minorities. This section of the law applies well beyond employers regulated by the traditional financial regulatory entities such as the Consumer Finance Protection Board, the Federal Reserve, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation. It also covers entities regulated by the Securities and Exchange Commission. That means the requirement applies to all publicly held companies, whether or not they hold federal contracts.

Proposed standards were issued in October 2013 and are expected to be finalized in the near future. It is anticipated that they will make supplier diversity more transparent to both regulatory agencies and the public, and that large companies will begin to ask for supplier metrics on those with whom they do business.

## OSHA

The Occupational Safety and Health Administration has been relatively quiet recently, but all of this may change as the agency has indicated it will be pursuing efforts to make all employers implement injury and illness prevention programs. This is another way of saying that employers will be required to take a more proactive role in promoting workplace safety.

OSHA soon will require employers of 250 or more to submit their illness and injury records electronically. OSHA intends to post these records on its website. The widespread public disclosure of this information will make it easier for unions to use it as part of their corporate campaign efforts.

OSHA also intends to implement a whistleblower employee incentive reward program and to mandate that union representatives be allowed to accompany OSHA inspectors when OSHA visits nonunion work sites.

## The Bottom Line

The next two years look to be especially active ones for the Obama administration as it attempts to make major changes in the workplace without any changes in legislation. Expect Congressional pushback, hearings and riders to spending bills that limit what money can be spent for some of these efforts.

Strap yourself in – it could be a bumpy ride.

## The 2014 Supreme Court Decisions Every Employer Should Know



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The highly anticipated 2013 – 2014 Supreme Court term included a number of controversial cases with significant political and employment law implications. Let's just say ... it was good year for employers — but a rough one for the current Obama administration. Here is a summary of the major decisions of 2014.

### ***NLRB v. Noel Canning Limits the President's Power***

In January 2012, membership in the National Labor Relations Board (NLRB) dropped to two, such that the NLRB lacked a quorum to operate. On January 4, 2012, during a Senate pro forma (three-day) recess, President Obama invoked the Recess Appointment Clause and appointed three new NLRB members (Griffin, Block and Flynn) to fill the empty seats. Noel Canning argued that President Obama's appointments were not authorized by the Recess Appointment Clause, and thus the NLRB actually lacked the minimum number of members required to enforce the National Labor Relations Act. The DC Circuit found that the recess that triggers the president's appointment power under the Recess Appointment Clause is the recess between the Senate's annual sessions — not the three-day recesses that occur during the annual meeting. The Supreme Court agreed and found that the NLRB's vacancies arose, and appointments were filled, during the three-day recess. Thus, the Court concluded, the Recess Appointment Clause was not applicable and the president's appointments to the NLRB thereunder unconstitutional and invalid.

The legal ramifications and political implications of this decision are significant. Not only did the Supreme Court place limits on the president's power under the Recess Appointments Clause — restricting the power only to periods when the Senate is on a recess of a "sufficient length" and unable to transact Senate business; it also could have a significant impact on the host of decisions the Board rendered while members Griffin, Block and Flynn were sitting.

### ***Do Religious Business Owners Have the Same Religious Freedoms as Churches and Individuals? — Let's Talk *Burwell v. Hobby Lobby****

The Green family, owners and operators of Hobby Lobby Stores, Inc., sued Kathleen Sebelius, the secretary of the

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Department of Health and Human Services, and challenged the Affordable Care Act's requirement that corporations pay for insurance coverage for contraception and abortion-inducing drugs. Specifically, the Greens argued the mandate under the Affordable Care Act to provide certain contraceptives to employees violated the employer's religious freedoms.

***Closely held, for profit companies are now allowed to be exempt from a law to which its owners religiously object, if there is a less restrictive means of furthering the law's interest.***

Delivering yet another hit to President Obama, the Court struck down the mandate of the Affordable Care Act. As a result of that ruling, closely held, for profit companies are now allowed to be exempt from a law to which its owners religiously object, if there is a less restrictive means of furthering the law's interest. This decision could have a wide-spread impact in that it may be read to allow corporations to claim religious exemptions from federal laws. Who knows ... for-profit corporations may have the same protection for religious beliefs as churches and individuals!

## **Let's Talk about the Defense of Marriage Act ... Again — *United States v. Windsor***

In a 5-4 decision, the Supreme Court declared unconstitutional the section of the Defense of Marriage Act that required federal laws to ignore same-sex marriages that were legally entered into under applicable state laws. Therefore, an employee with a valid same-sex marriage is now treated as having a spouse for any benefit plan that refers to "spouses" without limitations. Further, same-sex married couples, who live in a state that recognizes same-sex marriages, will be considered married for FMLA purposes, and an employee in a same-sex marriage will be entitled to FMLA leave to care for his or her spouse.

## **Retaliation Claims Just Got Harder : *UT Southwestern Medical Center v. Nassar***

In *Nassar*, an employee alleged that he was discharged because of his supervisor's racially and religiously motivated harassment and was later prevented from retaining employment at an affiliated hospital because he complained about such harassment. The employer argued that regardless of any retaliatory intent, it would not have hired the plaintiff due to other legitimate reasons.

The court ruled that plaintiffs would be required to prove that the retaliation would not have occurred "but for" the wrongful actions of the employer — and not by the lessened causation test ("motivating-factor" standard).

In rendering this decision, the Supreme Court made retaliation claims harder to prove by imposing a tougher standard of proof on employees with such claims. Judges and juries deciding these cases will now have to apply different standards of causation to retaliation claims than they apply to claims for discrimination.

## **The High Court Defines "Supervisor" in *Vance v. Ball State University***

A simple dining hall spat turned into a Supreme Court case in *Vance v. Ball State University* — and forced the Court to define the meaning of "supervisor" in the employment law context. The term supervisor must be defined for the purpose of imputing liability on the employer for the actions of its employee (supervisor) under Title VII.

In *Vance*, the Court held that an employee is a supervisor for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the victim. "Tangible" is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or decision causing a significant change in benefits.

## ***Sandifer v. U.S. Steel Corp.* Was a Victory for Unionized Employers — the Court Found Time Spent "Putting on Clothes" is Noncompensable**

In *Sandifer*, the Court tackled the definition of "changing clothes" under Section 203 (o) of the Fair Labor Standards Act. Whether an employee should be paid for changing clothes was of significant importance to the steelworkers, who spend substantial time getting dressed for work. These workers are required to wear flame-resistant jackets, pants, hoods, hard hats, gloves, wristlets, leggings, steel-toed boots, safety glasses and ear plugs. However, union contracts made it clear that employees are not compensated for time spent "donning and doffing protective clothes" (i.e., "time spent in preparatory and closing activities").

The Court found that changing clothes includes not only putting on substitute clothing but also "altering dress." So what does that mean for workers? Basically, it means that if the vast majority of the time in question is spent putting on "clothes" (specifically defined as flame-retardant jackets, pants and hoods, as well as hard hats, snoods, wristlets, work gloves, leggings and metatarsal boots) then the entire time qualifies as time spent "putting on clothes" and per the



union contract is not compensable. Now that is a mouthful ... but luckily for unionized employers it worked out in their favor.

### ***Integrity Staffing Solutions v. Busk* — Security Check Time is Noncompensable**

In *Integrity Staffing Solutions*, a staffing company providing nonexempt warehouse workers to Amazon.com, required its employees, to undergo a security screening prior to leaving the facility at the end of their shift. Similar to what is done in airports, the employees were required to empty their pockets, and pass through metal detectors, to ensure they had not stolen any products. The employees filed a class action, claiming they were entitled to compensation for the time spent waiting for, and undergoing, the required security screenings. They claimed such screenings were more than *de minimis* because each screening amounted to approximately 25 minutes, and occurred solely for the benefit of the employers in an effort to prevent theft.

Reversing the 9th Circuit Court of Appeals, the Supreme Court held that the security screenings do not constitute “an integral and indispensable part” of the employees’ principal activities, and thus, they were noncompensable, postliminary activities. In arriving at its conclusion, the Court explained that the security screenings were not principal activities because Integrity Staffing did not hire the workers to go through security screenings, but rather the employees were hired to pull products from warehouse shelves and repackage them. Also, the screenings were not an intrinsic part of the warehouse employees’ job duties — Integrity Staffing could eliminate them without affecting the employees’ abilities to work. The Court also noted that the U.S. Department of Labor’s regulations, interpreting and applying the FLSA, support its analysis. The regulations explain that activities including “checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks” are preliminary and postliminary activities that are not compensable.

*Integrity Staffing* represents a significant victory for retailers and other companies that use security screening measures to protect against worker theft. Apart from avoiding what could have been significant sums in back pay, such employers now have much-needed clarity regarding the compensability of “wait time” and time undergoing security checks.

It remains to be seen whether the run of employer-friendly Supreme Court rulings will continue in 2015; however, employers and employees alike will be watching the Court as it is poised to decide cases centering on issues such as pregnancy discrimination, religious accommodation, and the EEOC’s mandatory duty to conciliate discrimination claims.

## **What to Expect from the EEOC’s Evolving Enforcement Agenda in 2015**



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Since the Equal Employment Opportunity Commission developed its Strategic Enforcement Plan (SEP) in 2012, the agency has steadily increased its focus on having a “sustainable impact in reducing and deterring discriminatory practices in the workplace.” Overall, the national priorities of the EEOC’s enforcement agenda have largely remained intact. These priorities include, among other things, targeting class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities; targeting compensation systems and practices that discriminate based on gender; and targeting policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC’s investigative or enforcement efforts. What has been apparent, however, is the varying ways in which the EEOC has implemented the priorities outlined in its SEP.

### **A Snapshot of 2014**

In November 2014, the EEOC released its Performance and Accountability Report for fiscal year (FY) 2014. In it, the EEOC announced it secured \$296.1 million in monetary relief for victims of employment discrimination through its administrative enforcement procedures, including mediation and conciliation. The agency filed 133 merits lawsuits during FY 2014, including 105 individual suits, 11 nonsystemic class suits, and 17 systemic suits. As a result, the EEOC secured \$22.5 million in monetary relief for charging parties through litigation. The EEOC also completed 260 systemic investigations resulting in 78 settlements and conciliation agreements and recovering approximately \$13 million, and obtained \$74 million in monetary relief for federal employees and applicants. While this monetary relief is lower than the record relief obtained by the EEOC in 2013, the agency anticipates 2015 will meet or exceed its current targets.

2014 also saw increased activity in the EEOC’s rule-making authority. Most notable, the EEOC approved updated guidance on pregnancy discrimination, issued technical assistance on *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, and released updates on how changes in the definition of “disability” as a result

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of the 2008 Americans with Disabilities Act Amendments Act (ADAAA) may affect who is covered under the ADA. Additionally, the EEOC and the Federal Trade Commission jointly issued fact sheets about employment background checks, titled *Background Checks: What Employers Need to Know*, and *Background Checks: What Job Applicants and Employees Should Know*.

## Noteworthy Issues on the EEOC's Radar

### Transgender Discrimination

In September of this year, the EEOC filed the first two lawsuits in its history challenging transgender discrimination. In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* (filed in Michigan federal district court), the EEOC alleges that a transgendered female was discharged because she was transitioning from male to female and/or because she did not conform to the employer's gender-based expectations, preferences or stereotypes. In *EEOC v. Lakeland Eye Clinic* (pending in Florida federal district court), the EEOC alleges a transgendered female employee's position was eliminated after she began transitioning from male to female. Both cases are in the early stages of litigation, but their outcomes could have a wide-reaching impact on gender identity and expression in the workplace, and could further define and shape the EEOC's enforcement strategy for targeting employers in this area, so stay tuned. (For more information on these cases and the expansion of LGBT rights generally, see "Current State of LGBT Rights in the Workplace," p. 10.)

### Corporate "Wellness Programs"

As the popularity of corporate "wellness programs" increases, the EEOC has similarly increased its focus on reviewing companies' wellness programs to ensure they are nondiscriminatory in practice. Employers utilizing wellness programs may ask participating employees disability-related questions and collect results from biometric testing and other medical exams, so long as the information is kept confidential and the employees' participation is truly "voluntary."

The EEOC filed at least three lawsuits in 2014 against employers for violating the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) because of penalties and fines levied against employees who refused to participate in the companies' respective wellness programs. Of central importance, the EEOC takes issue with wellness programs that require employees to submit to biometric testing and a health risk assessment, or otherwise face cancellation of medical insurance, unspecified 'disciplinary action' for failing to participate, and a

requirement to pay the full premium in order to stay covered, arguing that the required testing and assessments are "disability-related inquiries and medical examinations" that are *not* job-related and consistent with business necessity. The EEOC deems these types of programs involuntary.

While the EEOC is now challenging wellness programs that include penalties for noncompliance, the agency has not yet issued formal guidance, and expects to release a formal regulation in 2015. What does this mean for employers? Employers should examine the parameters of their wellness programs, and ensure there is no discipline against employees for refusing to participate or no full premium payment cost-shifting to employees. Until there is more guidance, the most prudent approach is to proceed with caution.

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### Severance Agreements

The EEOC is also closely scrutinizing severance agreements offered to terminated employees to avoid litigation. In a lawsuit filed this year, the EEOC challenged CVS Pharmacy's severance agreement — which contained language prohibiting employees from filing suits, charges or complaints arising out of their employment, but not prohibiting them from filing a charge with or participating in any investigation or proceeding conducted by the EEOC or a comparable state or local agency, subject to a waiver of the right to recover monetary damages— because it allegedly violated Title VII by interfering with employees' rights to file charges, communicate voluntarily and participate in investigations with the EEOC. Notably, the language was modeled after a very similar agreement approved by the EEOC in an earlier, unrelated Consent Decree with Eastman Kodak Company.

In a recent development, a federal judge dismissed the EEOC's claims against CVS based on procedural issues, rather than addressing the substantive issues about the agreement on the merits. As a consequence, it is unlikely the ruling will dissuade the EEOC from its close scrutiny of employers' severance agreements. Indeed, another similar lawsuit filed by the EEOC this year is pending in the federal district court of Colorado.

While the ultimate outcome of the EEOC's lawsuits is unclear, employers may take solace in the fact that courts may ultimately decline to adopt the EEOC's stance. Still, in the wake of this litigation, and until finally resolved on the merits, employers should take note of the EEOC's new position, review severance/separation agreements, and consider taking some prophylactic measures to avoid the EEOC's radar screen, such as strengthening existing provisions that preserve the employee's right to file administrative charges and participate in agency investigations to allow for greater specificity, while still maintaining the waiver of the employee's right to recover monetary damages.

### **Religious Dress and Grooming Accommodation**

In March 2014, the EEOC issued a fact sheet and question-and-answer guide on religious dress and grooming in the workplace under Title VII of the Civil Rights Act of 1964, partly in response to the EEOC's observance of a steady increase in religious discrimination charges. While the guide does not create any new obligations on employers, it attempts to clarify several issues regarding how Title VII applies to religion in the workplace. For instance, employers may not take action against employees based on the discriminatory religious preferences of others, including customers, clients or co-workers; may not assign employees to non-customer contact positions because of customer preference; and may not automatically refuse to accommodate applicants' religious garb or grooming practice, even if it violates the employers' appearance or dress policy. The guide also discusses various types of acceptable reasonable accommodations, including covering the religious attire or item at work if permitted by the religious belief. However, according to the guide, employers may bar employees' religious dress or grooming practices based on workplace safety, security, health concerns, or if the practices actually pose an undue hardship on the operation of the business.

The guide signals the EEOC's renewed commitment to enforcing Title VII's prohibition on religious discrimination. What does this mean for employers? To ensure compliance, employers should reinforce their commitment to providing reasonable accommodations, and carefully evaluate the concept of undue hardship, as well as train managers and human resources personnel in the implementation of the guidelines. Also, having a formal process in place to address religious accommodation requests and distributing a robust policy that clearly explains the prohibition against discrimination could aid greatly in protecting employers from the EEOC's grasp.

### **Pregnancy Discrimination**

In July 2014, the EEOC issued its first comprehensive update of its pregnancy discrimination guidance since 1983. The guidance confirms the EEOC will broadly interpret when pregnancy-related conditions will be considered disabilities under ADA. For instance, lactation, a controversial and disputed matter in the courts, is now considered a medical condition according to the EEOC guidance. Also, notably, for the first time, the EEOC takes the position that the Pregnancy Discrimination Act requires employers to offer temporary light duty assignments to pregnant employees with work restrictions if the employers provide the same accommodation to non-pregnant employees who have similar work restrictions. Perhaps not a coincidence, a pregnant worker's entitlement to receive reasonable accommodations, like light duty work, even if she hasn't been injured on the job, is at the heart of the *Young v. UPS* case being decided by the Supreme Court in the current term. Despite the EEOC guidance, the Supreme Court's ruling on the *Young v. UPS* case could potentially conflict with the EEOC's pregnancy discrimination guidance. And, in that instance, the high court decision would prevail. Given the import of this decision, which could affect a large portion of today's workforce, the case is being closely watched. (For more information on pregnancy discrimination claims, see *What to Expect When Employees Are Expecting*, p. 16.)

### **What's Ahead For 2015?**

Based on the trending activity of 2014, employer wellness programs, religious discrimination and accommodation practices of employers, the enforceability of severance agreements, the accommodation of pregnant employees and pregnancy-related issues, and coverage of lesbian, gay, bisexual and transgender individuals under Title VII, all appear to be important developing issues, among others, that the EEOC will continue to target. What does this mean? While employers must be vigilant in ensuring compliance with all aspects of employment discrimination laws, it means more employers will face heightened scrutiny in these notable areas. And failure to understand the EEOC's priorities and adhere to federally protected rights could result in employers getting unwanted attention from the EEOC.

## NLRB Developments to Watch For in 2015



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In recent years, the National Labor Relations Board has become increasingly union- and employee-friendly, expanding the reach of the National Labor Relations Act (NLRA) and ruling on matters that were previously considered to be outside of its purview. That trend continued in 2014, leaving employers wondering just how far the long arm of the NLRB will reach. From its increasing scrutiny of the nonunion workplace to its reversal of well-established precedent, the Board has indicated it will continue to adhere to its employee-friendly stance. Here is a roundup of some of the hot topics from 2014, as well as key issues we anticipate the NLRB will decide in 2015.

***From its increasing scrutiny of the nonunion workplace to its reversal of well-established precedent, the Board has indicated it will continue to adhere to its employee-friendly stance.***

### Employees' Right to Use Work Email for Union Organizing Purposes

In a significant ruling in December 2014, the NLRB held that employees have a presumptive right to use their work email for nonbusiness purposes during nonbusiness hours, including union organizing efforts. While the Board's decision does not apply to nonemployees, its impact is far-reaching. Employers who previously were able to limit use of a company's email system to business purposes must now consider revising their policies to avoid an unfair labor practice charge, or ban workplace use of email. Needless to say, banning workplace email use is virtually impossible given today's technological landscape. The Board's decision raises a host of other potential issues for employers. Until now, employers comfortably monitored employees' email interactions. With the Board's ruling, employers may need to take precautions in this area. Although the Board stated

its decision does not prohibit employers from monitoring email use for legitimate reasons, doing so may now subject employers to claims of unlawful surveillance of protected communications.

### The Joint Employer Standard

Franchisors, contractors and other companies in joint employment relationships, such as businesses using the services of staffing agencies, came under attack when the Board decided to reevaluate its decades-old joint employer standard. Under the current standard articulated in such decisions as *TLI, Inc.*, 271 NLRB 798 (1984), the Board finds joint employment "where two separate entities share or codetermine those matters governing the essential terms and conditions of employment." An employer can only be a joint employer if it "meaningfully affect[s] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." Accordingly, the Board consistently analyzed joint employer status based on the putative employer's ability to exert "direct and immediate control" over employment issues. However, in the currently pending *Browning-Ferris Industries*, Case No. 32-RC109684, the Board invited *amicus* briefs to address whether it should embrace a new standard. In its *amicus* brief, the general counsel to the Board pushed for a new "industrial realities" test under which two entities will be found to be joint employers if they exercise direct or indirect control over working conditions, have *unexercised potential* to control working conditions, or industrial realities otherwise make the putative employer essential to meaningful bargaining. If adopted by the Board, the industrial realities test would extend joint employer liability to franchisors, companies that subcontract out their work, and companies that use temporary employees, resulting in a marked uptick in unfair labor practice litigation.

### Quickie Election Rule

On April 14, 2015, the NLRB's final rule on representation case procedures, the so-called "quickie election" or "ambush election" rule, will go into effect. This is the Board's second pass at a rule that makes significant changes to pre- and post-election procedures in union representation cases. The Board first published a version of its proposed rule in late December 2011, but a federal district court invalidated it in May 2012 because the Board lacked the required three-member quorum when the rule was enacted. The Board has since been reconstituted, and published the new final rule on December 15, 2014, with an effective date of April 14, 2015. By drastically reducing the time between the date of a representation petition and the subsequent election, the

quickie election rule allows unions to organize employees and demand an election in such a short timeframe that unsuspecting employers may lack sufficient time to obtain legal assistance and lawfully mount a counter-campaign. The rule will also require employers to produce final voter lists in two days instead of the previously established seven days, and to include the voters' phone numbers and email addresses.

These are only a few of several provisions that could have a significant impact on the ability of employers to address union organizing. The Board stated that the rule would "remove unnecessary barriers to the fair and expeditious resolution of representation cases." However, dissenting Board members Miscimarra and Johnson criticized the rule as limiting employers' rights to free speech under Section 8(c) of the NLRA and the First Amendment. In former Board member Brian Hayes' own words, it seems the Board's principal purpose is to "minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining." Although the rule is slated to go into effect in April 2015, employers should continue to monitor developments on this new rule as court challenges or congressional action might result in a delay or alteration of the rule.

### **Class/Collective Action Waivers in Arbitration Agreements**

In 2012, the Board ruled in *D.R. Horton* that arbitration agreements barring workers from pursuing joint, class or collective actions in any forum violate the NLRA. Since then, several federal appellate courts, including most recently the 5th Circuit Court of Appeals, have rejected this holding. Nonetheless, the NLRB stuck to its guns in *Murphy Oil USA, Inc.* (October 2014), reaffirming its *D.R. Horton* ruling, and holding that class action waivers are unlawful. The Board made clear that it will not follow the decision of any federal district or appellate court, placing the ball in the U.S. Supreme Court for a resolution of this split between the Board and the federal courts. As of yet, the Board has refused to appeal any of the courts' decisions, which means the Supreme Court might not have the opportunity to decide the matter for some time. In the meantime, employers have a difficult choice – endure unfair labor practice litigation or modify arbitration agreements to comply with the Board's stance.

### **Are College Athletes Really Employees?**

In a move that could fundamentally alter scholastic sports, an NLRB regional director in March concluded that grant-in-aid scholarship athletes on Northwestern University's

football team are employees under the NLRA and have a right to unionize. Applying the common law "right of control" test, the regional director found that in exchange for playing football for Northwestern under a contract for hire, the athletes received a "substantial economic benefit" in the form of scholarships amounting to as much as \$76,000 per year. Also, the players were subject to Northwestern's control because the coaches controlled their lives and schedules. If upheld, this decision may have a significant impact on both private and public educational institutions. For example, student-athletes who participate in non-profitable sporting events may also initiate unionization efforts. Also, the regional director's decision raises other important questions: what happens to students who receive scholarships for participation in non-sports related events such as those in theatre, dance or the arts? Are they employees too? How would such a decision affect the National Collegiate Athletic Association's rules and regulations? Answers to such questions remain difficult to predict. The university has appealed the regional director's decision to the Board, which has yet to issue a decision. If the Board upholds the decision, Northwestern will probably file a further appeal with the federal courts. It will be important for educational institutions and other nonprofit entities to follow any developments in this area.

## **Current State of LGBT Rights in the Workplace**



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Efforts to pass the Employment Non-discrimination Act (ENDA) have failed repeatedly, and it is unlikely to pass anytime soon given the results of the 2014 election. However, 2013 and 2014 saw significant progress toward expanded rights for lesbian, gay, bisexual and transgendered (LGBT) individuals, and the expansion is expected to continue. As these issues continue to move to the forefront, employers must remain informed and vigilant to assure compliance with the myriad new and changing laws applicable to the LGBT workforce.

As of December 15, 2014, **35 states** and the District of Columbia have full marriage equality. Additionally, **18 states** have state-wide laws prohibiting discrimination in employment on the basis of sexual orientation and gender identity, and three states have state-wide laws prohibiting

discrimination in employment on the basis of sexual orientation (but do not prohibit discrimination on the basis of gender identity). Some states that do not have state-wide laws protecting LGBT individuals in the workplace are host to localities that do. For example, although Pennsylvania does not have a state-wide law protecting the rights of LGBT individuals in the workplace, 30 jurisdictions within the commonwealth of Pennsylvania have laws prohibiting public and/or private employers from discriminating on the basis of sexual orientation.

Finally, the EEOC has made advancing workplace rights for LGBT individuals a top priority. The vast majority of Fortune 500 companies also have issued policies precluding discrimination on the basis of sexual orientation and many prohibit discrimination on the basis of gender identity as well. Thus, if your company hasn't done so already, it should update its policies and practices to preclude discrimination and harassment on the basis of sexual orientation and gender identity and provide the same benefits for same-sex spouses as to opposite-sex spouses.

## Employment Non-Discrimination Laws

In 1964, Title VII of the Civil Rights Act was passed prohibiting employment discrimination on the basis of race, color, religion, sex or national origin. In 1967, the Age Discrimination in Employment Act (ADEA) was passed to protect discrimination against employees on the basis of age for those over 40. In 1990, the Americans with Disabilities Act was passed to prevent discrimination against qualified individuals with disabilities and provide for reasonable accommodations in the workplace. ENDA sought to add sexual orientation and gender identity to the list of statuses protected from employment discrimination. The legislation has been introduced in nearly every Congress since 1994 (gender identity was only added in 2007), but has not passed.

Notwithstanding ENDA's failure to pass, there is federal case law that implicitly protects LGBT individuals under Title VII. In 1989, the U.S. Supreme Court held that Title VII protections, which prohibited discrimination "on the basis of sex," included claims of sex stereotyping, where a person is discriminated against based on perceived nonconformity with gender stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Although there is no discussion of sexual orientation in the *Price Waterhouse* opinion, the case established the framework that many courts use to evaluate discrimination claims that may appear to be based on sexual orientation or gender identity. In *Price Waterhouse*, the Supreme Court held that a female employee who was denied partnership in an accounting firm because she was

too "macho," told to go to "charm school," and dress and walk more like a woman, had a valid claim for unlawful discrimination on "the basis of sex" due to sex stereotyping (i.e., she claimed that adverse action was taken against her because she failed to conform to female norms).

Numerous federal courts have relied upon *Price Waterhouse* to prohibit discrimination against LGBT individuals. In *Smith v. City of Salem*, 369 F.3d 912 (6th Cir. 2004), the 6th Circuit Court of Appeals reversed a district court's decision dismissing a transgender firefighter's discrimination case. In *Smith*, the plaintiff was male by birth and worked as a firefighter for seven years as a male. The plaintiff was diagnosed with gender identity disorder and made a decision to begin dressing more like a woman and informed her supervisor of her intent to transition to a woman. According to *Smith's* complaint, the city devised a plan to force her to resign. *Smith* sued for gender discrimination. The district court granted the city's motion to dismiss holding that "transsexual" was not a protected status under Title VII. However, the 6th Circuit Court of Appeals reversed and held, "sex stereotyping based on a person's gender nonconforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label such as 'transsexual' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender nonconformity." See also *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009) (reversing summary judgment decision and remanding for trial a gay male employee's sex discrimination case noting "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw" and that plaintiff had adduced sufficient evidence of harassment based on gender stereotypes to proceed to a jury trial); *Genn v. Brumby*, 663 F.3d 1312, 1313-14 (11th Cir. 2011) (accepting a claim brought by a transgender plaintiff who was fired because her supervisor believed that her gender transition would be "inappropriate" and "disruptive" and would make fellow employees "uncomfortable").

The EEOC recently filed two lawsuits specifically asking courts to move beyond these previously recognized sex stereotyping/gender nonconformity prohibitions by recognizing that discrimination on the basis of one's status as transgender or one's status as transitioning from male to female constitutes Title VII-prohibited sex discrimination. In *EEOC v. Lakeland Eye Clinic*, Civ. No. 8:14-cv-2421 (M.D. Fla.), the commission alleges that an employer discriminated against a transgender woman, and thereby discriminated on the basis of sex in violation of Title VII. According to the complaint, an employee named Michael Branson — who presented as a male and complied with traditional male

gender norms — was hired by Lakeland Eye Clinic in July 2010 and successfully performed the duties of the job. After Branson began to wear feminine clothes, the employer confronted her about her changed appearance. Branson informed the employer that she was undergoing a gender transition from male to female and would soon legally change her first name to Brandi. The complaint further alleges that the managers and other employees made derogatory comments to her, stopped making referrals to her division within the clinic, and within two months of Branson’s announcement about her transition, the employer fired her on the purported basis that it was closing that division and not hiring a replacement. Soon after her termination, Branson found out that Lakeland had, in fact, hired a replacement for her position who was a male employee who complied with traditional gender norms.

The EEOC filed suit alleging discrimination on the basis of sex under all three possible theories: that the employer acted because Branson is transgender; because of Branson’s transition from male to female; and/or because Branson did not conform to the employer’s sex- or gender-based preferences, expectations and stereotypes. The employer filed an answer denying the allegations and asserting that Branson was terminated for poor performance. The employer also asserted affirmative defenses that transgender and transitioning from male to female are not protected statuses under Title VII.

In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, Civ. No. 2:14-cv-13710 (E.D. Mich.), the Commission again alleged discrimination on the basis of sex due to the firing of a transgender employee. According to this complaint, the employee, Stephens, was a funeral director/embalmer since October 2007 at Harris Funeral Homes. On July 31, 2014, according to the complaint, Stephens informed her employer that she would be undergoing a transition from male to female and intended to dress in appropriate business attire for a woman. About two weeks later, the owner of Harris Funeral Homes fired Stephens and allegedly told her that what she was “proposing to do” was unacceptable.

The EEOC filed suit alleging discrimination against Stephens on the basis of sex under all three possible theories: that the employer acted because Stephens is transgender; because of Stephens’s transition from male to female; and/or because Stephens did not conform to the employer’s sex- or gender-based preferences, expectations and stereotypes. In lieu of responding to the factual allegations in court, the employer filed a motion to dismiss the case on the basis that gender identity disorder is not covered by Title VII, that the EEOC’s prosecution of the gender identity claim is without authority,

and that the claim is not covered even under the *Price Waterhouse* sex stereotyping theory.

In addition to the case law developments that add federal protection and the EEOC’s clear mission to expand the workplace rights of LGBT individuals, executive orders protect federal employees and employees of federal contractors from discrimination on the basis of sexual orientation and gender identity. In May 1998, President Clinton issued an executive order prohibiting employment discrimination against federal employees on the basis of sexual orientation. In July 2014, President Obama issued an executive order prohibiting employment discrimination against federal employees on the basis of gender identity. Also in July 2014, President Obama issued an executive order banning federal contractors and subcontractors from discriminating against employees and applicants on the basis of sexual orientation or gender identity. On December 3, 2014, the Department of Labor announced the text of its rule for enforcing this executive order, which takes effect 120 days following its publication in the Federal Register.

## Benefits

As noted above, marriage equality for same-sex couples has spread rapidly across the country since the Supreme Court’s decision in *United States v. Windsor*, 132 S. Ct. 2675 (2013) striking down portions of the Defense of Marriage Act (DOMA). After *Windsor*, federal law (which generally governs employee benefits) recognizes a state’s determination of whether same-sex marriage is permissible. As of December 15, 2014, 35 states and the District of Columbia have full marriage equality and six states have lower court decisions in favor of marriage equality that are pending appellate court review.

Currently, the only Circuit Court of Appeals to uphold state same-sex marriage bans is the 6th Circuit Court of Appeals, which upheld same sex marriage bans in Michigan, Ohio, Kentucky and Tennessee. The plaintiffs in that case have filed a petition for *certiorari* to the U.S. Supreme Court to review the 6th Circuit’s decision. Marriage equality is important to LGBT rights in the workplace because many employee benefits are provided through or affected by a spousal relationship. Likewise, there are federal and state leave laws that permit employees to take leave to care for a spouse such as the Family Medical Leave Act (FMLA) and state mini-FMLA laws.

In a revenue ruling shortly after *Windsor*, the IRS declared the “state of celebration” test would be used to define a marriage for taxes – meaning if a same-sex couple got married in a state that legally recognizes marriage, the couple

will be considered married for purposes of federal tax laws regardless of whether they moved to a state where same-sex marriage is not recognized. This affects employee benefits as follows: (1) employers with group health plans should cease imputing income to employees whose same-sex spouse participates in the plans (as employers had previously been required to do); (2) employers should allow employees to pay the premiums for their same-sex spouse's coverage with pre-tax dollars (if other employees with opposite-sex spouses are permitted to do so); and (3) employers with qualified retirement plans should treat same-sex spouses as "spouses" for all purposes under their plan (e.g., the spousal consent requirements for beneficiary designations.)

In contrast to the IRS and other federal agencies, for purposes of the FMLA, the DOL determined that an individual will only qualify as a same-sex spouse of an employee if the employee resides in a state that recognizes his or her marriage known as the "state of residence" test. Because this has precluded couples who were legally married but moved to states that did not recognize their marriage from applicable rights, the DOL has proposed to modify its regulations to adopt the state of celebration test like the IRS. The proposed regulations were issued in June 2014, but have not been formally adopted. If an employee is legally married (regardless of the law of the particular state in which they are residing), it is wise to provide him/her with any applicable FMLA rights with respect to his/her spouse.

## Recent Developments Likely to Herald Expanded Enforcement Efforts

Employers should be aware that the U.S. Senate recently confirmed two appointments to the EEOC approving nominees favored by LGBT groups. David Lopez was confirmed to a second term as the EEOC's general counsel, and Charlotte Burrows was confirmed as an EEOC commissioner. The LGBT organization Freedom to Work strongly supported both of these nominees. Thus, the EEOC's priority to prevent discrimination against LGBT individuals is expected to continue.

Additionally, on December 15, 2014, the U.S. Department of Justice issued a memorandum holding that Title VII's prohibition against discrimination on the basis of sex also protects workers who are discriminated against based on their gender identity. Previously, the Department of Justice had interpreted Title VII as inapplicable to claimants who do not self-identify as their birth sex. The December 15 memorandum represents a reversal of the department's previous stance, and brings the Department of Justice in line with the EEOC's rulings. Notably, the Department of Justice

cannot file suit against private employers, but it can file lawsuits against state and local public employers.

In conclusion, although EDNA has not passed, LGBT workers now have sufficient legal authority (between state and local laws, federal case law, and regulatory guidance) that employers should ensure equal workplace rights and benefits for LGBT individuals.

## The Appropriate Social Media Policy Mindset (According to the NLRB)



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Let's get this out of the way: As we come to the end of 2014, it is no longer breaking news that your company needs to have policies that address social media. Now, as we turn the page into 2015, it is as critical as ever to understand what you can and cannot say and do when it comes to social media, and your employees' use of social media. The federal National Labor Relations Board (NLRB) continues to have quite a bit to say on the topic.

The NLRB was created back in the 1930s, and was primarily charged with addressing elections for labor unions, and investigating and remedying unfair labor practices. However, since the start of President Obama's administration, the highly political NLRB has become extremely active on the issue of workplace policies that either address social media on their face, or involve other workplace policies that may implicate social media in some way.

At the heart of the issue is a covered employee's right under Section 7 of the National Labor Relations Act "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" An employer will violate the Act if its policy would "reasonably tend to chill employees in the exercise of their Section 7 rights." In turn, a policy might "chill" employees if: (1) the policy explicitly violates Section 7; (2) an employee would reasonably construe the policy's language to prohibit Section 7 activity; (3) the policy was promulgated in response to union activity; or (4) the policy has been applied to restrict the exercise of Section 7 rights. Your company should hold up its policy to the mirror of that standard.



In an effort to find the elusive common denominator when it comes to what social media policies and practices pass NLRB muster, it is useful to review recent NLRB positions on five common workplace issues.

### **1. Prohibiting Employees from Being Discourteous, Inappropriate, Disparaging.**

Many companies have a policy like this:

All employees are expected to be courteous, polite and friendly, both to customers and to their fellow employees. The use of profanity or disrespect to a customer or co-worker, or engaging in any activity which could harm the image or reputation of the Company, is strictly prohibited.

The first sentence was found to be a permissible attempt to maintain order in the workplace, and promote harmonious relations between and among employees and customers. A generalized statement that employees should “treat everyone with respect” was similarly found in another case to be lawful. However, a policy that prohibited a “discourteous or inappropriate attitude” was deemed impermissibly overbroad and imprecise, because it could serve to cast a wide net over protected disagreements, conflicts or discussions about protected concerted activity.

The second sentence of the above policy was deemed unlawful, because it could be understood by an employee to limit the right to strike, or engage in a lawful workplace stoppage or other form of concerted activity. Put another way, just because your company believes that protected concerted activities may harm your image or reputation does not make the activities any less protected.

Other policy statements like “use technology appropriately,” as well as prohibitions on making “disparaging or defamatory comments” about the company or its employees, and on saying something online that may “damage any person’s reputation” have similarly been found to be unlawful because they could be construed as restricting employees from discussing wages, hours and working conditions, or otherwise collectively voicing objections to company practices. Most recently, the NLRB found that a broad policy prohibiting employee gossip was unlawful because the term “gossip” is too subjective, and could force employees to have to choose between violating some subjective standard of what the employer likes and does not like, and engaging in protected discussion about work conditions.

### **2. Prohibiting Employees from Wearing Pins or Other Insignia**

Many companies attempt to regulate what employees may wear or attach to their outer clothing, either in the name of a dress code or safety. Here too, your company should appropriately toe the line between the impermissibly vague and the appropriately defined.

A recent case involved a policy that stated: “Employees who have contact with the public may not wear pins, insignias or other message clothing.” The NLRB noted the need for a balanced approach that recognizes the right of employees to wear union insignia with the right of employers to take reasonable steps to ensure discipline and the safe production of goods and services. The problem with that policy was that it effectively served as a blanket prohibition of wearing everything, without regard to circumstances.

So while a ban on wearing pins was acceptable upon a showing of a safety or equipment risk, a prohibition on wearing “insignias, or other message clothing” infringed on employees’ rights to express themselves in a manner that constituted protected concerted activity. Similarly, a policy that forbade employees from wearing baseball caps, except for company-logo baseball caps worn with the bill facing forward, violated the law. While the company enacted that policy as part of its safety code, and it was intended to avoid gang insignia and symbolism, there was no actual evidence presented that any and all insignia other than the company’s own logo would pose a safety hazard, and thus the overbroad language could chill an employee from promoting a union or otherwise engaging in protected “speech” through his or her baseball cap.

### **3. Prohibiting the Depiction of Company Logos**

The flip side of a ban on wearing anything other than the company’s logo is a policy that prohibits an employee from depicting or using a company logo for any reason. One such policy was deemed unlawful in its overbreadth and lack of any appropriate balance:

Employees would reasonably understand the rule to prohibit the use of the Employer’s logo or trademark in their online Section 7 communications, which could include electronic leaflets, cartoons, or even photos of picket signs containing the Employer’s logo. . . . [The company’s] interests are not remotely implicated by employees’ non-commercial use of a name, logo, or other trademark to identify the Employer in the course of engaging in Section 7 activity related to their working conditions.

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The trend: the NLRB asks that you consider what you are looking to protect and why, and not simply wield a hard and fast rule banning everything, when you could be unnecessarily prohibiting protected concerted activity. Narrowly tailored prohibitions on the use of company logos for commercial (and competitive) purposes, as well as a requirement that employees respect all copyright and other intellectual property laws, are far better than a blanket restriction on depicting company logos in any manner and for any reason.

***All employers are Willy Wonka, and every workplace is the heavily guarded chocolate factory.***

## 4. Prohibiting Photos and Videos in the Workplace

It was only a matter of time before we would reach the inevitable intersection of employee photography and “selfies” and employers’ fear of the outside world seeing anything that goes on within the four walls of the office. All employers are Willy Wonka, and every workplace is the heavily guarded chocolate factory.

Yet, the NLRB says that employers need to engage in a balancing act here as well. For example:

We further find that the portion of the rule prohibiting employees from photographing or videotaping the Employer’s premises is unlawful as such a prohibition would reasonably be interpreted to prevent employees from using social media to communicate and share information regarding their Section 7 activities through pictures or videos, such as of employees engaged in picketing or other concerted activities.

The problem in that case was the overbreadth of the prohibition, while a similar policy implemented by another company was likely struck down because of the inconsistency in its enforcement. Specifically, that policy stated that the use of cameras or cell phones “to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security.”

The company there was trying to protect information from being disclosed to third parties, yet the term “business need” was too nebulous, and the company did not consistently enforce its ban. It might have been okay if the company wanted an outright ban on photography or videos in the most competitive parts of its facility, however there was evidence that members of the public were occasionally allowed to be

in those purportedly competitive areas. Thus, the inconsistent application and enforcement of the policy was its undoing.

## 5. Prohibition on Disclosing Confidential or Company Information

Many companies have, for years, admonished employees not to disclose “confidential information” or proprietary “company information,” paying particular attention to employee discussions about compensation. Employers are even more fearful of such information becoming a topic of discussion among co-workers, and getting in the hands of competitors, more quickly through social media.

However, the national and local trend continues to favor transparency in the workplace, as initiatives from President Obama to local municipalities have attempted to regulate minimum pay and pay inequity issues by promoting transparency and discussion about wages by and among the wage earners. Additionally, the NLRB continues to take the position that wage-related information is precisely the type of “protected” information that cannot be shielded from co-worker discussion. In that vein, consider policies that have caught the NLRB’s ire.

***The NLRB continues to take the position that wage-related information is precisely the type of “protected” information that cannot be shielded from co-worker discussion.***

In one, employees were told that they “may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.” The term “company information” was defined to include all employee records. The policy was held to be unlawful because the term company information was amorphous, and the policy failed to expand on its meaning or define the parameters of the term. In other words, employees might understand the policy to prohibit any discussion about wages, discipline, performance ratings and other indicia of their working conditions. In a more recent case in early June, an ALJ stated that an employer cannot even prevent employees from disclosing customer locations where they worked.

The holiday-time takeaway is that it is critical that your company develop the appropriate mindset when it comes to managing social media use by your employees, and creating (or refreshing) your social media policies and practices. It is not clear at this juncture which, if any, of the above positions will

ultimately stand the test of final court review. Until that time, there are a few best practices to consider.

First, avoid general, overbroad and undefined terms. Read each portion of your policy and ask yourself whether an employee could (reasonably?) interpret that rule as chilling protected concerted activity.

Second, avoid overly subjective terms that place much discretion in the hands of company decision makers as to what does and does not violate the policy, but little advance knowledge in the minds of employees as to precisely what is prohibited.

Third, consider what your company's real business interests truly are that need protecting, and narrowly tailor your workplace rules to accomplish those.

Fourth, apply and enforce your policy consistently, and in a manner that reflects a true intention to protect valuable company interests.

Fifth, continue to stay abreast of all developments in this area of the law and discuss any uncertainties with counsel.

## What to Expect When Employees Are Expecting: 2014 Leaves Federal Pregnancy Discrimination Law in Flux



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A rising tide of litigants is catching some employers by surprise, with bundles of joy leading to bushels of legal woes. According to the Equal Employment Opportunity Commission (EEOC), pregnancy discrimination complaints have risen at a faster rate than the rate at which women are entering the workplace. In an effort to address the rise in such complaints, in July 2014, the EEOC issued new enforcement guidance regarding the workplace rights of pregnant employees.

The enforcement guidance clarifies certain provisions of the Pregnancy Discrimination Act (PDA) as well as provisions in the Americans with Disabilities Act (ADA) as amended in 2008 that may apply to pregnant workers. Key to the new guidance is the EEOC's interpretation of the PDA as requiring an employer provide the same accommodations to pregnant workers as it provides to workers who are not pregnant but similar in their ability or inability to work, regardless of the

source of their limitation. That is, if employers have policies that provide light-duty work to only certain categories of injured employees, e.g., only employees who are injured on the job, they must offer the same light-duty work to pregnant employees with similar limitations.

The EEOC guidance has created some controversy because it is contrary to the majority view on pregnancy discrimination claims, which permits employers to offer light-duty work to only certain categories of workers, and to deny accommodations on the basis of pregnancy alone, as long as the categories of accommodated workers are selected on a pregnancy-neutral basis; e.g., all employees injured on the job, both non-pregnant and pregnant, are entitled to accommodations. Moreover, critics of the guidance see it as premature in light of a pending Supreme Court case addressing the same issues – *Young v. United Parcel Services, Inc.*

### A Brief History of the Pregnancy Discrimination Act

Congress enacted the PDA in response to the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In *Gilbert*, the Supreme Court held that an employer's disability insurance plan, which provided benefits to employees unable to work because of non-occupational sickness or accident, but not to those unable to work because of pregnancy, was facially nondiscriminatory despite not covering pregnancy-based disability. The Court reasoned that discrimination on the basis of pregnancy is not sex discrimination because the class of non-pregnant persons includes members of both sexes. That is, under the employer's disability insurance plan, there was no risk from which men were protected and women were not.

As a response to *Gilbert*, the Pregnancy Discrimination Act (PDA) amended Title VII of the Civil Rights Act of 1964, which prohibits discrimination because of sex. The PDA redefined the term "because of sex" to include:

"because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work ...." 42 U.S.C. § 2000e(k).

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After its enactment, courts have disagreed over how the PDA should be interpreted — and that disagreement has focused on the PDA's second clause — the provision requiring that pregnant workers “shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work.”

A typical sex discrimination plaintiff must establish that a member of the opposite sex similarly situated in all respects to the plaintiff received more favorable treatment than the plaintiff. Disagreement has arisen regarding whether the PDA alters that analysis. More specifically, a minority of courts have interpreted the PDA to require a pregnant employee to demonstrate only that an employee similarly situated in his or her ability or inability to work received more favorable treatment.

**Critics of the EEOC's guidance interpret it as granting pregnant employees a “most favored nation” status.**

## The EEOC's Position

The EEOC explicitly adopts this minority view in the enforcement guidance and explains that an employer must treat a pregnant employee temporarily unable to perform her job functions the same as it treats other employees similarly unable to perform their jobs. Moreover, an employer may not refuse to treat a pregnant worker the same as other employees with similar restrictions based upon the source of the employee's limitations (e.g., a policy providing light duty work only to employees injured on the job). Thus, according to the EEOC, if an employer offers light-duty work to employees injured on the job, the employer must also offer light duty work as an accommodation for pregnant employees with similar restrictions.

Critics of the EEOC's guidance interpret it as granting pregnant employees a “most favored nation” status. For example, if an employer offers light-duty work to employees injured on the job, the employer would also be required to provide light-duty work to a pregnant worker with similar restrictions, even if the employer denies those same accommodations to non-pregnant employees injured off the job.

While opponents of the EEOC's interpretation of the PDA fear that it grants pregnant employees a most favored nation status, proponents worry that interpreting the PDA otherwise may result in giving pregnant employees only a “least favored nation status.” For example, if the PDA is interpreted

according to the majority view, pregnant employees arguably would be entitled to only the same treatment as any group of non-pregnant employees who did not receive accommodations for their work limitations.

The other major premise to stem from the EEOC's enforcement guidance is that although pregnancy is not a disability, the 2008 amendments to the ADA make it easier to show that an impairment qualifies as a disability, and may require accommodation of employees with pregnancy-related impairments, i.e., nausea causing severe dehydration, preeclampsia or anemia.

It is important to note that courts are not required to follow these EEOC enforcement guidelines, and need only give them deference to the extent the guidance has the power to persuade.

## All Eyes on the Supreme Court: *Young v. United Parcel Services, Inc.*

The EEOC's guidance also has attracted criticism because it was published only two weeks after the Supreme Court decided to address pregnant employees' accommodation rights in *Young v. United Parcel Services, Inc.* Notably, during oral argument in *Young* before the Supreme Court, Justice Antonin Scalia questioned whether the EEOC's guidance should be owed any deference at all. Moreover, depending on how it decides, the Court's decision could have the practical effect of overruling the EEOC's enforcement guidance.

In *Young*, the 4th Circuit Court of Appeals held that UPS's policy of providing light-duty work to only three categories of workers (those injured on the job, those accommodated under the ADA, and those who lost certifications required to drive UPS trucks), and not to pregnant women, was in compliance with the PDA because the policy was pregnancy-blind and offered light-duty work to three categories of employees regardless of whether they were pregnant.

Before the Court, the plaintiff, Peggy Young, takes the same position as the EEOC; i.e., she argues that as a pregnant woman with lifting restrictions, she should have been offered the same light-duty work offered to the three categories of employees with similar work restrictions.

At oral argument in the case on December 3, 2014, the Court raised questions as to the reasonableness of each of the contrasting interpretations of the PDA, and there are no clear predictions regarding which way the Court will decide. The Supreme Court will issue its ruling in *Young* some time in 2015.

## Pregnancy Discrimination Law Continues to Develop

Ultimately, 2014 has demonstrated that the state of pregnancy discrimination law is fluid. The amount of weight the EEOC's enforcement guidance will carry with courts interpreting the PDA is particularly questionable in light of the pending Supreme Court decision in *Young*. However, one thing is for sure – given its enforcement guidance, the EEOC will very likely begin focusing more on pregnancy discrimination complaints.

Moreover, in the past two years, a number of cities and states, including New Jersey, Maryland, Delaware, Illinois, Washington D.C., New York City and Philadelphia, have adopted laws requiring accommodations for pregnant workers, adding to the states, such as California, which already had such laws in place. This number will likely grow next year.

Additionally, many employers across the country already have implemented their own pregnancy accommodation policies. For example, beginning in January 2015, Peggy Young's former employer, UPS, will voluntarily provide pregnant women the same accommodations as other employees with similar physical restrictions resulting from on-the-job activities. Thus, although the Court has yet to decide *Young*, and the practical effects of the EEOC's enforcement guidance remain to be seen, it is apparent that laws and workplace policies across the country are being revised to address the rights of pregnant workers, and employers should be prepared to adjust to this changing landscape.

## Unpaid Interns: The Litigation Risk That Employers Cannot Afford to Ignore



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Unpaid internship programs are a time-honored institution for many employers, providing benefits to the interns and the company or institution alike. However, a recent and burgeoning trend of lawsuits by interns alleging that they are employees under the federal Fair Labor Standards Act (FLSA or the Act), and/or state wage and hour laws, who must be paid at least minimum wage, has left many employers questioning whether an unpaid internship program is worth the risk. And the \$5.85 million price tag attached to publishing giant Conde Nast's November 2014 proposed

settlement with a class of unpaid interns illustrates just how risky unpaid interns can be. This article discusses recent significant cases addressing the issue, and suggests ways in which employers can increase the likelihood that an unpaid internship program will pass muster.

The FLSA requires that "employees" be paid at least minimum wage for all regular hours worked, and that nonexempt employees be paid overtime for all hours worked in excess of 40 per week. Proponents of unpaid internships argue that interns are not employees, and therefore need not be paid in accordance with the FLSA. But the FLSA's broad and vague definitions of employee ("any individual employed by an employer") and "employ" ("to suffer or permit to work") give interns ammunition in arguing that unpaid internships are unlawful under the Act.

The U.S. Department of Labor (DOL) takes the position that an intern may be properly unpaid only if each of the following factors is satisfied: (1) the internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment; (2) the internship experience is for the benefit of the intern; (3) the intern does not displace regular employees, but works under close supervision of existing staff; (4) the employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded; (5) the intern is not necessarily entitled to a job at the conclusion of the internship; and (6) the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship. Unfortunately for employers, the requirement that the employer derive no immediate benefit from the intern's activities makes the standard difficult to meet.

Defendants in lawsuits filed by unpaid interns run the gamut, and include operators of sports teams, event venues, and media outlets; motion picture companies; publishing companies; medical coding companies; colleges and universities; modeling agencies; music production companies; record labels; fashion houses; and television networks. And employers are not immune from suit simply because their interns are college students who receive academic credit for the internship.

**Employers are not immune from suit simply because their interns are college students who receive academic credit for the internship.**

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While unpaid interns have filed many lawsuits in recent years — a complaint filed against Kenneth Cole Productions, Inc. on December 2, 2014 is a recent high-profile example — few instructive decisions have been rendered. Conflicting opinions from the U.S. District Court for the Southern District of New York in the cases of *Wang v. Hearst Corporation* and *Glatt v. Fox Searchlight Pictures, Inc.* precipitated a consolidated appeal to the U.S. Court of Appeals for the 2nd Circuit, and many employers are waiting for that decision with baited breath, in hopes that it will provide much-needed guidance in this murky area of law. The DOL filed an *amicus* brief backing the plaintiffs' position in that case in July 2014, as did the Communications Workers of America, the Service Employees International Union, the United Food and Commercial Workers, and the American Federation of State, County and Municipal Employees.

In *Wang*, an unpaid intern for publishing giant Hearst sought to bring a collective action on behalf of all unpaid interns at Hearst Magazines dating back to 2006, contending that they were employees under the FLSA and the New York Labor Law (NYLL). The court denied the plaintiff's request for partial summary judgment and class certification. Analyzing the totality of the circumstances, rather than adhering to the DOL's 6-factor test, the court determined that genuine issues of fact precluded summary judgment. Although the court looked to the totality of the circumstances, it did note that the DOL's six factors offer an analytical framework and should not be ignored.

In *Glatt*, the plaintiffs similarly moved for summary judgment on the issue of their employee status under the FLSA and NYLL. The *Glatt* court applied the DOL's six-factor test and held that the interns were employees, because their work was similar to that of paid employees, they performed tasks that did not require specialized training, and they provided an immediate advantage to the employer. As noted above, it remains to be seen how the 2nd Circuit will decide the consolidated appeals in the *Wang* and *Glatt* cases.

Some courts, including the U.S. Court of Appeals for the 6th Circuit, have eschewed the DOL's test, finding it to be inconsistent, overly rigid, and ill-equipped to determine employee status in a training or educational setting. In *Solis v. Laurelbrook Sanitarium and School, Inc.*, that court found that students at a boarding school who spent time volunteering at a school-owned sanitarium were not employees, because the students (rather than the school) primarily benefitted from the arrangement. The court also noted that the students did not displace regular workers, that instructors spent time supervising students who otherwise would have been

spent doing productive work, and that services would be unimpeded if the students were not present.

In *Kaplan v. Code Blue Billing & Coding, Inc.*, the U.S. Court of Appeals for the 11th Circuit applied the "economic realities" test in determining whether an unpaid intern was an employee, focusing on whether the intern's work economically benefited the company. That case centered on unpaid interns in the medical coding field who received academic credit for the internship and who were required to complete an internship in order to graduate, and the court held that no employer-employee relationship existed. The court also summarily noted that the DOL's six-factor test was satisfied.

These conflicting approaches, combined with some Circuits (like the 3rd) that have offered no guidance, leave employers in a state of uncertainty with respect to whether their unpaid internship program would withstand challenge. Add to that stew the growth of anti-internship groups — such as the "Fair Pay Campaign," which reaches out to college students in an effort to organize campaigns against unpaid internships — and employers face a perfect storm of litigation risk.

Companies and institutions offering unpaid internships should carefully analyze their programs to ensure that they are providing interns with valuable training that is not specific to the company/institution's own operations, but rather is of general application within the industry. Additionally, individuals supervising interns should avoid assigning them any work if doing so would take work away from a paid employee. It is also helpful for the company/institution to be able to show that its interns actually impede operations; for example, records should be kept of the time paid employees spend supervising and/or mentoring interns which usually would be devoted to the employees' regular job duties. Finally, all interns should sign an acknowledgment that they are not employees, that the internship is unpaid, and that a job is not guaranteed at the conclusion of the internship. Such acknowledgments are not a silver bullet, however, as they would not provide an exemption or constitute an effective waiver of an intern's rights under the FLSA.

Ultimately, the legality of unpaid internships is likely to make its way to the U.S. Supreme Court. A comment in a 2012 decision regarding the exempt status of certain pharmaceutical representatives might provide insight into how the high Court would decide whether the DOL's heightened concern in recent years about unpaid internships is warranted: "While it may be possible for an entire industry to be in violation of the FLSA for a long time without the Labor

Department noticing, the more plausible hypothesis is that the Department did not think the industry's practice was unlawful." *Christopher v. SmithKline Beecham Corp.*, 132 U.S. 2156 (2012). Resolution of the question could be years in the offing, however, leaving employers in the unenviable position of deciding whether unpaid internships are worth the risk.

## The New Year Could Ring in a Wave of Affordable Care Act Whistleblowers: Prepare Yourself Now with This Primer



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More than 50 percent of all Americans historically have received their health care coverage from their employer. Furthermore, according to the U.S. Census Bureau, as of 2011, 68 percent of employed workers, aged 18-64, obtained their health insurance coverage either from their own employer or another person's employer. Therefore, it is not surprising that employers play a significant role in the regulatory scheme of the Patient Protection and Affordable Care Act (ACA) as major providers of health insurance coverage to employees and their dependents. Recognizing this, Congress has made it unlawful for employers to retaliate against individuals for asserting their rights under the health insurance reforms found in Title I of the ACA.

***Portions of the employer shared responsibility provisions of the ACA, often referred to as the employer mandate, go into effect on January 1, 2015 and create the potential for myriad employee whistleblowing complaints.***

While there have not been many ACA whistleblower cases filed since the ACA was passed in 2010, the number of cases is expected to rise dramatically over time as more provisions of the law go into effect. Portions of the employer shared responsibility provisions of the ACA, often referred to as the employer mandate, go into effect on January 1, 2015 and create the potential for myriad employee whistleblowing complaints.

Below are 10 questions and answers to help employers understand the ACA whistleblower landscape and prepare for possible ACA whistleblower complaints:

**1. Who is protected from retaliation under the ACA?** The ACA protects current employees, former employees and applicants for employment, in both the public and private sectors, from unlawful retaliation.

**2. What activities does the ACA protect?** Protections focus on Title I of the ACA, which generally covers the individual mandate to obtain health insurance coverage, employers' shared responsibility in the provision of health insurance coverage, and regulation of premiums, cost sharing and state insurance exchanges. Specifically, protected activity includes: (1) receiving of tax credits or subsidies in connection with participation in a health insurance exchange; (2) providing information or causing information to be provided (or preparing to take either of these actions) to the employer, the federal government, or the attorney general of a state relating to any act or omission that the individual reasonably believes to be a violation of Title I of the ACA; (3) testifying, assisting, or participating (or preparing to take any of these actions) in a proceeding concerning an alleged violation of Title I of the ACA; and (4) objecting to or refusing to participate in an activity that the employee reasonably believes to be in violation of Title I of the ACA.

**3. What actions are prohibited under the ACA?** An employer may not discharge or otherwise discipline, intimidate, threaten, restrain, coerce, or blacklist any employee or applicant for employment for engaging in any activity protected by the ACA.

**4. What remedies are available under the ACA?** The ACA provides a whole host of remedies: reinstatement; back-pay and interest; front pay (in lieu of reinstatement); compensatory damages; expert witness fees; attorneys' fees; expungement of discipline, if any, resulting from the protected activity; and neutral references. A prevailing employer may be awarded up to \$1,000 in attorneys' fees based upon a finding that the complainant's complaint was frivolous or brought in bad faith.

Significantly, the ACA also provides for "preliminary reinstatement," which requires an employer to put an employee back into the position he/she held before the unlawful retaliation, if the employee had been removed from the position. Moreover, orders for preliminary reinstatement take effect regardless of whether a party appeals the order. While an employer may request a stay of an order for preliminary reinstatement, such stays rarely are granted.

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**5. How can an individual prove retaliation under the ACA?** To establish a *prima facie* case of retaliation under the ACA, a complainant must prove: (1) he/she engaged in a protected activity; (2) the employer knew of or suspected that the complainant engaged in the protected activity; (3) the complainant suffered an adverse employment action; and (4) circumstances sufficient to raise the inference that the protected activity was a contributing factor to the adverse action. A “contributing factor” is any factor, alone or in combination with other factors, that tends to affect in any way the outcome of the decision.

The contributing factor test creates a low burden for complainants. They need only show, by a preponderance of evidence, that the protected activity was a contributing factor in the adverse action. Employers, on the other hand, have a high burden as they must demonstrate, by clear and convincing evidence, that they would have taken the same adverse action even in the absence of protected activity.

**6. What agency handles ACA whistleblower claims?**

The Occupational Safety and Health Administration (OSHA) enforces the whistleblower provisions of the ACA. OSHA also enforces 21 other whistleblower statutes generally covering reported violations affecting safety and health, the environment, consumer products, securities and financial reform laws.

**7. How does OSHA investigate ACA whistleblower claims?**

An employee or applicant for employment may file a claim, orally or in writing, with OSHA within 180 days of the alleged retaliation. OSHA will reduce oral complaints to writing and no particular form of complaint is required. The employer and complainant will be notified of OSHA’s receipt of the complaint and then each party has 20 days thereafter to submit a written statement and any affidavits or documents substantiating its position. During this same 20-day timeframe, each party may request a meeting with OSHA to present its position. OSHA will provide the complainant with copies of the employer’s submissions that are responsive to the complaint, redacted as necessary for confidentiality. The complainant then will be given the opportunity to respond to the employer submissions.

If OSHA determines that the complainant cannot demonstrate a *prima facie* case of retaliation, it will end the investigative proceedings and dismiss the complaint. If OSHA determines that there is reasonable cause to believe that the employer has violated the anti-retaliation provisions of the ACA, it will issue a preliminary order providing relief to the complainant, which may include preliminary reinstatement. OSHA is

required to issue its written findings and any preliminary order within 60 days of the filing of the complaint.

The written findings and any preliminary order will be effective 30 days after receipt by the employer or on the compliance date set forth in the order, if later, unless either party files timely objections to the written findings and/or the preliminary order. Notably, if the order requires preliminary reinstatement, that portion of the order is effective upon receipt, regardless of any objections that may be filed.

**8. How can an individual or an employer appeal OSHA’s findings?**

Either party may file objections with, and/or request a *de novo* hearing before, an administrative law judge within 30 days of receiving OSHA’s written findings and any preliminary order. Within 14 days of the date of the decision of the administrative law judge, either party may file a petition for review with the administrative review board. The administrative review board may either accept the petition for review or decline to accept it. Within 60 days after the final order of the administrative law judge or the administrative review board, as applicable, a party may file a petition for review in the U.S. Court of Appeals for the circuit in which the alleged violation occurred or the circuit in which the complainant resided at the time of the alleged violation.

**9. Can individuals pursue an ACA action in federal district court?**

Complainants also may bring an action in federal district court in two circumstances: within 210 days after the filing of the complaint if there has not been a final decision of the secretary of Labor or within 90 days after receipt of OSHA’s written findings if there has not been a final decision of the secretary of Labor. Either party may request that the action be tried before a jury.

**10. What can employers do to reduce their risk exposure to ACA whistleblower complaints?**

If employers do not have a whistleblower program in place, they should consider creating one. The program may include a written policy that contains, among other items, complaint mechanisms, an investigatory process, and assurances of no retaliation for engaging in whistleblowing activities or participating in any investigation of whistleblowing reports. Employers also should evaluate whether to implement a phone or web-based hotline in the United States to allow anonymous reporting. If any whistleblower program is implemented, it should include training of all employees, and specialized training for managers. The program should be communicated to the workforce upon hiring and at regular intervals. Furthermore, auditing controls should be put in place to evaluate the program’s effectiveness.



Whether or not an employer has a formal program to address whistleblowing, it is critical to respond properly to any employee concerns of alleged violations of the ACA or any other law. Prompt and appropriate action by an employer often is the best way to reduce risk exposure. Similarly, employers should make compliance with applicable laws a key component of the organization's mission and make all employees accountable for compliance.

## Employers Must Find Their Way Through the Legal Haze Created by New Marijuana Laws



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As more and more states remove legal impediments to the use and possession of marijuana while the federal statutory prohibition remains intact, employers are beginning to face a complicated legal landscape regarding employees' off-duty usage of marijuana. Although employers are likely within their rights to take an adverse action based on an employee's use of marijuana, courts are just beginning to face the various legal issues involved. Challenges for employers are only expected to grow as more employees begin to take advantage of state and local efforts to loosen restrictions on marijuana use.

***The Obama administration is convinced that individual wages will be raised if employees become unionized or are helped to address individual claims of pay inequity.***

In November 2014, voters in Alaska, Oregon and Washington, D.C., cast their ballots in favor of initiatives that would legalize marijuana under state law. When those statutes take effect in 2015, Alaska and Oregon will join Colorado and Washington as the only four states to approve of the recreational use of marijuana. (The status of the marijuana laws in Washington, D.C., is in doubt as Congress recently prohibited the expenditure of funds to enact any law or regulation that would legalize or otherwise reduces penalties for the possession, use or distribution of marijuana but D.C. officials believe its laws may still survive the federal action.) In addition to the

legalization efforts by those four states, 24 states have authorized the use of some form of medical marijuana, with varying restrictions or availability. Additionally, some localities in states that have not changed marijuana laws have acted to decriminalized marijuana possession.

Despite these changes on the state and local levels, possession and use of marijuana remains illegal under federal law for all purposes. In fact, marijuana is still classified as a Schedule I drug under the federal Controlled Substances Act and, thus, the federal government considers it to have no accepted medical use and a high possibility of abuse. Although the Food and Drug Administration is conducting a review at the request of the Drug Enforcement Administration regarding the effect of reclassifying marijuana, prospects are dim that either Congress or the DEA will soon change the placement of marijuana in Schedule I.

Against this backdrop of growing state-level tolerance for marijuana and strict federal prohibition, employers are often caught in the middle. In general, employers are likely legally authorized to take an adverse action against an employee for testing positive for marijuana, but the law in this area is still developing.

Although recovered drug users are considered disabled under the Americans with Disabilities Act, the current use of illegal drugs is not considered a disability under that law and employers are legally able to take adverse action against an employee for failing a drug test. In addition, the use of medical marijuana is not a reasonable accommodation that an employer would need to provide to an employee. Federal regulations regarding drug testing apply to certain employers and employees, often in the trucking or transportation industries, and no federal regulation has an exemption for medical marijuana usage.

Under state laws, an employee's use of marijuana will likely still be sufficient grounds for termination, but the answer isn't quite as clear. For example, some states (such as New York) have made a person's status as a patient authorized to use medical marijuana a protected category for antidiscrimination laws, but in other states (such as California), a person's status as a medical marijuana patient is not covered by state antidiscrimination laws, and an employer can discharge an employee for failing a drug test even if that employee was authorized by state law to use marijuana for medical purposes. Some states (such as Washington) do not expressly exempt current users of illegal drugs from their workplace accommodation statutes, suggesting that employees in those states may be able to at least raise an

accommodation claim under state law. Other states (such as Arizona and Delaware) require evidence of impairment in the workplace in order for an employer to take an adverse action against an employee for the use of marijuana — a positive test alone is insufficient to show impairment or to take an adverse action.

Other, lesser-known statutes may provide additional concerns for employers. For example, many states have statutes that prevent employers from taking adverse action against employees on the basis of their lawful, off-duty activities. One question for courts in those states will be whether marijuana use that is authorized or permitted under state law is a protected activity notwithstanding the federal prohibition. The Colorado Supreme Court recently heard oral argument on that issue, as it considers an appeal filed by an employee who was prescribed (and used) marijuana for medicinal purposes as authorized by Colorado law, but was fired by his employer after he failed a drug test based on the presence of marijuana. Both the trial court and the Colorado Court of Appeals ruled in favor of the employer, and the Supreme Court's evaluation of the case will be of tremendous importance to employers faced with these issues.

***The federal statutory treatment of marijuana as an illegal, Schedule I substance will likely weigh in favor of employers who wish to take adverse actions against their employees who test positive for the presence of marijuana.***

In the end, the federal statutory treatment of marijuana as an illegal, Schedule I substance will likely weigh in favor of employers who wish to take adverse actions against their employees who test positive for the presence of marijuana. And employers who wish to maintain a strict ban on the use of marijuana by their employees should ensure that their workplace policies prohibit the use of any drugs illegal under **federal**, state or local laws and/or only permits the use of prescription drugs that can be legally prescribed under **both** State **and** federal law. But employers need not enforce such a strict policy, however, if they choose not to do so. In any event, employers should be mindful of the potential for legal trouble with the emergence of state laws that purportedly legalize a drug still illegal under federal law and should review their drug-free workplace policies to ensure that the policies reflect the employer's goals.

## What Big Data Means for Employers Now and in the Future



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“Big data” became a buzz-term in 2014 in legal technology circles, with some experts predicting that it will eclipse the Internet in terms of overall societal impact. While this remains to be seen, big data's impact on employers is sure to be significant. We provided an introduction to big data in last year's Labor & Employment Observer. Here's what else you need to know to ensure that you remain ahead of the curve on big data issues now and in the months and years to come. First, employers need to understand that big data means more than simply data tonnage. Big data is really about data analytics – sophisticated algorithms that are being applied to incomprehensibly large volumes of data. Researchers use highly complex mathematical algorithms to find patterns in data, which reveal patterns in human conduct and nature, that human intuition alone could not see.

And corporate America has taken notice, using these new predictive capabilities to help sell products through Internet-based targeted marketing. For example, Target has tracked customer purchases to create a “pregnancy score” to help predict when a customer was pregnant so that the company could send targeted advertising to that customer. Big data also plays a role in assessing credit risk. European company Kreditech uses more than 8,000 sources — including social media — to create a unique credit score for consumers, which it then sells to banks and other lenders. And in 2012, President Obama's campaign relied heavily on big data analytics to identify 15 million undecided voters who might be persuaded to vote for Obama. Using data from cable boxes, the analysts determined what those 15 million voters watched on television and purchased advertising slots accordingly.

***Big data will dramatically change the way that employers use data about their employees and prospective hires.***

If big data can be used to predict how consumers, voters and debtors will act, it is easy to see how these same tools could impact human resources. Big data will dramatically change the way that employers use data about their employees and prospective hires. Indeed, in the not-so-distant future, some companies will use data analytics to replace employee

reviews, predict employee behavior, or help to create a persona of the "perfect" employee against which hiring managers can accurately measure job candidates. Recruiters will use centralized databases to find job candidates based on customized factual metrics from prior job performance. With this type of information, long-held beliefs about skills, education and the prediction of employee success will radically change.

This is not mere theorizing. Many Fortune 100 companies already have taken notice and put some of these concepts into play. For example, Xerox Services uses an online evaluation for prospective employees that focuses on personality testing, cognitive-skill assessment, and multiple-choice questions about how the applicant would handle specific scenarios. The program uses an algorithm and factual information gleaned from the candidate's application and sets a rating for each candidate based on their potential success in the job. Using this system has increased Xerox's retention rates by more than 20 percent.

Looking beyond big data's potential to improve retention rates, many commentators believe that it can help reduce inherent discrimination in employment. Numerous social science studies observe that people generally are presupposed to hire candidates who are like them. By using analytics, individual biases may be removed from the decision-making process.

***While data analytics can help eliminate individual biases in the decision-making process, the potential for disparate impact litigation arising from the use of data analytics to make hiring decisions is real and imminent.***

Employers must bear in mind, however, that over-reliance on data analytics can create other concerns. Earlier this year, President Obama created a task force to conduct a 90-day review of big data and its privacy implications. One of the main issues addressed in the resulting report was employment discrimination, with the concern being that the use of data analytics will disparately impact certain minority groups. The White House report called for the creation of tools, using big data analytics, to allow the federal government to identify areas where employees in protected categories are being disparately impacted and discriminated against. Indeed, it is not difficult to imagine a future in which the EEOC uses such tools to find disparate impact

discrimination and also to focus its investigative efforts on individual discrimination charges that are likely to have the most merit.

With the White House report mind, employers should focus on the following key issues for the future:

Big data should supplement the hiring process rather than dictate it. While data analytics can help eliminate individual biases in the decision-making process, the potential for disparate impact litigation arising from the use of data analytics to make hiring decisions is real and imminent. Even a facially neutral analytics program could disparately impact protected classes. Thus, employers will need to understand how to statistically validate analytics program results.

Big data will be used as an enforcement tool. Employers can expect the EEOC to develop analytical tools to help build profiles of companies that are most likely to engage in specific types of discrimination. The same process will be used to analyze discrimination claims to determine their potential merit. As these tools develop, employers must understand how the tools work and keep abreast of the best strategies to avoid becoming a target.

Employee performance and management will also be affected. Employers using data analytics to evaluate and manage employee performance will need to ensure that their criteria does not disparately impact protected employees. On the other hand, using analytics to monitor employee performance could make it harder for employees to prove pretext in discrimination claims, because decisions will be made (or heavily influenced) by an "objective" tool free from subjectivity that can lead to discrimination. But on this score, employers should heed the "garbage in, garbage out" rule and ensure that the analytics tools they use are free from potential biases, including the perception of any biases.

Employers will need to keep vigilant regarding the changing world of privacy regulation. If, as some commentators predict, the United States will ultimately move toward a EU-type privacy protection regime, employers will have to completely change how they manage employee privacy. This will become more difficult as companies gather and store exponentially more data regarding their employees, especially to manage performance.

Big data is a collision between math and sociology that promises to change the way we see and analyze our world. One day big data analytics will become the backbone for all personnel decisions. It will replace the anachronistic personality test and even face-to-face interviews. It will change how we structure our work environments, and how

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we evaluate, motivate and manage employees. But the key in using these tools is to ensure that protected categories are treated fairly. Blind reliance on big data can lead to major disparate impact issues. The White House is aware of the enormous positive potential of big data, but it is also looking out for the dangers of big data and its potential impact of groups excluded by its faceless algorithms. Employers must do the same.

## Employee Monitoring: Employers Can Do It, but Should They?



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A study performed by the Institute for Communication Technology Management estimates that in 2015 Americans will consume digital media for more than 1.7 trillion hours, which amounts to an average of approximately 15 and one half hours per person per day. It is estimated that about 61 percent of Americans own a smartphone, an increase of nearly 20 percent since 2012, and 74 percent of all adult Internet users visit social networking sites (e.g., Facebook, Twitter, Instagram, etc.). With smartphone use on the rise, and thus greater access to social media, employees are voluntarily offering their private lives to the public in record numbers, discussing everything from politics, religion and relationships, to work assignments, coworkers and other sensitive work-related information. In other words, what happens in the “office” no longer stays in the office. For this reason, monitoring employees by electronic means has become useful and even prudent; thus the relevant question is no long “if” but rather, to what degree?

Traditional methods of employee monitoring (e.g., email filters, video surveillance, phone logs, etc.) in the workplace have proven less effective as employees begin to migrate from conventional office settings and company-owned devices to their own homes using their personal computers, tablets and smartphones to complete job-related tasks. But employers have many good reasons for continuing to keep tabs on their employees’ activities, even from afar, because monitoring employee activity can help companies: (1) protect their reputations, (2) reduce their exposure to liability, (3) uncover potentially disastrous company policy violations, (4) pinpoint lost productivity, and (5) detect declines in employee performance.

On the other hand, employee monitoring (particularly

monitoring employees’ social media activity) can expose employers to information that could lead to a variety of claims. For example, imagine that an employer learns through Facebook that an employee is pregnant, and shortly thereafter fires that employee for a valid reason. The fact that the employer knew of the pregnancy exposes the employer to a discrimination claim that would be difficult to bring had the employer not known of the pregnancy. Thus, while employers can monitor employees, they must carefully decide whether and the extent to which they should.

Although the changing dynamics of the “workplace” have inspired changes in employee reconnaissance methods, employers have, over this past year, continued to enjoy broad flexibility in how, and to what degree, employee activity is monitored, both inside and outside of the workplace. For example:

- In October 2014, an Ohio Appellate court upheld the termination of police officer who made the following threat to her co-worker via Yahoo Messages: “Feeling the heat yet? It’s coming. I promise. You f\*\*ked with the wrong person..., you’re a\*\* is mine!”
- A neighborhood activity center offered to renew the employment agreements of two activity leaders, but rescinded the offers when it discovered the activity leaders had posted profanity-laced Facebook rants about their jobs. The NLRB upheld the job offer rescissions early this year.
- A New York school worker was issued a company cellphone equipped with GPS tracking software. The worker’s employer was able to use the GPS data collected from the phone to track the worker’s movements and determine that the worker was continually leaving work early and falsifying his time cards. The judge ruled that the employer had a legitimate reason to track the worker’s movement and the termination was upheld.

**Despite the latitude afforded companies this year, there are several issues employers should keep in mind when deciding how and when to monitor their employees.**

The continued deference to employer monitoring should give companies some solace in the upcoming year. However, despite the companies this year, there are several issues employers should keep in mind when deciding how and when to monitor their employees. First, employers should consider whether their activities violate the employees' privacy rights. Because employees typically have little reasonable expectation of privacy in the workplace or in using company property, whether privacy issues are implicated based on activity at work may be an easier issue for employers to resolve.

Notably, employee-users of social media and other Internet sites, who leave their "profiles" open to the public, or who invite or accept potential employers or companies to "friend" them or "connect" with them, implicitly grant permission of access and have little, if any, expectation of privacy with that company or employer. On the other hand, employers should stay away from less obvious means of surveillance, such as creating aliases or "dummy" accounts on social media sites or "borrowing" authorized login credentials to gain access to an employee or applicant's information, as this gives rise various ethical dilemmas and potential criminal violations. Employers may legally use the Internet and social media to gather information, if the information is publically available — that is, not password protected. However employers should not create aliases, borrow login credentials or otherwise provide false information to gain access to an employee or applicant's website, because doing so is violation of federal and state law.

Employers should make sure that their employees know they have no reasonable expectation of privacy in their use of the company's electronic resources, because it is all company property and to be used only for job-related purposes. Also remind employees that their company work stations, company-issued devices and company cars are property of the employer and may be subject to inspection or search.

Companies should be careful to monitor work-related calls for quality assurance purposes, but refrain from monitoring personal telephone conversations. Employers should also be aware that because company-issued devices are often used for personal matters, any searching, reviewing and monitoring of a company-issued device should be reserved for legitimate, business purposes and conducted in a manner that is aimed at collecting information relevant to the legitimate, business purpose of the search.

### **Monitoring and Disciplining Off-Duty Activities Going Forward**

As illustrated above, employers have a valid interest in monitoring an employee's work-related and non-work related activity as well as conduct that takes place away from the employer's premises. However, in light of developing legislation, disciplining employees based on that monitoring or surveillance gives rise to a host of new considerations. Specifically, several states have passed laws prohibiting employers from discriminating against an employee or applicant based on the individual's off-duty conduct, such as use of medicinal marijuana, tobacco products or any other lawful substance; affiliation or involvement with political, union or religious groups; sexual preference and/or marital status. For example:

- Arizona's medical-marijuana statute prohibits employers from discriminating against registered marijuana patients unless the employment of such patients would cause the employer to lose money or licensing under federal law (i.e., because medical marijuana use is not legal under federal law). Under the law, Arizona employers may prohibit even registered users from possession of medical marijuana on company premises or from impairment while working.
- Rhode Island broadly prohibits employers from discriminating against medical-marijuana users. (For more information on what recent state laws regarding marijuana mean for employers, see "Employers Must Find Their Way Through the Legal Haze Created by New Marijuana Laws," p. 22.)
- A number of other states (including Arizona, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Minnesota, Mississippi, North Dakota, Oklahoma, Utah and Wisconsin) protect an employee's right, with some limitations, to possess a legal firearm on company premises. In Texas, employees are allowed to bring their guns to work, as long as they are securely locked in the employee's vehicle.
- Several states (including Connecticut, Washington, D.C., Indiana, Kentucky, Louisiana, Maine, Mississippi, Missouri, New Hampshire, New Mexico, South Carolina, South Dakota, Tennessee, Virginia, West Virginia and Wyoming), have enacted laws to protect an employee's right to use tobacco away from company premises.

In addition to laws that protect specific types of off-duty conduct, several states have enacted laws to protect broader categories of lawful employee conduct that takes place while off-duty and away from the company's premises, such as making statements on social media that are critical of the employer may constitute protected whistleblowing.

## Employee Monitoring in Unionized Workplaces

Employers should also beware that the rules regarding employee monitoring in a unionized setting are significantly more regulated than in a nonunion workplace. For example, the use of hidden surveillance cameras in a unionized workplace is a mandatory subject of collective bargaining. Employers can therefore expect that unilaterally implementing the use of hidden video surveillance will result in an unfair labor practice charge.

Additionally, the NLRB very recently reversed its stance on email communication systems, overruling its 2007 decision in *Register Guard*. Previously, the NLRB determined that employees did not have a specific legal right to use their employer's email systems for non-business related purposes such as union organizing. However, on December 11, 2014, the NLRB reversed this long-standing rule. (For more information on this change, see "NLRB Developments to Watch for in 2015," p. 9.)

## Outlook for 2015

While it is likely that employers will continue to enjoy relatively broad discretion in monitoring employee behavior, companies should keep a close watch on developing state and federal laws, particularly in light of the increasing amount of legislation being passed to protect against discrimination based on lawful activities that take place away from the employer's premise. Although employee monitoring can be highly effective, and at times necessary, companies should continually audit their methods of surveillance to ensure compliance with state and federal law and to stay out of hot water.

## Immigration Update for 2014: A Year of Band-Aid Fixes



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Given the ever-growing population of undocumented immigrants seeking to work in the United States today, it is essential for employers to remain abreast of key immigration issues. This article provides an overview of immigration developments in the past year and their potential effects on U.S. employers.

In 2014, much was said, but little was actually done to reform the U.S. immigration system. Republicans and Democrats continued their deadlock in the House and Senate. Although the press had predicted that the Republicans would pass a comprehensive immigration reform bill this year before the November 2014 elections to gain the Latino vote, none was passed and the Republicans gained control of both the House and Senate. President Obama waited until after the elections to act, and on November 20 announced a series of executive actions to reform the immigration system. While these initiatives have not yet been implemented, over the next few months U.S. Citizenship and Immigration Services (USCIS) will issue detailed explanations, instructions, regulations and forms as necessary. USCIS hopes to implement these executive actions by spring of 2015.

President Obama's legal authority to achieve immigration reform through executive action has been questioned by the public and the press. On December 3, 17 states sued the U.S. government in a Texas federal court over President Obama's executive order on immigration. The states — Texas, Alabama, Georgia, Idaho, Indiana, Kansas, Louisiana, Montana, Nebraska, North Carolina, South Carolina, South Dakota, Utah, West Virginia, Wisconsin, Mississippi and Maine — claim the president's order is an unconstitutional exercise of power and seek to prevent the government from allowing millions of undocumented immigrants to stay in the United States. While President Obama and other White House officials have expressed confidence in their legal authority for releasing the new measures, the states' lawsuit argues that the president failed to comply with requirements that the federal government must follow in issuing new rules and violated the Administrative Procedure Act. The states

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<sup>1</sup> The author wishes to thank Jenna Baranko for assisting with this article.

further allege that certain immigration policies enacted by the federal government have had dire financial consequences because they created waves of undocumented immigrants crossing the U.S. border. The states contend that these undocumented immigrants are motivated by a belief that this administration will not deport them, and that they impose enormous law enforcement and other costs upon the states.

However, there is historical precedent that supports a president's discretion to act unilaterally on immigration matters. For example, the "Family Fairness" policy implemented by Presidents Ronald Reagan and George Bush, Sr. gave unauthorized immigrants a path to legalization if they had been "continuously" present in the United States since January 1, 1982. Later, this policy was extended to spouses and children under 18 of immigrants who were legalizing, provided they met certain criteria, in an effort to prevent the separation of families. It is estimated that Family Fairness protected nearly 1.5 million family members from deportation at the time it was issued. Following Presidents Reagan and Bush's actions on immigration, Congress passed the Immigration Act of 1990 that included the Family Fairness provisions, calling it the "Family Unity" provisions, which are still in place today. Notably, when President Bush signed the act into law, he also signed a statement preserving the "authority of the executive branch to exercise prosecutorial discretion in suitable immigration cases."

In addition to Family Fairness, other presidential actions to promote family unity included the suspended deportations of families of visa-holders under President Carter, parole of foreign-born orphans under Presidents Eisenhower and Obama, deferred action to widows of U.S. citizens and their children under President Obama, and parole-in-place to families of military members under President Obama. Presidents Nixon, Kennedy and Johnson granted parole to Cuban asylum seekers fleeing Castro, and President Clinton gave deferred action to battered immigrants under the Violence Against Women Act (VAWA).

***DHS will take a number of administrative actions to better enable U.S. businesses to hire and retain highly skilled foreign-born workers and strengthen and expand opportunities for students to gain on-the-job training.***

President Obama's recent immigration orders have gone beyond family unity, however, and attempted to address other areas of concern, such as enforcement, employment and the economy. The following is a brief summary of the president's executive actions and what they could mean for employers:

**Support High-Skilled Business and Workers:** DHS will take a number of administrative actions to better enable U.S. businesses to hire and retain highly skilled foreign-born workers and strengthen and expand opportunities for students to gain on-the-job training. For example, because the immigration system suffers from extremely long waits for green cards, it will amend current regulations and make other administrative changes to provide needed flexibility to workers with approved employment-based green card petitions.

**Revise Removal Priorities and End Secure Communities; Replace it with a New Priority Enforcement Program:** DHS will implement a new department-wide enforcement and removal policy that places top priority on national security threats, convicted felons, gang members, and illegal entrants apprehended at the border. Further, DHS will end the Secure Communities program, and replace it with the Priority Enforcement Program (PEP) that will closely and clearly reflect DHS's new top enforcement priorities. The program will continue to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies and will identify to law enforcement agencies the specific criteria for which it will seek an individual in their custody. These changes would reduce the likelihood that undocumented, but otherwise law-abiding, workers will be removed from the country anytime soon.

**Expand Deferred Action for Childhood Arrivals (DACA) Program:** DHS will expand eligibility for DACA to encompass a broader class of children. DACA eligibility was limited to those who were under 31 years of age on June 15, 2012, who entered the United States before June 15, 2007, and who were under 16 years old when they entered. DACA eligibility will be expanded to cover all undocumented immigrants who entered the United States under the age of 16, and not just those born after June 15, 1981. The date of entry will be adjusted from June 15, 2007 to January 1, 2010. The relief (including work authorization) will now last for three years rather than two. This change would add some certainty to the employment prospects of a large population of young adults who entered the United States when they were children.

**Extend Deferred Action to Parents of U.S. Citizens and Lawful Permanent Residents:** DHS will extend eligibility for

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deferred action to individuals who (i) are not removal priorities under the new policy, (ii) have been in this country at least five years, (iii) have children who on the date of this announcement are U.S. citizens or lawful permanent residents, and (iv) present no other factors that would make a grant of deferred action inappropriate. These individuals will be assessed for eligibility for deferred action on a case-by-case basis, and then be permitted to apply for work authorization, provided they pay a fee. Each individual will undergo a thorough background check of all relevant national security and criminal databases, including DHS and FBI databases. This change would expand the population of individuals authorized to work in this country.

**Expand Provisional Waivers to Spouses and Children of Lawful Permanent Residents:** The provisional waiver program DHS announced in January 2013 for undocumented spouses and children of U.S. citizens will be expanded to include the spouses and children of lawful permanent residents, as well as the adult children of U.S. citizens and lawful permanent residents. At the same time, DHS will further clarify the “extreme hardship” standard that must be met to obtain the waiver. This change would further expand the population of individuals authorized to work in the United States.

**Revise Parole Rules:** DHS will begin rulemaking to identify the conditions under which talented entrepreneurs should be paroled into the United States, on the ground that their entry would yield a significant public economic benefit. DHS will also support the military and its recruitment efforts by working with the Department of Defense to address the availability of parole-in-place and deferred action to spouses, parents and children of U.S. citizens or lawful permanent residents who seek to enlist in the U.S. Armed Forces. DHS will also issue guidance to clarify that when anyone is given “advance parole” to leave the country — including those who obtain deferred action — they will not be considered to have departed. Undocumented aliens generally trigger a 3- or 10-year bar to returning to the United States when they depart. This change would help ensure that some of the country’s most talented foreign-born minds remain available to contribute to the U.S. workforce.

**Strengthen Border Security:** DHS will implement a Southern Border and Approaches Campaign Strategy to fundamentally alter the way in which it will marshal resources to the border. A stronger border would reduce growth rate for the population of undocumented workers.

**Personnel Reform for ICE Officers:** DHS will bring ICE agents’ and officers’ pay in line with other law enforcement personnel. While this change is unlikely to have a direct effect on employers, better-paid enforcement personnel would likely increase their job satisfaction, which in turn could increase efficiency of enforcement action. Such changes would have a

trickle-down effect on employers.

**Promote the Naturalization Process:** To promote access to U.S. citizenship, DHS will permit the use of credit cards as a payment option for the naturalization fee, and expand citizenship public awareness. DHS will also explore the feasibility of expanding fee waiver options. Again, this change would likely have a trickle-down effect on employers.

The recent actions by President Obama are an obvious attempt by the administration to address the growing concern over the nation’s broken immigration system. It is debatable whether these measures will provide meaningful solutions or just Band-Aid fixes over certain pockets of the wider problem, and at least one federal district court already has deemed the president’s actions unconstitutional. Further, the president did not address concerns of U.S. companies to raise the H-1B quota, among other immigration actions to support U.S. business. President Obama responded that he did not have the authority to increase the H-1B quota. As the year comes to an end, the Republicans have announced that they are waiting until January 2015, when they will gain control of the House and Senate, to enact their own immigration reform legislation. Thus, employers must remain on the lookout for more immigration changes in the coming year.

## What Employers Must Know About I-9 Employment Eligibility Verification in the Face of an Ever-Burgeoning Remote Workforce



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With the existing stringent rules regarding the proper and timely completion of the I-9 form, many employers still find themselves wrestling with the issue of what to do with employees who are hired and work remotely. Let’s face it, allowing employees to work remotely has become extremely popular and will only continue to grow in popularity as businesses become more tech-savvy and widespread in their outreach. Until recently, the United States Citizenship and Immigration Services (USCIS) provided very little to no guidance on how to handle these remote hires. However, USCIS has decided to address this issue head-on and has given employers direction on how to properly handle these remote hires while remaining compliant with their I-9 obligations.



According to USCIS, employers can designate an authorized representative to complete the I-9 forms with their remote hires. The authorized representative can be a personnel officer, a foreman, an agent of the employer, or even a notary public. When using a notary public for purposes of the I-9 form and its completion, the notary public is viewed as an authorized representative of the employer, not as a notary. Therefore, the notary would complete the I-9 form with the employee, as would any agent of the employer, and should not provide any notary insignia on the form.

While the authorized representative does not need to have any written agreement regarding the ability to complete the I-9 form on behalf of the employer, it would be prudent to have some memorandum indicating the person has been designated as such. This will prove to be helpful if the employer is ever faced with a government audit where this kind of arrangement for remote hires has been made. It is also important to remember that the authorized representative is still required to comply with the rules regarding proper completion of the form, which includes a physical examination of the employee's employment eligibility documentation while the employee is physically present. Webcam review of the documentation is still not permitted. Employers should keep in mind that the employer is liable for any violations committed in connection with the I-9 form, even when the form is completed on behalf of the employer by an authorized representative. Therefore, employers are responsible for ensuring that any authorized representative is properly trained and well-versed on the proper completion of the I-9 form.

Another form I-9 issue employers are increasingly facing has to do with determining their level of I-9 liability when dealing with independent contractors. USCIS informs employers that they are not responsible for completing I-9 forms for the employees of the independent contractors with whom they may have contracts. The employer is only responsible for completing I-9 forms for their own employees. However, there may be liability if an employer works with an independent contractor despite knowing that the independent contractor employs individuals not authorized to work in the United States. The penalties for this actual or constructive knowledge have not been spelled out, but it does appear that USCIS would impute some form of liability on the employer as a result of having this knowledge. Therefore, it is important that employers using independent contractors ask the proper questions regarding their form I-9 process to ensure that the independent contractor is following all form I-9 requirements for the employees who will be working on a project or particular job.

## Why Do California Employees Think They Are So Special? Because California Employment Laws Make Them Special!



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Ask any employment lawyer, or any business that employs even one employee in California, and they will have horror story after horror story of missteps involving the landmine that is known as California's employment laws. Love it or hate it, the Internet is here to stay and California employees are particularly empowered by their access to "the law" and the "special laws" in the Golden State. It is often said that "a little bit of information can be a very dangerous thing" and the adage rings painfully true when employees know only a little information about a particular employment issue, including those outlined below.

The following is just a sampling of the very special employment laws imposed by the state of California, which are set forth as general propositions. As with any laws, however, exceptions, caveats and case law interpretations of these general propositions frequently demand a case-by-case analysis of a given issue. **Employees are entitled to reimbursement** for business use of personal items if necessary to perform the duties of their job. (Cal. Labor Code § 2802) **Big Take Away:** Employers should be reimbursing employees for business use of their personal electronic devices (e.g., cell phone usage for business), and know that employees are entitled to attorneys' fees incurred in their attempts to enforce their rights under this law.

**If an employee earns \$150,000 per year, one hour of unpaid vacation could cost you \$17,307.60 in waiting time penalties!**

**Employers are required to produce their employees' personnel records for inspection and provide a copy** within 30 days of a written request. (Cal. Labor Code § 1198.5) **Take Away:** This applies to *current* and *former* employees and more recent changes to this code not only impose a 30-day deadline, but now require that employers must provide a **copy** of the personnel records in addition to allowing inspection of them.

**Employees get up to 30 days of pay as an employer penalty** if they are not paid for all wages, which includes accrued vacation time, immediately upon termination by the employer. (Cal. Labor Code § 203) **Big Take Away:** For example, if you

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owe a single day of vacation to a highly paid employee and you fail to pay it upon termination or during the 30 days thereafter, you would owe almost one and one-half months of salary to the employee as a penalty for not immediately paying the wages that were due. If an employee earns \$150,000 per year, one hour of unpaid vacation could cost you \$17,307.60 in waiting time penalties! ( $\$150,000/\text{year} = \text{daily rate of } \$576.92; \$576.92 \times 30 \text{ days} = \$17,307.60$ )

**Employers must provide employees or applicants with a copy of each document they sign** that relates to obtaining or holding employment – upon request. (Cal. Labor Code § 432)

**Take Away:** Employers should be mindful that requests for documents can take various forms (e.g., email requests to a supervisor), and prompt response is required.

**Employees are entitled to DAILY and weekly overtime pay** if they do not qualify under California's exemptions from overtime laws. (Cal. Labor Code §§ 510, 515 et al.) **Big Take Away:** The standard daily overtime calculation is one and one-half times one's regular rate of pay for any work performed beyond eight hours and up to and including 12 hours in a single workday, and double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday. There is also premium pay for work performed on the seventh consecutive workday in a workweek, which is one and one-half times the regular rate of pay for the first eight hours and double time for all hours worked in excess of eight. For hours worked in excess of 40 hours in a workweek, the standard weekly overtime rate is one and one-half times the employee's regular rate of pay.

**Employers must provide nonexempt employees with at least a 30-minute meal period** if they work more than six hours in a day, and may have to provide a second meal period (Cal. Labor Code § 512), as well as **10-minute rest periods** for every four hours worked or major fraction thereof (Cal. Labor Code § 516, Industrial Welfare Commission Wage Orders, Sec. 12), otherwise penalties apply. **Big Take Away:** A conservative compliance plan for the average eight hours per day worker is to schedule and enforce approximately four hours of work, with a 10-minute rest period after two hours, then a one-hour meal period, and four additional hours of work, with a 10-minute rest period after two hours. If the employee has to work overtime, do not have the overtime exceed two additional hours, otherwise a second meal period will be triggered. Waiver of the second meal period can be achieved only if the total hours worked in the day do not exceed 12 hours, both the employee and employer agree, and the first meal period of that day was taken by the employee.

**Employees are entitled to suitable seating** during work where the nature of the work reasonably permits (Cal. Labor Code § 516, IWC Wage Orders, Sec. 14) **Take Away:** California employers in industries that traditionally do not have seats,

chairs, benches or rest areas as part of the immediate work area, for example, those in the retail industry, should consider consulting with counsel and determining if their work areas that traditionally have not had seats can be updated to include seats and still allow for the work to be performed.

**Employers are required to put commission agreements in writing, agreements must contain the method by which the commissions are computed and paid,** the employee must get a signed copy and the employer must get a written receipt confirming the employee received the copy. (Cal. Labor Code § 2751) **Big Take Away:** California employers would be wise to self-audit their files and determine if their agreements with commission paid employees are in compliance with this rather new law. If not, prepare new, compliant agreements and secure the required written confirmation of receipt of a copy of the agreement from their commission-paid employees.

**Employers must give written notice to employees, upon hiring and when changes are made, of the employee's hourly rate,** all rates of pay and certain employer-related information. (Cal. Labor Code § 2810.5) **Take Away:** This is another area where a self-audit may be wise. The California Division of Labor Standards Enforcement (i.e., Wage Commissioner) has prepared a "form" "Notice to Employee" to help employers comply with this requirement. Assuming the at-will employment relationship exists, we recommend that you include a reminder statement as part of this form that nothing in the "Notice To Employee" changes the at-will employment relationship between the employee and the employer.



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