

TEN HR ISSUES FROM 2013¹
Employment Seminar

By Ater Wynne LLP — December 12, 2013

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¹ This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings, and legal publications and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

1. 2013 OREGON LEGISLATIVE UPDATE FOR EMPLOYERS (Shemia Fagan)

A. Veterans Day Off for Veterans

- Begins Veterans Day 2013 (November 11).
- Veteran must give employer notice of intent to take leave 21 days before leave.
- It is the employer's decision whether to grant paid or unpaid leave.

Exceptions:

- "Significant economic or operations disruption or undue hardship" exception.
- If employer cannot grant leave for more than one veteran, the employer can deny them all or deny leave for the minimum necessary to avoid disruption or hardship.
- A veteran who is denied the day off due to these exceptions must be granted a different day off at the veteran's discretion.

Definitions:

Under this law, a veteran is defined as an individual who served on active duty for at least six months and received an honorable discharge, served on active duty and received a disability rating, or served on active duty in a combat zone.

B. Bereavement Leave Under OFLA

Up to two weeks' leave is allowed to grieve, attend a funeral, and take care of necessary business relating to the death of a family member.

Employee must notify employer within 60 days of hearing of family member's death, must give oral notice within 24 hours of beginning the leave, and written notice within three days of returning to work.

Bereavement leave counts toward the employee's annual OFLA entitlement, but does not count towards their FMLA entitlement.

Definitions:

"Family member" means the spouse, same-gender domestic partner, custodial parent, non-custodial parent, adoptive parent, foster parent, biological parent, parent-in-law, parent of same-gender domestic partner, grandparent or grandchild of the employee, or a person with whom the employee is or was in a relationship of in loco parentis. It also includes the biological, adopted, foster or stepchild of an employee or the child of an employee's same-sex domestic partner.

C. Discrimination Protections for Interns

Interns are now entitled to the same statutory protections against discrimination that employees receive. They can make a claim with BOLI or the federal Equal Employment Opportunity Commission or file a lawsuit just like an employee.

Nothing in the new law changes an intern's status to "employee," and interns are not subject to minimum wage and overtime laws.

Definitions:

To determine whether an individual is considered an intern, the test used is the same as that used by the U.S. Department of Labor Wage and Hour Division:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- 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;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

D. Direct Deposit Expanded

Employers can now pay employees through direct deposit without securing the employee's consent.

Employers must provide a physical paycheck only if the employee requests it.

Employers are still responsible for providing an itemized statement of deductions on paper unless the employee consents to an electronic copy.

According to BOLI, employers cannot require as a condition of employment consent to an electronic statement of deductions.

E. Employees of LLCs and Partners Gain Workers' Compensation Protection

Workers' compensation protections are extended to "partners, limited liability company members, general partners, and limited partners."

F. Restricted Access to Employees' Social Media Accounts

Employers are now prohibited from:

- Requiring an applicant or employee to provide login information or other means of accessing a social media account.
- Retaliating against an applicant or employee who refuses access.
- Requiring an employee to add the employer to their list of contacts.
- Compelling an applicant or employee to allow the employer access in the employer's presence.

Exceptions:

Where a social media account belongs to the employer or is being used on behalf of the employer.

Employers can compel employees to share content from a social media account if it was reported to the employer through other means and is “necessary for the employer to make a factual determination about the matter.”

Protections:

Employers gain important liability protections provided they follow this law.

Definitions:

The new law defines “social media account” as “an electronic medium that allows users to create, share and view user-generated content, including, but not limited to, uploading or downloading videos, still photographs, blogs, video blog.”

G. Domestic Violence Victims' Rights Poster

- The poster will explain rights under current law (*see* ORS 659.270A - 659A.285) that include a victim's right to take a leave of absence.
- Must be displayed in a conspicuous and accessible location.
- This law will not go into effect until BOLI develops the poster.

LESSON:

Some of the Oregon legislative changes to employment laws have already gone into effect. If you have not done it already, year-end is always a good time to review your employee handbook and employment procedures to make sure your policies and procedures are up to date. It is also a good time to plan your supervisor training on the new laws. Let us know if we can help.

2. ADA CLAIMS MAY INCREASE WITH THE CREATION OF NEW MENTAL DISORDERS IN DSM-5 (Kathy Feldman)

In May 2013, the American Psychiatric Association published its fifth edition of The Diagnostic and Statistical Manual of Mental Disorders, known as the DSM-5.² The DSM is used by health care professions as the authoritative guide to the diagnosis of mental disorders. This new DSM-5 expands significantly the scope of several previously-recognized disorders and creates more than 15 new diagnoses. The revision has been critiqued by many experts, including Dr. Allen Frances, the emeritus chairman of the psychiatry department at the Duke University School of Medicine, who called the DSM-5 deeply flawed and scientifically unsound.³

Some of the newly-stated, medically diagnosable disorders are:

- Binge Eating Disorder—a rapid overconsumption of food at least once a week for three months coupled with a lack of control, feelings of distress, embarrassment, and/or guilt.
- Caffeine-Withdrawal Syndrome—Symptoms are fatigue, headache, difficulty focusing, frequent urination, muscle twitching, rambling flow of thought and speech resulting from over-intake of caffeine.
- Social (pragmatic) Communication Disorder—A persistent difficulty with verbal and nonverbal communication that cannot be explained by low cognitive ability and that may cause inappropriate responses in conversation.
- Mild Neurocognitive Disorder—This goes beyond normal issues of aging and describes a level of cognitive decline that requires compensatory strategies and accommodations to help maintain independence and perform activities of daily living.

The DSM-5 has even identified a potentially new disorder—Internet Use Disorder or Internet Addiction Disorder, as well as central sleep apnea, hoarding disorder, and restless leg syndrome.

With an increased number of diagnoses, employers may see an increased demand for requests for accommodation. There is certainly the potential that employees will defend poor performance and inappropriate behavior with claims that they can't communicate effectively with co-workers, they can't remember things due to a neurocognitive disorder, or their inappropriate comment was due to their social (pragmatic) communication disorder. Such performance issues may lead to accommodation requests such as not wanting to meet with customers or attend meetings, or to have tasks modified or jobs restructured to accommodate memory loss. However, recognition of a disorder in the DSM-5 does not mean it automatically meets the definition of "disability" under the ADA.

The Americans with Disabilities Act Amendments Act (ADAAA) generally requires impairment for six months or more to qualify as a disability. Conditions included in the new DSM-5, such as caffeine withdrawal, likely would not be considered a disability as the effects are usually only temporary. Nevertheless, the DSM is widely accepted and used by physicians for diagnostic and

² Diagnostic and Statistical Manual of Mental Disorders, produced by the American Psychiatric Association (APA).

³ Psychologytoday.com.

treatment purposes. Plaintiffs' lawyers will certainly argue that poor performance and misconduct are a result of a "disorder" as opposed to ordinary characteristics of workplace issues.

LESSON:

The new DSM-5 makes it more important than ever for employers to communicate clear and consistent job expectations and to document performance issues. Employers should continue to train supervisors to recognize accommodation requests even when the word "accommodation" is not specifically used. Remind your managers to contact Human Resources for assistance in determining whether there is a reasonable accommodation available. Finally, do not assume that conditions are not disabilities—rather, assume that they might be and engage in an interactive process with your employee to determine whether a possible reasonable accommodation exists.

3. SORRY, YOU'RE TOO LATE . . . THE ENFORCEABILITY OF CONTRACTUALLY-SHORTENED STATUTES OF LIMITATIONS (Michael J. "Sam" Sandmire)

Employers are routinely looking for ways to reduce exposure to employee lawsuits, such as mandating arbitration or other internal grievance procedures and shortening the time period in which employees can bring employment related claims. This last method, shortening the time period, is particularly effective because, for example, the value of a million dollar discrimination claim drops to zero the day after the limitations period expires.

By law, nearly all legal claims are subject to a "statute of limitations," which is the period of time within which the plaintiff must file the lawsuit or it is forever barred.⁴ So, the question for employers becomes: may an employer *contractually* shorten the otherwise applicable statutory limitations periods set by the Legislature? And, if so, under what circumstances and for what types of claims?

The rationale for any statute of limitations is rooted in fairness. As time passes, evidence vanishes, witnesses disappear, and memories fade. Moreover, in the employment context, liabilities become more significant the longer the claim languishes, and delays between the adverse employment action and the employee's assertion of the claim limits the ability of the employer to take remedial action to limit damages.

Clearly, it is to the employer's advantage to limit the length of time allowed to an employee to file suit. The Oregon courts, citing to United States Supreme Court precedent, have generally upheld contractual provisions that limit the time to bring a commercial action to a period less than the statutory limitations period.⁵ The Oregon Supreme Court has not specifically decided whether and to what extent Oregon *employers* may limit the periods within which employees may file claims. In the lower courts, the federal district court in Oregon, and in courts around the

⁴ The statutory limitations periods applicable to most employment related claims range from one to six years.

⁵ *Order of United Commercial Travelers of America v. Wolfe*, 331 US 586, 608 (1947) ("[I]t is well established that, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.").

country, employees have argued against enforcement of the contractually-shortened limitations periods, contending that those provisions are “unconscionable.”

The application of a contract provision can be procedurally unconscionable, substantively unconscionable, or both. For procedural unconscionability, the employee must demonstrate that the manner in which the parties entered into the contract was unfair. “Procedural unconscionability refers to the conditions of contract formation and involves a focus on two factors: oppression and surprise.”⁶ In *Fink v. Guardsmark, LLC*, for example, the employee argued that she was required to sign the contract in a large room with many other applicants and that she was rushed and not given time to read the contract or discuss its provisions with the employer. For substantive unconscionability, the employee must demonstrate the provision is “so one-sided as to shock the conscience.”⁷ While the Oregon Supreme Court has yet to rule, thus far, challenges from employees based on unconscionability have failed in Oregon. In two recent cases, the federal district court in Oregon and the Oregon Court of Appeals each upheld shortened time limitations in employment contracts against charges of unconscionability.

In *Fink*,⁸ the U.S. District Court for the District of Oregon dismissed the lawsuit, upholding a six-month limitation on employment claims, including claims under the Oregon Family Leave Act and the (federal) Family Medical Leave Act.⁹ The employment contract required the employee to bring any claim arising from employment within six months of the date that claim arose. The employer moved to dismiss the case, contending that the employee’s claims were time-barred under the time-limiting provision in the employment contract. The employee argued that the time-limitation was unconscionable. Despite the fact that the employee was not given an opportunity to opt out of the employment contract or to negotiate its terms, the Court found that the contract was unambiguous and, therefore, the limitation period was fully enforceable.

Similarly, last year in *Hatkoff v. Providence Adventist Medical Center*,¹⁰ the Oregon Court of Appeals upheld a 90-day effective limitation period in an employment agreement. The agreement required an employee to initiate a grievance procedure “within 90 calendar days of the event giving rise to the grievance.”¹¹ It also stated that failure to initiate the grievance in a timely manner “shall result in waiver of [the employee’s] right to pursue the underlying issue in court or arbitration.”¹² The employee challenged the grievance procedure as unconscionable, arguing that the 90-day period “severely shortens all employment claim statutes of limitation to 90 days.”¹³ The Court disagreed, finding that the 90-day period was reasonable and appropriately disclosed to the employee in the employment agreement.

Courts in other jurisdictions have *not* allowed employers to contractually shorten limitations periods, at least with respect to certain types of claims. In August of this year, the Sixth Circuit Court of Appeals¹⁴ in *Boaz v. FedEx Customer Info. Services, Inc.*¹⁵ determined that a

⁶ *Hatkoff v. Providence Medical Center*, 252 Or App 210, 217 (2012).

⁷ *Fink v. Guardsmark, LLC*, 2004 US Dist LEXIS 16970 *14 (D. Or. 2004).

⁸ *Id.*

⁹ *Id.* at 9-10.

¹⁰ 252 Or App 210, 214 (2012).

¹¹ The arbitration provided an alternative deadline for submitting the grievance, which was the applicable limitations period for matters ultimately subject to arbitration.

¹² *Id.* at 215.

¹³ *Id.* at 221-22.

¹⁴ The Sixth Circuit Court of Appeals covers Kentucky, Michigan, Ohio, and Tennessee.

contractually shortened limitations period operated as an impermissible waiver of the employee's rights under the Fair Labor Standards Act (FLSA) and the Equal Pay Act (EPA). While it has long been established that employers cannot circumvent the FLSA by having employees *waive* their rights under the Act,¹⁶ until *Boaz*, courts had not determined that contractually limited statutes of limitations in employment contracts operated as a *waiver* of the underlying legal claims. The Court concluded that the same rationale applied to the employee's EPA claim which likewise could not be waived. The Ninth Circuit Court of Appeals, in which Oregon is located, has not yet ruled on the application of shorter limitations periods to federal employment claims such as those under the FLSA or EPA, and ultimately, the United States Supreme Court will have to resolve the issue.

LESSON:

There is disagreement among federal courts as to the enforceability of a contractually shortened statute of limitations in connection with claims arising under federal law. However, given the favorable treatment by the Oregon courts, and the significant benefit of having such a clause, Oregon employers should examine their employment agreements and consult with counsel to determine if they can benefit from contractual provisions which limit the time periods within which they may be sued by their employees.

4. INFORMATION TECHNOLOGY—THE NEW 800 LB. GORILLA (Dan Larsen)

As companies become more and more dependent upon technology, Information Technology (IT) staff have become some of the most important players when it comes to protecting the company's operations and confidential data. Ensuring confidentiality becomes exponentially more difficult as companies relinquish more and more oversight and control over systems and confidential data to IT departments, and allow employees to access company systems from remote locations, and use portable laptops and their own personal electronic devices. It is becoming increasingly more important to balance productivity and cost savings with appropriate controls.

How well do you understand what your IT staff is doing? What access does your IT department have to your most sensitive data? What security is in place to protect your data? What would happen to your data in the event of a disaster? And, most importantly, what internal controls are imposed upon IT staff? Although the law affords protection to confidential information and trade secrets, a rogue IT employee can do a lot of damage—and the worst part is, you might never know it if your IT member is clever enough to cover his or her tracks.

Oregon Protection for Confidential Data and Trade Secrets

Oregon protects trade secrets under the Uniform Trade Secret Act (UTSA).¹⁷ The definition of "Trade Secrets" under the UTSA is a lot broader than the Big Mac "secret sauce" or the Coca-Cola "recipe." Trade secrets may include:

¹⁵ *Boaz v. FedEx Customer Info. Servs.*, 725 F3d 603 (6th Cir. August 12, 2013).

¹⁶ See *Brooklyn Sav. Bank v. O'Neil*, 324 US 697, 706-10 (1945).

¹⁷ ORS 646.461-646.475

- Drawings
- Cost Data
- Customer Lists
- Formulae
- Patterns
- Compilations
- Programs
- Devices
- Methods
- Techniques
- Processes

However, any of these items will have trade secret status *only* if, in fact,

- (a) It is not known or readily obtainable by the public;
- (b) It has either (1) independent economic value, actual or potential, from not being generally known to the public, or (2) value to other persons who can obtain economic value from its disclosure or use (*e.g.*, anything that helps your company operate better or generate revenue, or that could be valuable to your competitor); *and*
- (c) Is the subject of reasonable efforts to maintain its secrecy (*e.g.*, labeled confidential, has limited access to designated employees after login and password, is the subject of employee non-disclosure agreements, is not disseminated outside of office).

Similarly, confidential information that does not qualify as a trade secret is also afforded protection under the law, but only when the owner has taken reasonable steps to protect it from disclosure.

Once a trade secret or confidential information is disclosed publicly, it can never become a secret again—you can't “un-ring” the bell. However, even before actual disclosure, sloppy confidentiality practices may result in loss of protection. In other words, if the information is not treated by the company as confidential or as a trade secret, the law will not protect it.

Protecting the Company From Internal IT Risks

Last year, we discussed the confidentiality risks of allowing employees to use their own electronic devices for work. But the problem does not end there. A potentially-greater problem is the unfettered access that IT is typically afforded to all company systems and data with no established rules governing IT's access to and use of the company systems and data. There are many types of information to which IT does not need, and probably should not have access.

For example, some companies may wish to restrict access to their trade secrets and other confidential business information. While IT probably needs access to the systems in which trade secret and confidential information is stored, IT may not need access to the actual data.

Another type of data to which you may want to restrict access is employee health information, which employers are required to treat as confidential under HIPAA, FMLA, ADA, and

comparable state laws. IT should also be restricted from access to confidential Human Resource data, and communications with counsel that would otherwise be subject to attorney client and/or work product privileges.

All Companies should be addressing the role of IT and its access to company data and operational information. Consider the following:

- (1) Do not relegate to a single individual control and/or possession of passwords and access to company data and the website;
- (2) Limit IT staff's access to data and systems consistent with their need to know;
- (3) Understand what resources IT is using to safeguard company data—do not rely upon use of the Cloud for storage of trade secrets or things that a competitor may use against the company;
- (4) Develop specific policies for IT personnel governing access to data, monitoring, confidentiality, licensing, and security, and require all IT staff to sign an IT “code of conduct”;
- (5) Monitor or restrict transfer of company data (*e.g.*, to personal or home computers and to third parties);
- (6) Monitor the use and contents of laptop/personal devices, and develop controls to deactivate or wipe devices that are lost or stolen;
- (7) Conduct annual or more frequent audits of IT using an independent provider (among other things, to assess whether your IT staff is competent); and
- (8) Terminate access quickly if you identify risks with any employee in IT.

You may wish to consider the following additional steps to take with all employees to enhance your ability to protect company trade secrets and confidential data:

- (1) Get to know your employees and be wary of anyone who is “disgruntled”;
- (2) Maintain written policies that notify anyone who has authorized access to a trade secret to (i) its trade secret status, (ii) its value to the company due to the secrecy about its contents, (iii) procedures required to maintain its secrecy and proper use, and (iv) consequences for breach of that secrecy;
- (3) Limit or control access to trade secrets—use logins and passwords;
- (4) Label trade secret information where possible (at least use computer screens to notify user that restricted database contains confidential information);
- (5) Require all individuals who will have access to trade secrets to first sign a Confidentiality or Non-Disclosure Agreement;

- (6) Monitor how company confidential information and trade secrets are viewed, stored, downloaded, and transmitted (do not permit employees to email company information to their home computers or third parties); and
- (7) Hold “exit interviews” to remind departing employees of their obligation not to disclose trade secrets. Have employees sign an acknowledgement that reaffirms their obligations.

LESSON:

Your IT staff likely has access to all company systems and data and, therefore, wields substantial control over your company operations, its confidential information, and trade secrets. While you have to trust your IT staff, it is important to maintain controls by engaging a third party to audit and/or by monitoring internally to see how your company’s information is being stored, accessed, and transmitted. If it turns out your trust was misplaced, it is important to have a backup plan. The worst case scenario would be for your IT officer, or anyone who has substantial access to confidential information or trade secrets, to become disgruntled and sabotage your systems or data.

5. PORTLAND SICK LEAVE ORDINANCE (Stacey Mark)

This year the Portland City Council enacted an Ordinance¹⁸ requiring employers to provide sick leave (in most cases paid) to certain employees who work within the Portland City limits. On November 1, 2013, the City published administrative rules.¹⁹ The Ordinance goes into effect on January 1, 2014.

Definitions

1. “Sick Time” means time that has been accrued and may be used by an employee under the Ordinance. Paid Sick Time is calculated at the same hourly rate and with the same benefits, including health care benefits, as the employee normally earns during hours worked.²⁰
2. “Sick Leave” means time off from work using Sick Time.²¹ Sick Time may be paid or unpaid.
3. “Year” means any consecutive 12-month period of time that is normally used by an employer for calculating wages and benefits, including a calendar year, tax year, fiscal year, contract year, or the year running from an employee’s anniversary date of employment.²²

¹⁸ See Code of the City of Portland (CCP), Title 9, Chapter 9.01 at <http://www.portlandonline.com/fritz/index.cfm?c=55242&a=470060>.

¹⁹ See Administrative Rules for the City of Portland Sick Leave Ordinance at <http://www.portlandonline.com/fritz/index.cfm?c=55242&a=469250>.

²⁰ CCP § 9.01.020(I).

²¹ CCP § 9.01.020(J).

²² CCP § 9.01.020(K).

4. “Family Member” means the employee’s spouse or registered domestic partner; biological, adoptive, or foster parent; child; grandparent; grandchild; parent-in-law; or a person with whom the employee was or is in a relationship of in loco parentis.²³
5. “Health Care Provider” means a physician, podiatrist, dentist, psychologist, optometrist, naturopath, registered nurse, nurse practitioner, direct entry midwife, licensed practical nurse, social worker, or chiropractic physician who is primarily responsible for providing health care to an employee or a Family Member of an employee and who is performing within the scope of the person’s professional license or certificate.²⁴

Who Is Covered?

1. All employers are covered by the Ordinance except:
 - The U.S. government
 - The State of Oregon and its political subdivisions
 - Any county, city, district, authority, public corporation or public entity other than the City of Portland (City)²⁵

Employers with five or fewer employees are required to provide unpaid leave.²⁶ Employers with six or more employees must provide paid leave.²⁷

2. Anyone who provides personal services to an employer is covered by the Ordinance except:
 - Copartners of the employer
 - Independent contractors
 - Certain participants in work training and work study programs
 - Certain railroad workers²⁸

What Is Eligible?

1. Employees who have worked for an employer within the geographic boundaries of the City for at least 240 hours in a year are eligible to use Sick Time under the Ordinance. Once an employee becomes eligible to use Sick Time, the employee remains eligible regardless of the number of hours worked for that employer in subsequent years.²⁹
2. Eligible employees are entitled to use Sick Time beginning the 90th calendar day after employment begins, provided they have worked at least 240 hours within the Portland

²³ CCP § 9.01.020(F); SL § 1.02(9).

²⁴ SL § 1.02(10).

²⁵ CCP § 9.01.020(E).

²⁶ CCP § 9.01.020(B).

²⁷ CCP § 9.01.020(A).

²⁸ CCP § 9.01.020(C) and (D).

²⁹ CCP § 9.01.040(A).

City limits. Employees are not entitled to use Sick Time for shifts on which they are not scheduled to work in the City limits.³⁰

3. Eligible employees who have a break in service of six (6) months or less do not have to reestablish their eligibility and must be credited with the number of unused Sick Time hours they had accrued at the time of separation. The accrued Sick Time must be available for use immediately upon rehire.³¹

Accruing Sick Time

1. Eligible employees accrue one hour of Sick Time for every 30 hours of work performed within Portland City limits, up to a maximum of forty (40) hours in a calendar year.³²
2. Exempt executive, administrative, and professional employees are presumed to work 40 hours per week for the purpose of accruing Sick Time unless their regular work week is less than forty (40) hours, in which case they accrue Sick Time based upon their regular work week.³³
3. Employers may credit employees with the full annual allotment of Sick Time in advance of accrual, provided the frontloading otherwise meets the requirements of the Ordinance for accrual, use, and carryover.³⁴
4. Employees start to accrue Sick Time immediately upon hire.³⁵
5. Employees who travel to the City and make a stop as a purpose of conducting their work accrue benefits only for the hours they are paid to work within the City.³⁶

Using Sick Time

1. Employees are entitled to use Sick Time for any of the following qualifying absences:
 - For the diagnosis, care, or treatment of a mental or physical illness, injury, or health condition (including preventive medical care, pregnancy, childbirth, and post-partum care) of the employee or the employee's family member;³⁷
 - For qualifying leave under ORS 659A.272 (for Domestic Violence, Harassment (criminal), Sexual Assault, or Stalking);³⁸

³⁰ CCP § 9.01.040(D).

³¹ CCP § 9.01.030(J).

³² CCP § 9.01.030(A) and (B).

³³ CCP § 9.01.030(D).

³⁴ Administrative Rules for City of Portland Earned Sick Leave Ordinance (SL)§ 3.03. Employers that provide frontloaded Sick Time are not required to allow an employee to carry over accrued hours. SL § 3.05(1).

³⁵ CCP § 9.01.030(L).

³⁶ CCP § 9.01.030(E).

³⁷ CCP § 9.01.040(B)(1).

³⁸ CCP § 9.01.040(B)(2).

- For any absence from work due to:
 - The closure of the employer, the closure of the school or day care attended by the employee's child, or by order of a public official due to a public health emergency;
 - To care for a family member whose presence in the community would jeopardize the health of others, as determined by a public health authority or health care provider; or
 - Any law or regulation under which the employer is required to exclude the employee from the workplace for health reasons.³⁹
2. Employees must use accrued Sick Time on the first and each subsequent day of qualifying absence.⁴⁰
 3. An employee may not use Sick Time if the employee is not scheduled to work in the City on the shift for which leave is requested.⁴¹
 4. If the employer allows shift trading and an appropriate shift is available, the employee must be permitted to trade shifts instead of using Sick Time.⁴² However, an employer may not require an employee to work an alternate shift to make up for the use of Sick Time.⁴³
 5. An employer may not require an employee to search for or find a replacement worker as a condition of the Employee's use of Sick Time.⁴⁴
 6. Employees must use Sick Time in increments of at least one hour, unless the employer allows a lesser amount.⁴⁵
 7. Where it is physically impossible for an employee to commence or end work part way through a shift, the entire time an employee is forced to be absent may be counted against an employee's Sick Time.⁴⁶
 8. A maximum of forty (40) hours of Sick Time may be used per calendar year, regardless of how many hours of accrued and unused Sick Time are carried over from the previous year.⁴⁷

³⁹ CCP § 9.01.040(B)(3).

⁴⁰ CCP § 9.01.040(E).

⁴¹ CCP § 9.01.040(D).

⁴² CCP § 9.01.040(G).

⁴³ CCP § 9.01.040(F)(2).

⁴⁴ CCP § 9.01.040(F)(1).

⁴⁵ CCP § 9.01.040(C)(1).

⁴⁶ CCP § 9.01.040(C)(1).

⁴⁷ CCP § 9.01.040(C)(3); SL § 3.05(2).

Notice Requirements

Employer Notice:

1. Employers must provide and post a notice of employees' rights under the Ordinance.⁴⁸
2. Employers must establish a written policy or standard (*e.g.*, a call-in procedure) for an employee to notify the employer of the employee's use of Sick Time.⁴⁹
3. Employers must provide employees with written notification of their available Sick Time no less frequently than each quarter.⁵⁰

Employee Notice:

1. If the reason for Sick Time is foreseeable, the employee must provide notice using the employer's policy or standard as soon as practicable, and must make a reasonable effort to schedule the Sick Leave in a manner that does not unduly disrupt the employer's operations, and advise the employer of any change to the expected duration of the Sick Leave as soon as practicable.⁵¹
2. If the reason for leave is not foreseeable, the employee must notify the employer of the need to use Sick Time using the employer's established policy or standard before the start of the employee's scheduled work shift, or as soon as practicable.⁵²
3. An Employer may deny Sick Time to an employee who fails to provide the required notice or if the employee fails to make a reasonable effort to schedule leave in a manner that does not unduly disrupt the operations of the employer.⁵³

Certification of Absences

1. An employee who is absent due to illness for three (3) or more consecutive work days may be required to provide documentation that the absence was for a qualifying reason (for example, a signed statement from the employee's health care provider indicating the need for Sick Time, certification acceptable for the purpose of Domestic Violence Leave, or a signed personal statement certifying that the employee is using Sick Time for a qualifying absence).⁵⁴

⁴⁸ CCP § 9.01.060(A). A copy of the required notice is available at <http://www.portlandonline.com/fritz/index.cfm?c=55242&a=472271>.

⁴⁹ CCP § 9.01.040(H). Employers may require compliance with the employer's written policy or standard, which may include notice by calling a designated phone number, applying a uniform call-in procedure, or by using another reasonable and accessible means of communication. SL § 7.01(2).

⁵⁰ SL § 9.04.

⁵¹ CCP § 9.01.040(J); SL § 7.04.

⁵² CCP § 9.01.040(I).

⁵³ SL § 7.04.

⁵⁴ CCP § 9.01.040(K). "Consecutive work days" means consecutive full calendar days, not including scheduled days off. SL § 8.01(2).

2. Employers suspecting Sick Leave abuse, including patterns of abuse (*e.g.*, repeated use of unscheduled Sick Time on or adjacent to weekends, holidays, or vacation, payday, or when mandatory shifts are scheduled) may require documentation from a licensed health care provider verifying the employee's need for leave at the employee's expense.⁵⁵
3. Employers must pay the cost of any verification by a health care provider that is not covered by insurance or another benefit plan.⁵⁶

Payment for Sick Time

1. Employees entitled to paid Sick Time must be compensated at the same base rate of pay the employee would have earned during the time the paid leave is taken. Employees are not entitled to compensation for lost tips or commissions. Compensation is required only for the hours that the employee was scheduled to work.⁵⁷
2. Exempt employees are paid by dividing the annual salary by 52 to get the weekly salary and dividing the weekly salary by the number of hours in the employee's normal work week.⁵⁸
3. Sick Time must be paid no later than the payday for the next regular payroll period after the Sick Time was used by the employee. However, if the employer asked for, but did not receive, documentation of the employee's use of Sick Time, the employer is not obligated to pay Sick Time until the employee has provided documentation verifying that the absence was for a qualifying reason.⁵⁹

Employers are not required to compensate employees for unused accrued Sick Time upon the termination of employment.⁶⁰

Retaliation Prohibited

Employers may not count absences that qualify for Sick Time against the employee for disciplinary purposes, or otherwise discriminate or retaliate against an employee for using Sick Time.⁶¹

⁵⁵ CCP § 9.01.040(M); *but see*, ORS 659A.306 (employers must pay the cost of any required medical verification).

⁵⁶ CCP § 9.01.040(L).

⁵⁷ SL § 6.04(1).

⁵⁸ SL § 6.04(2). Note, however, reducing the salary of an exempt employee for an absence due to illness may result in the loss of the applicable exemption under the Fair Labor Standards Act and state law unless the absence also qualifies for FMLA. *See* OAR 839-009-0240(12)(b).

⁵⁹ SL § 6.04(2)(d), *but see footnote 42*, OAR 839-009-0240(12)(b)..

⁶⁰ CCP § 9.01.040(N).

⁶¹ CCP § 9.01.050(D) (employers may not count absences for disciplinary purposes); CCP § 9.01.050(A) (it is unlawful for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under the Ordinance); CCP § 9.01.050(B) (employers are prohibited from taking retaliatory action or discriminating against an employee for exercising rights protected under the Ordinance).

Recordkeeping

Employers must retain records documenting hours worked, and Sick Time accrued and used by employees, for a period of at least two years.⁶² These records must include:

1. The name, address, and occupation of each employee;
2. The amount of Sick Time or PTO accrued and used by each employee; and
 - a. For hourly employees, the hours actually worked in the City during each pay period by each employee; or
 - b. For salaried employees who work in the City on a regular basis, the hours of a normal work week for each employee; or
 - c. For salaried employees who work in the City on an occasional basis, the hours actually worked in the City during each pay period by each employee; or
 - d. For employers that choose to front-load their employees' Sick Time or PTO, the amount of Sick Time or PTO front-loaded and the dates on which the Sick Time or PTO is available to the employee to use.⁶³

LESSON:

The deadline for complying with the Ordinance is fast approaching. Employers' existing sick leave policies may not be sufficient to comply with the specific requirements of Portland Sick Leave Ordinance, under which absences may, but will not always run concurrently with OFLA, FMLA and/or Domestic Violence Leave. The Ordinance, therefore, necessitates another layer of analysis every time an employee is absent from work. To ensure compliance, covered employers will want to:

- Get and post the required notice.
- Develop a written notification procedure.
- Review and update attendance, PTO, and sick leave policies to ensure they all comply with the Ordinance.
- Train supervisors (at a minimum) on the retaliation and discrimination provisions of the Ordinance.
- Establish recordkeeping procedures for tracking accrual and use of Sick Time.
- Establish a quarterly notification procedure for advising employees of their Sick Time balance.

⁶² CCP § 9.010.070.

⁶³ SL § 10.01(2).

6. UPDATE ON SAME-SEX MARRIAGE) (Stacey Mark)

One of the most anticipated court rulings this year was the U.S. Supreme Court's decision in *U.S. v. Windsor*,⁶⁴ regarding same-sex marriage. The Court struck down as unconstitutional Section 3 of the federal Defense of Marriage Act (DOMA), which defined the terms "marriage" and "spouse"⁶⁵ so as to bar federal recognition of same-sex marriage for the purpose of all federal laws.⁶⁶ As a result of the *Windsor* decision, a valid same-sex marriage must be recognized for the purpose of applying all federal laws. However, states remain free to prohibit same-sex marriage and other same-sex unions, and to refuse to recognize such same-sex relationships for the purpose of state laws under Section 2 of DOMA, which was not at issue in *Windsor*.

Despite the continuing validity of Section 2, there have been cases limiting its effect based on the application specific state laws that infringed on an individual's right to equal protection. For example, a married status designation on a death certificate issued under state law may be necessary, among other things, to receive life insurance payouts, claim social security survivor benefits, administer wills, and deed automobiles, real estate, and other property. If the state issuing the death certificate does not recognize a valid same-sex marriage performed in another jurisdiction, the surviving spouse might be unable to claim social security benefits or insurance, visit a dying spouse in the hospital, or be buried according to their wishes. Recognizing this disparity, a federal district court in Ohio found that Ohio's statute prohibiting the recognition of out-of-state same-sex marriages was a denial of equal protection because Ohio recognizes other out-of-state marriages in which the couple could not have married in Ohio (*e.g.*, where the couple were first cousins or one spouse was underage).⁶⁷

⁶⁴ *U.S. v. Windsor*, 570 US ___, 133 S Ct 786 (2012); http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf. By a 5 to 4 majority, the Supreme Court concluded that the injury and indignity imposed by Section 3 of DOMA violates basic due process and equal protection principles applicable to the Federal Government under the Fifth Amendment. *Id.*, *Slip Op.at p. 20-21* ("The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States" *** "[A] bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group.").

⁶⁵ Section 3 provides:

"In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 USC § 7.

⁶⁶ The definitions in Section 3 controlled over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law. *Windsor*, *slip op.at p. 2*.

⁶⁷ *Obergefell v. Wymyslo*, 2013 US Dist LEXIS 102077 (SD Ohio 2013). Obergefell was in hospice care for ALS and went to Maryland by plane, where he and his same-sex partner were married on the tarmac and then flew back to Ohio. The couple sought a ruling requiring that the death certificate reflect Obergefell's married status to insure that he and his spouse would be buried side by side in a family plot, which would be permitted only if the couple had been married. The court issued a temporary restraining order (TRO) granting the request. While the case was pending, Obergefell died, and a surviving spouse of another same-sex marriage joined as plaintiff, and obtained a similar TRO. A funeral director responsible for originating the death certificates with the Ohio Department of Health also joined as a plaintiff, anticipating the need to provide death certificates for other deceased same sex spouses in the future. The state moved to dismiss the case based on the funeral director's lack of standing and the absence of live controversy, as both of the surviving plaintiffs had obtained the relief they sought. The court denied the motion, based, among other things, on the funeral's director's valid fear of criminal prosecution by the state for knowingly making a false statement under oath regarding the married status of decedents. The court noted that the case should be ripe for full resolution in late December 2013.

Similarly, a New Jersey state court ruled that the state's prohibition on same-sex marriage was a denial of equal protection under the State Constitution because it denied individuals in same-sex unions, which were legal under New Jersey law, equal access to benefits available only to married persons under federal law.⁶⁸

As of December 2013, 16 states and the District of Columbia allow same-sex marriage.⁶⁹ Thirty states have constitutional amendments banning (or authorizing the legislature to ban) legal recognition of same-sex marriage.⁷⁰

The *Windsor* ruling impacts federal employment laws, employment taxes, and employment benefits. Theoretically, if same-sex couples are treated the same as opposite-sex couples under federal law, then employees in same-sex marriages are subject to employment taxes and eligible for employment benefits on an equal footing with employees in opposite-sex marriages. While that sounds simple enough, many questions remain unanswered, such as the retroactivity of the *Windsor* ruling, and which state's law applies for the purpose of determining whether the marriage is valid (*e.g.*, the state of celebration, the state of residence, the state of employment).

What happens if same-sex marriage is considered valid in the state where the employee was married, but not in the state where the employee lives or works? The Treasury Department and the Department of Labor (DoL) issued guidance on this issue for the purpose of benefits subject to ERISA and federal tax laws. However, the DoL does not apply the *Windsor* ruling consistently for all purposes.

Tax Treatment Under the Internal Revenue Code

The Treasury Department announced on August 29, 2013, that "same-sex couples, legally married in jurisdictions that recognize their marriages, will be treated as married for federal tax purposes. The ruling applies regardless of whether the couple lives in a jurisdiction that recognizes same-sex marriage or a jurisdiction that does not recognize same-sex marriage." The ruling does not apply to civil unions, registered domestic partnerships, and similar formal

⁶⁸ *Garden State Equality v. Dow*, Superior Court of New Jersey, Civil Docket No. L-1729-11 (September 27, 2013), http://www.judiciary.state.nj.us/samesex/Decision_Summary_Judgment.pdf. The court noted that New Jersey citizens in same-sex unions received unequal benefits when it came to matters such as "family and medical leave, Medicare, tax and immigration matters, military and veterans' affairs, and other areas."

⁶⁹ Those states include California, Connecticut, Delaware, Hawaii, Iowa, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Washington. See Social Security Administration list of states permitting and recognizing same-sex marriage, <https://secure.ssa.gov/apps10/public/reference.nsf/links/08092013111040AM>.

⁷⁰ *Id.* Of these states, nine (Alaska, Arizona, Colorado, Nevada, Mississippi, Montana, Missouri, Oregon, Tennessee) prohibit only same-sex marriage; eighteen (Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Wisconsin) prohibit both same-sex marriage and civil unions, although an Ohio federal court found the state prohibition unconstitutional; two states (Michigan, Virginia) make same-sex marriage, civil unions, and other contracts unconstitutional; one state (Hawaii) authorizes the legislature to limit marriage to opposite-sex couples, although the legislature instead voted to legalize same-sex marriage. Two states (Nevada and Michigan) have rejected constitutional amendments banning same-sex marriage.

relationships recognized under state law.⁷¹ The IRS has since issued a FAQ which provides further guidance.⁷²

For tax year 2013 and forward, same-sex spouses are entitled to the same tax treatment as opposite sex spouses, and may (but are not required to) file amended returns for open taxable years (generally, going back three years). This will allow employees who paid taxes on group health benefits for a same-sex spouse to claim a refund.

On September 18, 2013, the DoL issued its own guidance (consistent with the IRS), indicating its intent to interpret the term “marriage” to include a same-sex marriage that is legally recognized as a marriage under any state law, U.S. territory, or foreign jurisdiction having the legal authority to sanction marriages. Other formal unions are not recognized. This interpretation will apply solely for the purpose of DoL’s jurisdiction over ERISA benefit plans.⁷³

Interpretation of “Spouse” Under the Family Medical Leave Act

In contrast, the DoL announced that, for the purpose of the Family Medical Leave Act (FMLA), it will interpret “spouse” as meaning “a husband or wife as defined or recognized under state law for purposes of marriage *in the state where the employee resides*, including ‘common law’ marriage and same-sex marriage [emphasis added].”⁷⁴ This means that an employee who resides in a state that does not recognize same-sex marriage is ineligible for benefits as a “spouse” under FMLA,⁷⁵ regardless of the validity of the marriage in the jurisdiction where the marriage was

⁷¹ All Legal Same-Sex Marriages Will Be Recognized for Federal Tax Purposes, <http://www.treasury.gov/press-center/press-releases/Pages/jl2153.aspx>. The IRS provided more detailed guidance in Revenue Ruling 2013-17, which provides in relevant part:

1. For Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term “marriage” includes such a marriage between individuals of the same sex.
2. For Federal tax purposes, the Service adopts a general rule recognizing a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages.
3. For Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” do not include individuals (whether of the opposite sex or the same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state, and the term “marriage” does not include such formal relationships.

The holdings of this ruling went into effect on September 16, 2013, and may be relied upon retroactively for open years by taxpayers. See Revenue Ruling 2013-17, <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf>. Note that the IRS ruling does not control potential participant claims for benefits under Employee Retirement Income Security Act (ERISA), Title I.

⁷² Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law, <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples>.

⁷³ Technical Release No. 2013-04, Guidance to Employee Benefit Plans on the Definition of “Spouse” and “Marriage” under ERISA and the Supreme Court’s Decision in *United States v. Windsor*, <http://www.dol.gov/ebsa/newsroom/tr13-04.html>.

⁷⁴ Department of Labor, Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act, <http://www.dol.gov/whd/regs/compliance/whdfs28f.htm>; see also, 29 CFR § 825.122(c) (“spouse” means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides).

⁷⁵ Note that the only FMLA benefit likely to be affected is family leave to care for a same-sex spouse. Prior to *Windsor*, employees with same-sex partners, married or not, who stood *in loco parentis* were already eligible for leave to care for, and for the birth, adoption, or placement of, a “son or daughter,” defined as “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is—(A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability [emphasis added].” See 29 USC § 2611(12); 825.800 (defining “son or daughter”); 825.122(c)(3) (“Persons who are ‘in loco

performed or the employer is located. For the purpose of administering FMLA, employers will, therefore, need to verify the employee's marital status in the employee's state of residence. This is true even if the employer elects to extend FMLA benefits to all married employees on an equal footing, regardless of applicable law, because the extension of non-qualifying spousal benefits cannot be counted against the employee's 12-week allotment under FMLA.⁷⁶ As a result, employees in same-sex marriages working in the same facility may not all receive equivalent family leave benefits.

7. MAKING THE CASE FOR COMPREHENSIVE IMMIGRATION REFORM— EMPLOYMENT-BASED IMMIGRATION (Andrea Bartoloni)

The need for immigration reform is no longer in question: our immigration system is broken, and the American people have called upon Congress to fix it. The question now is not if, but how.

Any effective reform program must: (1) encourage the undocumented population to come out of the shadows and earn legal status; (2) provide fair and lawful ways for American businesses to hire much-needed immigrant workers; and (3) reduce the unreasonable and counterproductive backlogs in family-based and employment-based immigration by reforming the permanent immigration system.

A. Falsehoods Regarding Comprehensive Immigration Reform

Falsehood #1: Comprehensive immigration reform is really an “amnesty” for illegal immigrants.

The truth: Comprehensive immigration reform is nothing of the sort. In fact, the recent Comprehensive Immigration Reform Act of 2006 (S. 2611) is far from an amnesty. Rather, such legislation creates a more orderly system of rules and penalties to replace the current chaotic system. Under comprehensive measures like S. 2611, immigrants must register, get to the back of the line, pay significant fines and back taxes, work prospectively, learn English, and follow the rules or they will be sent home.

Comprehensive immigration reform recognizes that most Americans believe it is unrealistic to deport the twelve million undocumented immigrants living and working in our country—and that we must act in the national interest to deal with this underground community. The undocumented would be required to *earn* the privilege of legal status before they could apply for a permanent visa. Only those who pass rigorous background and security screening checks and prove they are learning English would be eligible to apply.

Falsehood #2: Legalizing the undocumented is unfair to those who are patiently waiting in line.

The truth: The earned legalization proposals do not allow anyone to “cut in line.” In fact, it will help those waiting in line because a central component of comprehensive reform is reduction

parentis' include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.”)

⁷⁶ This is already the case in states like Oregon, where employees subject to FMLA are also eligible under state leave laws that provide benefits to recognized same-sex couples.

of the family backlogs to allow families to reunify in a timely manner. Immigrants without papers already living in the United States will go to the back of the line. After first registering for temporary admission, they must work for a number of years before they could earn the opportunity to permanently adjust their status.

Falsehood #3: Comprehensive immigration reform will take jobs away from American workers.

The truth: American workers will not be displaced. All of the proposals under consideration require employers to demonstrate that they are unable to fill the positions with qualified U.S. workers. The proposals simply allow immigrant workers to fill jobs that are currently going unfilled because the large majority of Americans are over-qualified and are unwilling to take these jobs. While 31 percent of foreign-born workers age 25 and over held a bachelor's degree or more in 2005, many less educated immigrants come to the U.S. because there is a high demand for such workers in important lower-skilled sectors of our economy.

According to the Bureau of Labor Statistics, among the 20 occupations expected to experience the largest job growth during the 2004-2014 period, 10 will require only short-term on-the-job training (not a high school or college education): salespersons, food preparation and serving workers, cashiers, janitors, waiters and waitresses, nursing aides, receptionists, security guards, office clerks, teaching assistants, home health aides, personal and home care aides, truck drivers, and groundskeepers. Overall, 45 percent of total job openings in the 2004-2014 period are expected to be filled by workers who have a high school diploma or less education. Given that native-born workers are more likely than immigrants to have a high school diploma, vocational training, or several years of college—and that the native-born population is rapidly growing older as the baby boomers reach retirement age and birthrates decline—less-skilled immigrants are needed to fill these positions.

Falsehood #4: Comprehensive immigration reform will lead to wage depression for U.S. workers.

The truth: By creating legal channels for foreign workers, comprehensive immigration reform will buoy the wages and working conditions of U.S. workers. Currently, some undocumented workers are forced to accept submarket wages and working conditions because their status makes them vulnerable and unable to protect themselves against unscrupulous employers. By according them legal status, comprehensive reform will put them on the same footing with employers as native-born workers.

Studies have also shown that those lesser-skilled U.S. citizen workers who compete most closely with lesser skilled immigrant workers experience very little downward pressure on their wages, while the vast majority of native workers actually experience wage gains. In a 2006 study, economist Giovanni Peri found that, “during the 1990-2004 period, the 90 percent of native-born workers with at least a high-school diploma experienced wage gains from immigration that ranged from 0.7 percent to 3.4 percent depending on education. Native-born workers without a high-school diploma lost only 1.1 percent of their real yearly wages due to immigration.” Recent history drives this point home. As Peri points out, “the average yearly wages of native-born workers rose by 12.5 percent in 1990-2004 even though immigration increased the size of the labor force by almost 12 percent.”

Falsehood #5: Immigrants are a drain on our economy.

The truth: To the contrary, our economy is “highly dependent on immigration, legal and illegal, temporary and permanent,” according to a 2004 report issued by the Chicago Council of Foreign Relations. Another 2004 report notes that “the challenge facing the American workforce in the coming 20 years” is that “we will not have enough people to fill it.”

A comprehensive 1997 report issued by the National Academy of Sciences reinforces the positive impact of immigration on our economy. This study concluded that immigrants benefit the U.S. economy overall, have little negative effect on the income and job opportunities of most native-born Americans, and annually may add as much as \$10 billion to the economy. As a result, the report concluded, most Americans enjoy a healthier economy because of the increased supply of labor and lower prices resulting from immigration.

Additionally, in a poll of eminent economists conducted by the CATO Institute in the mid-1980s and updated in 1990, 81 percent of the respondents opined that, on balance, twentieth-century immigration has had a “very favorable” effect on U.S. economic growth. The Cato Institute also concluded in a 1997 study that immigrant households paid an estimated \$133 billion in direct taxes to federal, state, and local governments. In 2006, over 500 economists and social scientists confirmed these findings in an open letter to President Bush and members of Congress that stressed the net economic benefit of immigration and stated that immigrants benefit American workers by lowering consumer prices and contributing skills, capital, and entrepreneurship to the American economy. The message from those who are charged with crunching the numbers is simple: immigration is good for our economy.

B. The Need for Essential Workers

1. What are Essential Workers?

“*Essential Workers*” are workers employed in unskilled or semi-skilled occupations in all sectors of our economy. Essential workers include, for example, restaurant workers, retail clerks, carpenters, plumbers, roofers, manufacturing line workers, hotel service workers, food production workers, landscape workers, and health care aides. These individuals often work in the difficult manual jobs that increasingly skilled and educated Americans no longer choose, but which are “essential” to keep our economy growing.

2. Aren't there enough U.S. workers for these jobs?

New jobs will increase dramatically by the end of the decade, boosting the demand for Essential Workers. During this period, employment growth will be concentrated in the service-producing sector, with health services, leisure and hospitality, transportation and warehousing among the fastest growing sectors.

Unskilled and semi-skilled occupations have the highest projected growth rate. The Department of Labor ranked the top 30 occupations with the largest projected job growth from 2002-2012. Of the occupations listed, 20 require only short-term or moderate-term on-the-job training.

As the baby boomers age, demand increases for Essential Workers. The aging population and increased life expectancies will increase the need for health services. The healthcare services industry added roughly 3.5 million jobs—1 out of every 6 new jobs created in 2012.

*The U.S. is not **producing** enough new workers.* The Bureau of Labor Statistics projects that as the baby boomers retire, growth in the work force will slow to 0.4% per year. Barring unforeseen increases in immigration and/or participation rates among the elderly, there will be a reduction in the total size of the nation's workforce.

Employers are doing the “right” things. Essential Worker employers have led the way in welfare-to-work, school-to-work and other initiatives that have been successful in reducing welfare rolls and getting graduates jobs, but these efforts still are insufficient. Employers are raising wages, offering improved benefits, signing bonuses and relocation pay.

Isn't there already a visa category for essential workers that these employers can use? Yes and No. The H-2B temporary visa program is useful only for employers who can establish that their need for foreign workers is seasonal (a one-time occurrence, or a peak load or intermittent need). If the employer's need is year-round or does not fall into one of the definitions used by the Department of Labor or Immigration Service, the employer cannot use the H-2B visa to fill labor needs. A nonimmigrant visa category does not exist for employers who need workers for more than one year or for employers who have permanent or long-term jobs, for example in the health care, retail, hospitality, construction, and other industries.

3. What needs to be done?

Congress and the Administration need to commit to passing bipartisan comprehensive immigration reform that would match willing workers with willing employers. The United States needs a regulated, workable immigration system that allows foreign nationals to work here when there is evidence of a shortage of available U.S. workers, that allows those individuals already here and working to obtain legal status and work authorization, and reduces the permanent immigration backlogs in order to allow the families of workers in the U.S. to reunite. Such initiatives must receive adequate funding in order to succeed and reduce the long visa processing backlogs that make current programs difficult to use.

C. H-1B Professionals and Wages: Setting the Record Straight

Foreign professionals and individuals employed in specialty occupations are currently authorized to work in the U.S. under the H-1B classification.

U.S. companies hire and recruit globally. In some cases, this means hiring foreign-born individuals on H-1B temporary visas, many times off U.S. college campuses as part of the normal recruitment process. In essence, critics assert the only reason a U.S. employer would ever hire someone on an H-1B visa is because he or she will work cheaper than Americans, implying that only people born in the United States possess desirable skills. The story that a veritable conspiracy exists in America to hire foreign-born professionals so they can work cheaply is unsupported by the evidence. Moreover, it runs contrary to common sense and any serious analysis of how the U.S. labor market functions.

A study by Madeline Zavodny, a research economist at the Federal Reserve Bank of Atlanta, found that the entry of H-1B professionals neither lowers the contemporaneous earnings of natives, nor has “an adverse impact on contemporaneous unemployment rates.”

Research by Paul E. Harrington, associate director of the Center for Labor Market Studies at Northeastern University, shows foreign-born and native professionals earn virtually identical salaries in math and science fields. National Science Foundation data show foreign-born scientists and engineers actually earn more than natives in some fields.

If companies simply wanted to obtain services based only upon wages, then U.S. companies would move all of their work outside the United States, since the median salary for a computer software engineer is \$7,273 in Bangalore and \$5,244 in Bombay, compared to \$60,000 in Boston and \$65,000 in New York, according to the Seattle-based market research firm PayScale.

D. Eliminating the Employment-Based Visa Backlog: Vital to America’s Economic Competitiveness

The Issue: Reform of the permanent employment-based visa program is urgently needed in order for U.S. employers to hire the foreign talent necessary for the American economy to remain vibrant and competitive. There simply are not enough Americans available to meet U.S. employer demands for high-skilled labor in this country. Over half of all science, technology, engineering, and mathematics graduates of American universities are foreign born. Our current system, however, forces most of these graduates to leave the U.S. and apply their valuable skills in other countries, a scenario that is beneficial to all but the U.S. Needless to say, foreign countries are not complaining, but are instead poised to take advantage in their increasingly successful attempts to surpass us. Simply put, if the problem is not solved soon, the U.S. stands to rapidly lose not only the competitive economic edge generations of Americans have worked so hard to achieve, but also its global preeminence in science and technology—areas vital to our prosperity and national security.

Each year, 140,000 EB visas, or “green cards,” spread across five preference categories based upon credentials, are allotted to foreign nationals seeking permanent residence and who are sponsored by their employers to work in this country. The spouses and children of these foreign nationals also count against the 140,000 visa cap, accounting for over half the allotted number. However, because these visas are distributed equally among all countries, with a quota set for each country, backlogs have resulted for individuals coming from high-demand countries, even when the overall cap has not been reached. Once the quota is met for nationals of a given country, only those who applied before a set cut-off date are able to get visas.

The current problems with the EB system are attributable to two things: administrative delays in processing green card applications; and, as mentioned above, the statutory limits, regulated by the U.S. Department of State (DOS), putting a cap on the number of EB visas issued each year. When DOS believes that either the overall or per-country cap is about to be reached, it imposes a “cut off” date, and only applications received before this date are processed. In October 2005, DOS moved this cut-off date backward in an effort to ration available green cards. As a result, thousands of foreign professionals, many of whom have been in the U.S. legally for nearly a decade on student or work visas, have been forced to wait, essentially in a legal purgatory, up to seven years to get a green card and enjoy the rights and benefits of legal permanent residence.

This means up to seven years is spent waiting and worrying, with spouses unauthorized to work at all. Not surprisingly, these talented professionals often tire of waiting and leave the U.S. entirely to put their knowledge and skills to use in other countries eager to compete with and surpass the U.S.

Congress must reform the EB visa system. These reforms should include:

- Recapture of unused EB visas from prior years;
- Exemption of spouses and children from EB visa quotas;
- A market-based EB visa cap, responsive to the needs of U.S. employers.

Without these reforms, we will continue to make it more and more difficult for talented foreign professionals to work in this country and fill the positions U.S. employers desperately need to fill. As a result, these talented professionals simply will go elsewhere, resulting in devastating long-term consequences for the U.S. economy.

E. Recent Legislation

- Raised the cap from 140,000 to 290,000 visas a year and allowed unused visas to fall forward annually, while recapturing unused visas from previous fiscal years 2001-2005.
- Exempted from the EB cap professionals who have earned a U.S. master's or higher degree AND those awarded a medical specialty certification based upon post-doctoral U.S. training and experience.
- Exempted those who will perform labor in shortage occupations (designated by the Secretary of Labor for blanket certification as lacking sufficient U.S. workers) who are able, willing, qualified and available for such occupation, if the employment does not adversely affect conditions of similarly employed U.S. workers.
- Exempted spouse and minor children of employment-based professionals.

LESSON:

Many studies confirm that immigration reform would benefit the country and our economy. Congress' unwillingness to act hurts us all. Everyone with an interest in this important issue should consider contacting their representative in Congress to encourage them to get a reasonable proposal on the table and bring it to a vote.

8. SUPREME COURT INCREASES BURDEN OF PROOF IN RETALIATION CASES (Heidee Stoller)

On June 24, 2013, the U.S. Supreme Court decided *University of Texas Southwestern Medical Center v. Nassar*, holding that a plaintiff alleging retaliation under Title VII must prove "but-for" causation, rather than the less stringent "mixed-motive" standard of conduct.⁷⁷

⁷⁷ 133 S Ct 2517, 186 L Ed2d 503 (2013).

Under the more stringent “but-for” test, the plaintiff in a federal retaliation lawsuit will have to show “that the harm would not have occurred in the absence of—that is, but for—the defendant’s conduct.” The plaintiff, therefore, is required to prove that the employer would not have taken the adverse action if the employee had not engaged in the protected activity. Prior to *Nassar*, some courts had held that a plaintiff only had to meet a lesser causation standard—the mixed-motive standard—by showing that retaliation was one of the employer’s motives, even if the employer had other, lawful motives that contributed to the employer’s decision. Note, however, that the *Nassar* holding applies only to retaliation claims. The mixed-motive standard remains the test for Title VII discrimination claims.

This decision has significant implications as it places a substantially-higher burden on plaintiffs in retaliation claims than in other Title VII discrimination claims. As the Supreme Court noted, its ruling would help prevent “the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment.” The Court also raised concerns about instances in which “an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation.” The Court suggested that the “but-for” standard would make it easier for courts to “dismiss dubious claims at the summary judgment stage.”

LESSON:

As the Supreme Court noted in *Nassar*, “the number of [retaliation] claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past 15 years—from just over 16,000 in 1997 to over 31,000 in 2012.” The *Nassar* decision highlights the importance of following good employment practices, which can greatly increase the chances that the employer will defeat retaliation claims by establishing that an employee was terminated or subjected to other adverse employment action for lawful, rather than retaliatory, reasons. These best practices include the following:

- **Have a Written Anti-Retaliation Policy and Train Supervisors**—A written anti-retaliation policy and complaint procedure is critical to demonstrate that your company is serious about avoiding retaliation. Retaliation training will help ensure that supervisors are aware of and can act to avoid potential retaliation claims.
 - It is also important to inform supervisors that there may be individual liability for retaliation under Oregon law so they have additional incentive to avoid retaliation claims.
- **Know Which Complaints Are Protected Activities**—Under federal and state law, it is illegal to retaliate against an employee because the employee invoked, opposed, or sought a remedy for unlawful workplace discrimination.⁷⁸ However, Oregon’s retaliation and whistleblowing statutes provide protection for a much broader scope of behavior. Under Oregon law, an employer can also be liable for retaliating against an employee for a

⁷⁸ 42 USC § 2000e-3(a); ORS 659A.030(f).

number of different reasons, including: (1) making a wage complaint,⁷⁹ (2) invoking his or her rights under the Workers' Compensation Act or OFLA,⁸⁰ or (3) reporting "information that the employee believes is evidence of a violation of a state or federal law, rule or regulation."⁸¹ Due to the extremely broad scope of protected activities under Oregon law, it is very important to promptly investigate all employee complaints.

- **Timing Is Everything**—Often, a key factor at summary judgment and at trials is whether the adverse employment action was close in time to the employee's discrimination complaint. In state court, timing alone can be sufficient to defeat summary judgment. In federal court, courts will look closely at timing to determine whether there is sufficient evidence of causation to defeat a summary judgment motion. This means that if an employee has complained of discrimination or another violation of any "state or federal law, rule or regulation," the employer will want to be cognizant of and assess the risk before making a decision about termination or another adverse employment action shortly after the complaint.
- **Document Performance/Behavior Issues Contemporaneously**—If an employer has documented problems before an employee engages in protected activity, that evidence tends to negate an employee's claim that a subsequent termination or adverse employment action was retaliatory. The documentation can be anything from a short note to the file to a formal disciplinary memorandum signed by the employee. In all cases, documentation of performance/behavior issues should follow the following guidelines:
 - Document the issue contemporaneously, preferably the same day;
 - Identify the person who authored it;
 - Objectively identify the issue (identify the expectations or performance standards that were not satisfied and provide specific examples, rather than relying upon subjective characterizations, such as "attitude");
 - State when the incident occurred;
 - Confirm the timing and substance of the communication with the employee;
 - State what must be done to correct the problem and the consequences of not correcting it; and
 - Identify any help offered to the employee.

The summary should be limited to an objective account of the facts, without editorializing. All documentation of performance should be placed in the employee's personnel file.

⁷⁹ ORS 659A.030(f).

⁸⁰ *Id.*

⁸¹ ORS 659A.199.

- **Investigate All Employee Complaints**—An employer’s response or failure to respond to a complaint can provide strong evidence in a retaliation case. It is critically important to investigate all complaints—even if they are made after termination—to determine if there is any validity to an employee’s claims.
- **Verify the Supervisor’s Stated Reasons for an Adverse Action**—If possible, try to find independent verification of a supervisor’s reasons for termination or adverse action.
- **Inform the Employee of the Reason for the Action**—Courts have found evidence of retaliation in instances where an employer did not communicate the reason for the termination or adverse employment action to the employee, but only raised the reason after the employee brought a retaliation claim. It is, therefore, very important to communicate the reasons for the termination or adverse employment action to the employee.
- **Don’t Change Your Story**—Courts have also found evidence of retaliation when an employer provides different or conflicting reasons for the termination or adverse employment action at different times. Consequently, if there are multiple reasons for a termination or adverse employment action, it is important to let the employee know at the time of termination, not after a claim has been made.

9. THE U.S. SUPREME COURT’S DEFINITION OF “SUPERVISOR” LIMITS EXPOSURE TO STRICT LIABILITY (Kathy Feldman)

Title VII prohibits workplace discrimination, and it is unlawful for an employer to create or perpetuate a discriminatory work environment. Generally, a plaintiff must show that the work environment was so pervaded by discrimination that the terms and conditions of employment were altered. The definition of supervisor has become important because the U.S. Supreme Court has previously held that if a supervisor harasses another employee, the employer is automatically liable for that supervisor’s harassing conduct.⁸² An employer, however, is not liable for the harassing conduct of a mere co-worker, unless the employer was negligent in allowing the conduct to occur. Therefore, whether an employee is a supervisor has a significant effect on whether the employer will be vicariously liable for the alleged harassing conduct.

Until recently, the Supreme Court had left open the question of who qualifies as a “supervisor.” Some courts held that an employer is not a supervisor unless he or she has the power to hire, fire, demote, promote, transfer, or discipline the victim. Other courts followed a broader definition of supervisor, like that taken in the Equal Employment Opportunity Commission’s (EEOC) Enforcement Guidance, which included employees with day-to-day supervisory authority and those that can take a tangible employment action. This year, the U.S. Supreme Court resolved the issue in *Vance v. Ball*.⁸³

Martha Vance, an African-American woman, was employed at Ball State University (BSU) as a catering assistant. Vance alleged that Sandra Davis, a white woman and catering specialist, slammed pots and pans in her presence, gave her a weird look, and blocked her path to the elevator. Vance filed suit claiming that Davis was her supervisor and that she had been

⁸² *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

⁸³ *Vance v. Ball State University*, 133 S Ct 2434 (2013).

subjected to a racially hostile work environment in violation of Title VII. The district court granted summary judgment in favor of BSU and found that BSU could not be held vicariously liable for Davis' alleged racial harassment because Davis could not "hire, fire, demote, promote, transfer, or discipline" Vance and, as a result, was not Vance's supervisor. The Seventh Circuit affirmed the decision.

The Supreme Court agreed, holding that an employee is a "supervisor" for purposes of vicarious liability under Title VII if he/she is empowered by the employer to take tangible employment actions against the victim, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits.

LESSON:

What does this mean for employers? The Court's decision adopted a bright line practical standard which can now be easily applied by employers and employees. The Supreme Court's decision allows the issue of supervisory status to be decided as a matter of law before trial. This decision does not absolve employers of all liability. Employers can still be liable for harassment by co-workers if they are on notice and do nothing to prevent it.

10. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA) UPDATE (Jeff Peterson)

Congress enacted USERRA (1) to encourage military service in the Reserves and National Guard by eliminating or minimizing the disadvantages to civilian careers, (2) to minimize the disruption of military service to service-members and their employers by providing for the prompt reemployment of service-members, and (3) to prohibit discrimination against service-members.⁸⁴ One of USERRA's primary benefits to service-members is the right to reemployment with their civilian employers upon the completion of a period of military service.

At the heart of this right to reemployment are the "escalator principle" and the "reasonable certainty" test. Under the escalator principle and the reasonable certainty test, a returning service-member, generally, "is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service."⁸⁵ This reemployment position is known as the "escalator position," and while it is the default position for a returning service-member, it is not necessarily the position in which a service-member will be reemployed.

USERRA sets forth a process that takes into consideration the circumstances of the service-member and employer to determine the correct reemployment position.⁸⁶ For a service-member whose period of service lasted more than 90 days, the employer must promptly reemploy the service-member "in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified

⁸⁴ 38 USC § 4301(a).

⁸⁵ 20 CFR § 1002.191.

⁸⁶ Exceptions from the this process apply to service-members who: (1) have service-connected disabilities that render them unqualified for their escalator positions; or (2) are not qualified for their escalator positions or their pre-service positions for any reason other than disability and cannot become qualified through reasonable efforts by their employers. 38 USC § 4313(a)(3), (4).

to perform.”⁸⁷ If, and only if, the service-member is not qualified for one of those positions after the employer makes reasonable efforts to qualify the service-member, the employer must promptly reemploy the service-member “in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform.”⁸⁸

Similar to escalators in real life, it is important to note that the escalator principle can move a service-member up into a higher position or down into a lower position. The USERRA regulations provide that “[d]epending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated.”⁸⁹

Recently, a federal court of appeals clarified the circumstances in which the escalator principle and the reasonable certainty test apply. In *Rivera-Meléndez v. Pfizer Pharmaceuticals, LLC*, the trial court ruled, erroneously, that the escalator principle and the reasonable certainty test do not apply to non-automatic, discretionary promotions.⁹⁰ The plaintiff, Luis Rivera-Meléndez, was in the Naval Reserve and was called into active duty service. During his deployment to Iraq, Pfizer restructured the department in which Mr. Rivera-Meléndez worked, eliminating his position as a Group Leader, which was a non-salaried position, and replacing it with two new positions— Team Leader and Service Coordinator. The Team Leaders were salaried and were higher in the organization than the Service Coordinators, who were not salaried. Before making these changes, Pfizer invited the Group Leaders to apply for one of the seven new Team Leader positions. Pfizer also informed the Group Leaders that those not selected to be Team Leaders would have three alternatives. They could apply for the non-salaried Service Coordinator position; they could be demoted to the Senior Operator position; or they could participate in a voluntary separation option.

Upon Mr. Rivera-Meléndez’s return, Pfizer reemployed him in “special tasks” and eventually made him a Service Coordinator, along with three other former Group Leaders. Pfizer, however, promoted six former Group Leaders to Team Leaders.

The trial court ruled that Pfizer did not violate Mr. Rivera-Meléndez’s rights under USERRA because, according to the trial court, an escalator position is a promotion that is based solely upon the employee’s seniority and does not include a non-automatic promotion to a position that depends on the employee’s ability and the employer’s exercise of discretion.

The court of appeals reversed the trial court and held that the escalator principle and reasonable certainty test apply to automatic and non-automatic promotions, alike. The court stated that “the appropriate inquiry in determining the proper reemployment position for a returning servicemember is not whether an advancement or promotion was automatic, but rather whether it was reasonably certain that the returning servicemember would have attained the higher position but for his absence due to military service.”⁹¹

⁸⁷ 38 USC § 4313(a)(2)(A).

⁸⁸ 38 USC § 4313(a)(2)(B).

⁸⁹ 20 CFR § 1002.194.

⁹⁰ *Rivera-Meléndez v. Pfizer Pharms., LLC*, 730 F3d 49, 50 (1st Cir 2013).

⁹¹ *Id.* at 57.

The court of appeals expressed no opinion as to whether it was reasonably certain that Mr. Rivera-Meléndez would have been promoted to Team Leader.

LESSON:

For service-members entitled to reemployment under USERRA, the statute and its regulations provide broad rights and remedies. Unless certain circumstances are present, an employer must apply the reasonable certainty test and attempt to reemploy a returning service-member in the escalator position, regardless of whether that position is normally attained only after a non-automatic, discretionary promotion.

11. BONUS ISSUE: OFCCP UPDATE

The Office of Federal Contract Compliance Programs (OFCCP)⁹² issued final regulations requiring federal contractors to establish a seven percent utilization goal for workers with disabilities and a variable hiring benchmark for protected veterans, in addition to new data collection and recordkeeping requirements.⁹³ The rules were implemented to improve employment rates for workers with disabilities and veterans, whose unemployment rates, particularly those who have fought in Iraq and Afghanistan, are persistently higher than average. Although the final rule becomes effective April 23, 2014 (180 days after publication), full compliance with the requirements of the final rule by current contractors is being phased in.

The final rule applicable to veterans includes the following major provisions:

- Allows contractors to establish their own or adopt a predetermined annual hiring benchmark (currently eight percent (8%) based upon national labor force data).
- Requires that contractors maintain several quantitative measurements and comparisons for the number of veterans who apply for jobs and the number of veterans they hire.
- Requires contractors to list their job openings with the appropriate state employment service agency in a format that the state agency can access and use to make the job listings available to job seekers.
- Requires prime contractors to include specific, mandated language in their subcontracts alerting subcontractors to their responsibilities as federal contractors.
- Allows contractors establish “linkage agreements” with organizations that provide recruiting or training services to veterans to meet the contractors’ specific needs, while assuring outreach to veterans seeking employment.

⁹² OFCCP enforces the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended by the Jobs for Veterans Act of 2002 (VEVRAA), which prohibits employment discrimination against protected veterans by covered federal contractors and subcontractors. VEVRAA also requires each covered federal contractor and subcontractor to take affirmative action to employ and advance these veterans.

⁹³ 78 FR 58614 (September 24, 2013), <http://www.gpo.gov/fdsys/pkg/FR-2013-09-24/pdf/2013-21227.pdf>; 78 FR 58682 (September 24, 2013), <http://www.gpo.gov/fdsys/pkg/FR-2013-09-24/pdf/2013-21228.pdf>.

- Clarifies the contractor’s mandatory job listing requirements and the relationship between the contractor, its agents, and the state employment services that provide priority referral of protected veterans.
- Repeals outdated and obsolete regulations at 41 CFR Part 60–250 that apply to contracts entered into before December 1, 2003, and not since modified.

The final rule applicable to individuals with disabilities includes the following major provisions:

- Establishes, for the first time, a seven percent (7%) workforce utilization goal for individuals with disabilities. OFCCP stressed that “the goal is not a quota or a ceiling that limits or restricts the employment of individuals with disabilities.” Rather, it characterizes the goal as “a management tool that informs decision-making and provides real accountability.” Failing to meet the disability utilization goal, alone, is not a violation of the regulation and will not lead to a fine, penalty, or sanction. Smaller contractors with a total workforce of 100 or fewer employees will be permitted to apply the 7% goal to their entire workforce, rather than to each job group.
- Requires contractors to invite applicants to voluntarily self-identify as disabled at the pre-offer stage of the hiring process, in addition to the existing requirement that contractors invite applicants to voluntarily self-identify after receiving a job offer. The purported goal of the early data collection is to provide contractors with useful information about the extent to which their outreach and recruitment efforts are effectively reaching people with disabilities.
- Requires contractors to invite incumbent employees to voluntarily self-identify on a regular basis. The status of employees may change and a regular invitation to self-identify provides employees a way to self-identify for the first time, or to change their previously reported status.
- Requires contractors to maintain several quantitative measurements and comparisons for the number of individuals with disabilities who apply for jobs and the number of individuals with disabilities they hire in order to create greater accountability for employment decisions and practices.
- Requires prime contractors to include specific, mandated language in their subcontracts in order to provide knowledge and increase compliance by alerting subcontractors to their responsibilities as Federal contractors.
- Implements changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008 by revising the definition of “disability” and certain nondiscrimination provisions of the implementing regulations.

LESSON:

The new OFCCP rules have the potential to significantly increase the burdens on federal contractors. While disclaiming the benchmarks as quotas, the inclusion of specific numbers are disconcerting. So, too, is the requirement that employers invite disabled applicants to

self-identify as disabled, as an employer's rejection of a candidate with knowledge of his or her disability tends to invite a discrimination claim. Concerns notwithstanding, contractors are expected to phase in their compliance between now and April, and will need to get a move on to meet the deadline.

12. JUST THE FACTS

A. Patient Protection and Affordable Care Act (ACA)

On December 2, 2013, the Supreme Court denied review⁹⁴ of a Fourth Circuit decision upholding constitutionality of both the ACA's individual mandate and the employer mandate, which the plaintiffs had challenged based on religious freedom and equal protection grounds.⁹⁵ Plaintiffs had argued that ACA violated their religious belief that they should play no part in facilitating, subsidizing, easing, funding, or supporting abortions, that the exemptions to the individual mandate discriminated between religious sects, and that the regulations requiring group health plans to cover all FDA-approved contraceptive methods violated their religious rights.

- The Fourth Circuit rejected plaintiffs' argument that the ACA forced plaintiffs to facilitate or support abortion, noting that the Act specifically provides individuals the option to purchase and employers to offer a plan that covers no abortion services at all, as well as a plan that provides no abortion services except in cases of rape or incest, or where the mother's life would be endangered.
- The court rejected the argument that the religious exemptions to the individual mandate distinguishes between religious sects, finding that the religious conscience objection⁹⁶ adopts an exemption from the Social Security Amendments of 1965, which courts have consistently found constitutional under the Establishment Clause and the Fifth Amendment, and neither the text or the history of the health care sharing ministry exemption⁹⁷ suggests a deliberate attempt to distinguish between religious groups.

⁹⁴ *Liberty University v. Lew*, Case No. 13-306 (Supreme Court, December 2, 2013).

⁹⁵ *Liberty University v. Lew*, Case No. 10-2347 (4th Cir, July 11, 2013),

<http://isysweb.ca4.uscourts.gov/isysquery/8a8f5862-e91e-4d8d-a64a-127f1803e822/1/doc/102347A.p.pdf#xml=http://New-ISYS/isysquery/8a8f5862-e91e-4d8d-a64a-127f1803e822/1/hilite/>. The Fourth Circuit upheld the constitutionality of both the individual mandate and the employer mandate under Congress' taxing power, and found that the employer mandate was also an appropriate exercise of Congress' power under the Commerce Clause. The individual mandate imposes a "penalty" on a covered taxpayer who fails to obtain "minimum essential coverage," which generally includes coverage provided under an employer-sponsored plan, a government-sponsored program, or a health plan offered in the individual market within a state. Individuals are excused from the mandate based on two, religious-based exemptions. The employer mandate requires covered employers (those with at least 50 FTEs) to provide affordable coverage to their full time employees and their dependents. Employer sponsored plans must provide "minimum essential coverage," which includes contraceptive care at no cost to the employee.

⁹⁶ This exempts persons who are members of religious community established prior to 1950 that opposes all insurance benefits and has its own system to pay for its members' health care.

⁹⁷ This exempts members of religious non-profit organizations whose members (1) share a common set of ethical beliefs and share health care expenses, (2) remain members after they develop a medical condition, and (3) has been in continuous existence since 1999, during which time the medical expenses of its members have been continuously shared.

- The court refused to consider plaintiffs' argument with respect to the requirement that plans provide contraceptive coverage, which plaintiffs raised for the first time on appeal. Moreover, several other circuits are considering the issue based on a fully-developed record.⁹⁸

B. ARBITRATION UPDATE

The Fifth Circuit held overturned a decision of the National Labor Relations Board (NLRB) finding that the employer's requirement that employees to sign an arbitration agreement prohibiting them from participating in a collective or class action is a violation of the National Labor Relations Act (NLRA).⁹⁹ However, the Fifth Circuit upheld the NLRB's requirement that the employer clarify with employees that they retained their rights to pursue claims of unfair labor practices with the Board.

C. NLRB UPDATE

On January 25, 2013, the D.C. Circuit ruled that NLRB recess appointments issued by President Obama on January 4, 2012, were invalid. As a result, the court held that the NLRB did not have a quorum and could not lawfully act, leaving in doubt the precedential value of many significant Board rulings. The U.S. Supreme Court accepted review of the case and will hear oral argument in early 2014. On December 9, 2013, the Court granted a motion by Senate Republican Leader Mitch McConnell and 44 Other Members of the U.S. Senate for leave to participate in oral argument as amici curiae, and will allow them 15 minutes for argument.

⁹⁸ On November 26, 2013, the U.S. Supreme Court agreed to review two of these cases, in which the court issued conflicting decisions as to whether a corporate entity can raise a valid religious objection. See *Hobby Lobby Stores, Inc. v. Sebelius*, 2013 US App. LEXIS 13316 (10th Cir 2013); *Sebelius v. Hobby Lobby Stores, Inc.*, cert. granted, Case No. 13-354 (SCT 2013), and *Conestoga v. Secretary of the U.S. Department of Health and Human Services* 2013 US App LEXIS 2706 (3rd Cir 2013); *Conestoga Wood Specialties v. Sebelius*, cert. granted, No. 13-354 (S Ct 2013). These cases involve conflicting decisions as to whether a corporate entity can raise a valid religious objection.

⁹⁹ *D.R. Horton, Inc. v. NLRB*, Case No. 12-60031 (5th Cir 2013).