TEN HR ISSUES FROM 2010 [1]
Employment Seminar

By Ater Wynne LLP
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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. WHAT HEALTHCARE REFORM MEANS FOR YOUR BUSINESS

The continuing political disagreements about the health care reform law enacted in March illustrate the significant role that access to and paying for health care plays in our personal lives and our national, state, and local economies. In contrast to the disagreement about the need for reform or the approach taken, everyone agrees that this is a large, complex law that will significantly change how health care is provided to employees and is paid for by employers.

"Health care reform" actually refers to two separate pieces of legislation: (1) the Patient Protection and Affordable Care Act ("PPACA"),[2] adopted on March 23; and (2) the Health Care and Education Reconciliation Act of 2010 ("HCERA"),[3] containing negotiated amendments to the PPACA and adopted a week later. The statutes primarily focus on financing and access to health care, not on underlying issues such as medical costs, effectiveness, and efficiency. In other words, they change how employers and employees pay for the same system we have in order to extend coverage to individuals who do not currently have it.

The statutes certainly are a significant change; their text exceeds 2,500 pages, despite leaving many of the details, definitions, and full meanings to regulations that are not yet available. Even the government does not know exactly what the statutes will do:

> "The actual future impacts of the PPACA on health expenditures, insured status, individual decisions, and employer behavior are very uncertain. The legislation would result in numerous changes in the way health care insurance is provided and paid for in the U.S., and the scope and magnitude of these changes are such that few precedents exist for use in estimation. Consequently, the estimates presented here are subject to a substantially greater degree of uncertainty than is usually the case with more routine health care legislation."[4]

The statutes' provisions have staggered effective dates from 2010 until 2018. A partial exemption from at least some of the new rules exists for "grandfathered plans" (or at least for certain participants in those plans). Those are discussed on page 9. For non-grandfathered plans, most of the new laws become effective for plan years beginning on or after September 23, 2010. For example, calendar-year health plans will have to comply beginning January 1, 2011.

A. Provisions Effective in 2010

(1) *Tax Credit for Small Businesses*.

A tax credit is available to certain small employers that purchase health insurance for their employees. "Small employers" have no more than 25 full-time equivalent employees ("FTEs") employed during the employer's taxable year who have annual full-time equivalent wages that

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[2] Available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3590enr.txt.pdf.

[3] Available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid =f:h4872enr.txt.pdf. We will refer to the two laws as "the statutes."

[4] Centers for Medicare and Medicaid Services Chief Actuary Richard S. Foster, *Estimated Financial Effects of the Patient Protection and Affordable Care Act, as Amended* (page 4). Available at https://www.cms.gov/ActuarialStudies/Downloads/PPACA_2010-04-22.pdf (as of Sept 28, 2010).

average no more than $50,000. The full amount of the credit, however, is available only to an employer with 10 or fewer FTEs with average annual full-time equivalent wages of less than $25,000. The credit is reduced for employers with more than 10 FTEs or for an employee with an average wage between $25,000 and $50,000. These $25,000 and $50,000 wage limits are indexed for inflation beginning in 2014.

To be eligible for the credit, a small employer must make a contribution on behalf of each employee who enrolls in certain qualifying health insurance plans. This employer contribution must be a uniform percentage of at least 50 percent of the premium cost of the plan. The employer must pay the employees' premiums during the year and claim the credit on its income tax return. The credit is a general business credit, which can be carried back for one year and forward for 20 years. The credit is available for tax liability under the alternative minimum tax.

The credit is available through 2013. For taxable years beginning after 2013, the credit is only available for purchases through a state insurance exchange and is only available for a maximum coverage period of two consecutive taxable years. The maximum two year coverage period does not take into account any taxable years beginning in years before 2014. So, a small employer could potentially qualify for the credit for a total of six taxable years (2010-2016).

The amount of the credit is generally equal to the "applicable tax credit percentage" (35 percent for the years 2010-13, or 50 percent thereafter) of the employer's contribution to the health insurance premium for each covered employee. Only contributions by the employer are taken into account in calculating the credit. Amounts contributed pursuant to a salary reduction arrangement under a cafeteria plan are not treated as an employer contribution.

(2) *Early Retiree Medical Benefit Subsidy*.

The Department of Health and Human Services ("HHS") has established a temporary program that subsidizes an employer's cost of providing health benefits to early retirees and their dependents.[5] Early retirees are age 55 or older, ineligible for Medicare and not active employees of an employer maintaining or currently contributing to the plan.

A plan wishing to participate in the program must submit an application to HHS. A participating plan can then submit claims for reimbursement of 80 percent of the costs for an early retiree, or their dependent, that exceed $15,000 but are less than $90,000 for any plan year.[6]

Payments from the program must be used to lower costs of the plan, such as reducing participant contributions, copayments, deductibles, coinsurance, or other out-of-pocket cost for participants. Payments from the program may also be used to reduce premium costs for an employer maintaining the plan, but may not be used as general revenues for such an entity. There is a limit on the dollars available under the program (generally, $5 billion), and applications are processed first-come, first-served, so applying now is a good idea. There is an appeals process if claims for

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[5] Information about applying for the subsidy is available at http://www.errp.gov/how_to_apply.shtml. The application form is available at http://www.errp.gov/download/ERRP_Application.pdf. A summary of the program is available here: http://www.errp.gov/download/TheAffordableCareAct.pdf.

[6] HHS released interim final regulations about the program that are available here: http://www.hhs.gov/ociio/regulations/gate.pdf, and FAQs are available here: http://www.errp.gov/faq_applications.shtml.

reimbursement are denied. Payments from the reinsurance program to a plan are not included in the gross income of any employer that maintains the plan.

(3) *Dependent Children Benefits Excluded from Income*.

The statutes modify the Tax Code by extending the exclusion from the employee's income to the coverage of certain adult children. Currently, children are no longer "dependents" eligible for tax-free benefits under their parent-employee's health plan after age 18, unless they are full-time students, which extends the tax-free benefit through age 23. As of March 30, 2010, the income tax exclusion under an employer provided health plan is extended to any child of an employee who has not attained age 27 as of the end of the taxable year. Self-employed individuals may also deduct the cost of covering any child of the taxpayer who has not attained age 27 as of the end of the taxable year.

B. Provisions Effective for Years after September 23, 2010

(1) *No Lifetime Limits*.

A health plan may not impose any lifetime dollar limits on the availability of "essential health benefits." HHS will eventually define what constitutes an essential health benefit in regulations. However, the definition will include at least the following:

- Ambulatory patient services,
- Emergency services,
- Hospitalization,
- Maternity and newborn care,
- Mental and behavioral health and substance abuse services and treatment,
- Prescription drugs,
- Rehabilitative services and devices,
- Laboratory services,
- Preventative, wellness, and chronic disease management services, and
- Pediatric services, including oral and vision care.

HHS' definition of essential health benefits must include the scope of benefits provided under a "typical" employer plan. To determine what a "typical" employer plan looks like, the Department of Labor will conduct a survey of employer-sponsored health coverage to determine the benefits typically covered by employers. If an eligible employee has reached the lifetime limit and therefore lost coverage, the plan must offer that employee a special enrollment period.

(2) *No Annual Limits.*

In addition to the prohibition on lifetime dollar limits, a plan may not impose any annual dollar limits on essential health benefits for plan years beginning after 2013. Before then, an annual limit must exceed $750,000 for plan years beginning after September 23, 2010, $1 million in 2011 and $2 million in 2012, if those limits do not violate other state or federal laws (i.e., higher minimums under other laws).

A plan may set lifetime or annual benefit limits on benefits that are ***not*** essential benefits. But it is unclear how to do so until HHS issues guidance describing precisely what an "essential health benefit" is. The statutes instruct HHS to define the annual limit in a way which ensures that access to needed services is available with a "minimal impact" on premiums.

(3) ***No Pre-existing Conditions for Younger Children.***

A plan may not impose any preexisting condition exclusions on participants (and apparently dependents) that are under age 19. This will be the case whether or not such individuals have prior creditable coverage and whether or not the individual is a late enrollee. Effective for plan years beginning after 2013, the requirement becomes applicable for all plan participants, regardless of age.

(4) ***Prohibition on Coverage Rescissions.***

A plan cannot rescind coverage once a participant becomes eligible, unless the participant has committed fraud or has made an intentional misrepresentation of material fact "as prohibited by the terms of the plan." The plan must provide 30-day advance written notice of the rescission. This does not prohibit an employer from terminating the entire health plan with appropriate prior notice to participants, or from cancelling an individual's coverage prospectively, but instead addresses only retroactively taking away a participant's coverage.

The reference to the "terms of the plan" means that the plan can retroactively cancel coverage only if the plan terms so provide, even if a participant has engaged in fraud – such as lying about previous treatment or obtaining coverage for an individual by wrongly asserting that they are the employee's spouse or dependent. Employers may want to amend their plans to allow for the rescission of coverage under such circumstances, if the plan does not already do so.

(5) ***Dependent Coverage for Older Children.***

A non-grandfathered plan that provides coverage for dependent children must now continue that coverage until a child attains age 26. This requirement applies even if the child is married or is covered under their own plan. Plans are not required to make coverage available for a child of a child receiving dependent coverage (e.g., a child whose parent is a dependent child of a covered employee). Plans must give a special enrollment opportunity to children of eligible employees who are older than the plan's current exclusion age (usually 18 or 23, as mentioned above) but younger than 26.

(6) ***Preventive Services.***

A non-grandfathered plan must cover, and may not impose any cost-sharing requirements with respect to, certain preventative care benefits, including recommended immunizations. The statutes refer to particular lists of recommendations and guidelines for determining which preventative services are subject to this prohibition on cost-sharing.[7] Employers will want to review those lists carefully, since failure to comply can result in a penalty of $100 per day, per participant in addition to liabilities under ERISA.

[7] The Task Force's recommendations are available at http://www.uspreventiveservicestaskforce.org/.

(7) *Prohibition on Insured Plans Discriminating in Favor of Highly-Compensated Individuals*.

For many years, nondiscrimination rules have prohibited self-insured health plans from favoring highly-compensated individuals. If a self-insured plan fails to satisfy those rules, the value of the health benefit becomes taxable income for the highly-compensated individual.

The statutes generally extend these nondiscrimination rules to non-grandfathered insured plans. However, the consequences of failing to meet the requirements are different for insured plans. The employer sponsoring such a discriminatory plan is subject to an excise tax of $100 *per day, per participant*. In addition, the 20% Code section 409A penalties may attach to the no longer tax-free health benefit provided to the individuals covered by the plan.

(8) *Appeals Process*.

The statutes add new claims appeals process requirements applicable to all non-grandfathered plans. They do not displace (and mostly incorporate) the existing claims and appeals requirements of ERISA and its related regulations. The new "internal" appeals process requirements may cause a careless employer to violate HIPAA, triggering penalties. They also seem to require full, rather than "substantial," compliance. Notably, the new provisions require *all* plans to have an external review process. Non-grandfathered self-funded plans, previously exempt from state appeals rules, are now subject to an internal review process followed by federal external review. This review includes the hiring (at the plan's expense) of an independent review organization. All other plans are subject to a state external review process.

Plans must provide participants with notice, in a culturally and linguistically appropriate manner, of the internal and external appeals processes available. A plan must allow a participant to review his or her file, present evidence and testimony as part of the appeals process, *and receive continued coverage pending outcome of the appeals process*. This continued coverage requirement presumably means, for example, that if a participant is undergoing a course of treatment for which a plan has or will deny coverage, the plan will be required to continue to pay those expenses until the appeals process is exhausted. This may pose a number of difficult questions, including how quickly a plan must make payment for disputed coverage during the pendency of a participant's appeal.

(9) *Choice of Health Care Professional*.

If a non-grandfathered plan requires a participant to designate a primary care provider, the plan must permit a participant or beneficiary to designate any participating primary care provider who is available to accept that individual. If a plan requires the designation of a participating primary care provider for the child of a participant, the plan must permit the designation of a physician who specializes in pediatrics as the child's primary care provider, if that physician participates in the plan's network.

A plan that covers obstetric or gynecology care and requires the designation of a primary care provider may not require prior authorization or referral if a female participant seeks obstetrical or gynecological care provided by a participating health care professional who specializes in obstetrics or gynecology. That professional, however, must agree to otherwise adhere to the

plan's policies and procedures, including those regarding referrals and obtaining prior authorization and providing services pursuant to a treatment plan (if any) approved by the plan.

A plan that requires designation of a participating primary care provider (and provides coverage for obstetric or gynecological care) must treat the provision of obstetrical and gynecological care by the professional chosen by the participant or beneficiary as the authorization of a primary care provider. This does not require a plan to waive coverage exclusions under the plan's terms relating to obstetrical or gynecological care. Nor does it preclude a plan from requiring that the provider notify the primary care health care professional or the plan of treatment decisions.

(10) *Emergency Services.*

If a non-grandfathered plan provides any benefits for services in an emergency department of a hospital, the plan must cover emergency services without requiring prior authorization and must provide coverage whether or not the emergency care provider is a participating provider under the plan with respect to those services. In addition, a plan must provide for such coverage by a nonparticipating provider without imposing limitations on coverage more restrictive than those applicable to emergency department services from providers who have a contractual relationship with the plan. If emergency services are provided out-of-network, the cost-sharing requirement (expressed as co-payment amount or coinsurance rate) must be the same as if the services were provided in-network.

Emergency services must relate to an "emergency medical condition." An emergency medical condition is a medical condition with acute symptoms of sufficient severity (including severe pain) that a prudent layperson, with an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in placing the health of the individual (or an unborn child) in serious jeopardy, result in serious impairment to bodily functions or result in serious dysfunction of any body part. The emergency services subject to the new rule are a medical screening examination, including ancillary services routinely available to the emergency department to evaluate the emergency medical condition, and any further medical examination and treatment that is required to stabilize the patient. "To stabilize" means to provide treatment necessary to assure that no material deterioration of the condition is likely to result from, or occur during the transfer of the individual.

(11) *State Consumer Assistance.*

During 2010, HHS will award grants to states to establish, expand, or provide support for health insurance ombudsman programs or offices of health insurance consumer assistance. Under these programs, the state office or ombudsman would respond to inquiries or complaints about insured plans not only with respect to state law, but also with respect to federal health insurance requirements.[8]

States will establish programs to assist individuals with plan enrollment and with the filing of complaints and appeals, including appeals under a plan's internal appeal or grievance process. This is an unprecedented intrusion of state government into the internal operation of self-insured plans. And the states are required to collect and report data to HHS about the types of problems

[8] The Oregon Department of Business and Consumer Services received $400,000. http://www.cbs.state.or.us/external/ins/news_releases/2010/101910-oregonfederalgrant.pdf.

encountered by individuals. HHS, in turn, will use this data to identify areas where more enforcement action is necessary, and it will be required to share this information with state insurance regulators, the Dept. of Labor, and the Internal Revenue Service for use in their enforcement activities.

C. Effective in 2011

(1) *Medicine and Drug Reimbursements under HSAs, FSAs, and HRAs*.

Reimbursement for a medicine or a drug is a qualified medical expense eligible for favorable tax treatment under an HSA only if it is a prescribed drug or is insulin. In other words, over-the-counter drugs are no longer reimbursable expenses. However, a drug that is available without a prescription, but which, in fact, is prescribed, will qualify for favorable treatment. Similar rules will apply to health plans, Flexible Spending Accounts ("FSAs"), and health reimbursement arrangements ("HRAs"). The rules for HSAs, health plans, FSAs, and HRAs are effective for expenses incurred during taxable years beginning after December 31, 2010.

(2) *Increase in Tax on HSA/MSA Distributions*.

The tax on distributions from Health Savings Accounts ("HSAs") and Medical Savings Accounts ((MSAs") that are not for "qualified medical expenses" is increased from 10 percent to 20 percent for distributions made after December 31, 2010.

(3) *Simple Cafeteria Plans for Small Businesses*.

The statutes add a provision allowing small businesses to establish "simple cafeteria plans" for years beginning after December 31, 2010. If certain requirements are met, a "small employer" (an employer that employed an average of 100 or fewer employees during either of the two preceding years) enjoys a safe harbor from the nondiscrimination requirements applicable to cafeteria plans. The plan also enjoys a safe harbor from the nondiscrimination requirements for specified benefits offered under a cafeteria plan, including benefits under a self-insured medical expense reimbursement plan, group term life insurance and benefits under a dependent care assistance program. The plan must meet minimum eligibility and participation requirements, and the employer must make minimum matching or non-elective contributions.

(4) *Reporting Cost of Health Coverage on W-2*.

Effective for W-2s distributed in 2013 for the 2012 year, an employer must report on an employee's W-2 the aggregate cost of the employee's health insurance coverage sponsored by the employer, excluding the amount of any salary reduction contribution to an FSA.

D. Grandfathered Plan Rules

Certain rules do not apply to "grandfathered plans," or at least do not apply to certain participants in those plans. The general rule for grandfathered plans is that the requirements described above as not applying to grandfathered plans do not apply to a plan's coverage of an individual if that individual was enrolled in the plan on March 23, 2010. In addition, the rules do not apply to family members of such a grandfathered individual who are permitted to enroll after March 23, 2010, if the enrollment of those family members was permitted under the terms of the

plan as in effect on March 23, 2010, and the plan is "renewed" after March 23, 2010. Further, a plan that provided coverage on March 23, 2010, may permit "new" employees (and their family members) to enroll in the plan without having the provisions of the law described above apply to those new employees (and their families).

The result of these rules is that a plan in existence on March 23, 2010, may for many of its participants avoid the rules we have described above. However, note below that some of those rules still apply to grandfathered plans.

Some participants in a plan that existed on March 23, 2010, would not seem to be grandfathered. For example, it appears that individuals who were employees on March 23, 2010, but who were not participants in the plan on that date may not be grandfathered (nor would their family members be grandfathered). This could include individuals who were employees on March 23, 2010, but who (a) chose not to be covered; (b) were not in a group of employees eligible for coverage, or (c) wanted coverage but had not yet satisfied the plan's waiting period.

It will be interesting to see how guidance from the agencies addresses the question whether an individual was enrolled on March 23, 2010. We wonder, for example, whether individuals will lose grandfathered status if their plan merges with another plan or the plan sponsor changes. The question in that case, presumably, would be whether the resulting plan is the same as the plan that provided coverage on March 23, 2010.

There are a number of exceptions to the general rule that the provisions above do not apply to grandfathered plans. The following provisions also apply to grandfathered plans, and will do so at the same time they would apply to non-grandfathered plans:

- The waiting period rules (applicable in 2014);
- The restrictions on lifetime and annual limits;
- The rules on rescission;
- The preexisting condition prohibition; and
- The rules on covering adult children (up to age 26) as dependents, although for plan years beginning before January 1, 2014, the rules will apply only to an adult child who is not eligible to enroll in an "eligible employer sponsored health plan" other than the grandfathered plan. The term "eligible employer sponsored health plan" means a plan offered by an employer to an employee that is subject to ERISA, a governmental plan, or an insured plan (whether or not subject to ERISA or a governmental plan).

E. Collectively Bargained Plans

In the case of an insured plan maintained pursuant to one or more collective bargaining agreements between employee representatives (such as a union) and one or more employers that was ratified before March 23, 2010, the applicable provisions above may have a delayed effective date. Those rules will not apply until the date on which the last of the collective bargaining agreements relating to the coverage terminates. Any coverage amendment made

pursuant to a collective bargaining agreement that changes the coverage solely to conform to a requirement added by the statutes will not be treated as a termination of the collective bargaining agreement for this purpose. It appears that the delayed effective date does not apply to self-insured plans, though it is possible this distinction was inadvertent.

F. Employment Law Issues

(1) *New FLSA Whistleblower Protections*.

The statutes prohibit employers from retaliating against any employee who provides or is about to provide to an employer, the federal government, or a state attorney general information that the employee "reasonably believes" to be a violation of PPACA. Employers are also prohibited from retaliating against any employee who participates in investigations into alleged violations, or objects to or refuses to participate in any activity that the employee reasonably believes to be a violation of PPACA. Among other things, employees can object to activities ranging from denials of coverage due to preexisting conditions to improper claims handling, both of which would violate PPACA. Unlike some other whistleblower laws, the new provision does not require employees to notify the employer that they believe they have been asked to perform a task that violates the PPACA at the time they are asked to perform the task. The whistleblower rights and remedies may not be waived by any agreement, policy, form, or condition of employment.

Retaliation occurs when an employer discharges or discriminates against any employee with respect to the terms, conditions, or other privileges of employment on account of the employee's whistleblower activity. Retaliatory actions are those that are likely to dissuade a reasonable worker from engaging in whistleblower activity. Such actions can include termination, suspension, demotion, reduction in pay, failure to promote, significant loss in benefits, and job reassignment to what are considered undesirable tasks.

The complaint procedures, burden of proof, and remedies applicable to whistleblower retaliation claims arising under the PPACA are set forth in the Consumer Product Safety Improvement Act of 2008.[9] An employee has 180 days from the date of the alleged violation to submit a complaint to the Department of Labor's Occupational Safety & Health Administration (OSHA). OSHA may grant preliminary relief during its disposition of the complaint.

Within 90 days of OSHA's written determination, or 210 days after the filing of the complaint, an employee may file a civil action in federal court and exercise his or her right to a jury trial. Available remedies include reinstatement, other injunctive relief, back pay with interest, litigation costs, expert witness fees, and reasonable attorney's fees.

(2) *Nursing Mothers*.

The statutes also amend the FLSA to require employers to give an employee "reasonable" break time to express milk for one year after a child's birth, each time the employee needs to express milk. The employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, where the employee can express milk. The employer is not required to pay the employee for this break time. Employers with fewer

[9] 15 USC 2087(b).

than 50 employees are not subject to these requirements if they would impose an undue hardship "by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." The provision does not preempt any state laws that provide greater protections to employees. Since the law does not preempt Oregon's nursing mother statute, "reasonable break time" means at least 30 minutes during each four-hour work period.[10]

2. WELLNESS PLANS

Wellness programs are offered by employers to promote health and prevent disease. As under current regulations, how wellness programs are treated under the statutes depends on whether an individual is rewarded for satisfying a standard related to a health status factor. If none of the conditions for obtaining a premium discount or rebate or other reward for participation in a wellness program is based on an individual satisfying a standard that is related to a health status factor, it appears the wellness program will not violate the new rules so long as participation in the program is made available to all similarly-situated individuals. However, there is an ambiguity in the statutes that can be read to allow only programs that fall into one of the following five types:

- A program that reimburses all or part of the cost for memberships in a fitness center.
- A diagnostic testing program that provides a reward for participation and does not base any part of the reward on outcomes.
- A program that encourages preventive care related to a health condition through the waiver of the copayment or deductible requirement under a group health plan for the costs of certain items or services related to a health condition (such as prenatal care or well-baby visits).
- A program that reimburses individuals for the cost of smoking cessation programs without regard to whether the individual quits smoking, and
- A program that provides a reward to individuals for attending a periodic health education seminar.

An alternative, and perhaps better, reading of the statute is that the five types of programs above are deemed to meet the requirement that they not offer a reward based on a standard related to a health status factor. If that is the case, other programs that do not offer a reward based on satisfying a standard related to a health status factor will be permissible if made available to all similarly-situated individuals.

Even if one or more of the conditions for obtaining a premium discount, rebate, or reward is based on satisfying a standard related to a health status factor, a wellness program will not violate the statutes if each of the following requirements is met:

- The reward for the wellness program, together with the reward for other wellness programs related to the plan that require satisfaction of a standard related to a health

[10] ORS 653.077.

status factor, does not exceed 30 percent of the cost of employee-only coverage under the plan. If, in addition to employees or individuals, any class of dependents (such as spouses or spouses and dependent children) may participate fully in the wellness program, the reward may not exceed 30 percent of the cost of the coverage in which the employee or individual and any dependents are enrolled. The cost of coverage will be based on the total amount of employer and employee contributions for the benefit package under which the employee is (or the employee and any dependents are) receiving coverage. A reward may be in the form of a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism (such as deductibles, copayments, or coinsurance), the absence of a surcharge, or the value of a benefit that would otherwise not be provided under the plan. HHS, Labor and Treasury may increase the maximum reward from 30 percent to as much as 50 percent, if they think appropriate.

- The wellness program is reasonably designed to promote health and prevent disease. This requirement will be met if the program has a reasonable chance of improving the health of, or preventing disease in, participating individuals, and it is not overly burdensome, is not a subterfuge for discriminating based on a health status factor, and is not highly suspect in the method chosen to promote health or prevent disease.

- The plan gives eligible individuals the opportunity to qualify for the reward at least once each year.

- The full reward is available to all similarly-situated individuals. For this purpose, the reward will not be considered available to all similarly-situated individuals for a period unless, among other requirements, the wellness program allows (1) for a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom, for that period, it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard; and (2) for a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom, for that period, it is medically inadvisable to attempt to satisfy the otherwise applicable standard. If reasonable under the circumstances, the plan (or insurance company) may seek verification, such as a statement from an individual's physician, that a health status factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy or attempt to satisfy the otherwise applicable standard.

- The plan (or insurance company) involved must disclose in all plan materials describing the terms of the wellness program the availability of a reasonable alternative standard (or the possibility of a waiver of the otherwise applicable standard). Alternatively, plan materials may disclose that a wellness program is available without describing its terms; in which case, there will be no need to describe the alternative standard.

Under an important grandfather provision, the new rules do not prohibit a currently operating wellness program established prior to March 23, 2010, that complied with all applicable regulations. Such a program may continue to operate for as long as the previously applicable

regulations remain in effect, apparently without the need to comply with the new rules during that time period.

LESSON:

These are just some of the provisions of the statutes that take effect in 2010 and 2011. In addition, many of the changes that have received the most media coverage do not take effect until 2014 (e.g., "Cadillac" health plan tax, mandatory insurance coverage, etc.). Several states' Attorney Generals have filed suit opposing the new laws on constitutional grounds, and many members of Congress have vowed to repeal the laws during the new session beginning in January. Whether any of those efforts is ultimately successful is uncertain. Until then, employers should continue to implement the current provisions of the statutes and plan on implementation methods for provisions applicable in the future.

3. DISABILITY LAW UPDATE

A. Federal Law (ADA)

In 2008, Congress passed the Americans with Disabilities Act Amendments Act (ADAAA) to expand the protections of the ADA.[11] Although the proposed ADAAA regulations published by the EEOC have not been made final,[12] the changes to the underlying law became effective on January 1, 2009. Accordingly, employers would be wise to follow the EEOC interpretation as stated in the proposed regulations rather than wait for final regulations. The ADA applies to employers with 15 or more employees. It is anticipated that larger numbers of employees will be seeking protection from discrimination and requesting accommodation as a result of these changes. The ADAAA and proposed regulations do the following:

- To be covered by the ADA, an individual must have an impairment that "substantially limits" a major life activity. The proposed regulations contain a broader definition of the term "substantially limits," thereby making it easier to qualify as "disabled" under the ADA.

- The ADAAA and proposed regulations contain an expanded (but nonexclusive) list of major life activities, including: caring for oneself, manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Significantly, under the proposed regulations, major life activities now include major bodily functions, which are described as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, reproductive, hemic, lymphatic, musculoskeletal, special sense organs and skin functions."[13]

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[11] The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) 42 USC 1210, *et seq.*

[12] 74 Fed Reg 48431, http://edocket.access.gpo.gov/2009/E9-22840.htm. *See also*, "EEOC Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008." http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html.

[13] *See* Proposed Regulations Section 1630.2(i).

- Under the prior interpretation of the ADA, an individual whose condition was controlled by treatment would not be considered disabled. Under the ADAAA and the proposed regulations, mitigating measures other than "ordinary eyeglasses or contact lenses" will no longer be considered in assessing whether an individual has a disability. This means that individuals with, for example, diabetes or mental illness, who are fine on medication, almost certainly now qualify as disabled.

- Clarifies that an impairment that is episodic or in remission (such as cancer or multiple sclerosis) is a disability if it would substantially limit a major life activity when active.

- Makes it easier for an employee to sue his or her employer under the theory that the employer "regarded" the employee as disabled. Specifically, the amendments provide that an individual only needs to show they were discriminated against due to their non-minor, non-transitory, impairment without showing that the impairment meets the more stringent definition of "disability."

- Provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation.

B. Genetic Information Nondiscrimination Act (GINA)

Because the ADA already covers individuals who are currently disabled, GINA is primarily intended to prevent discrimination against individuals who are currently healthy but who face an increased genetic risk of contracting a disease or disability in the future.[14] The EEOC has issued final regulations implementing GINA.[15] The regulations prohibit an employer from asking for genetic information and prohibit discrimination based on an applicant or employee's genetic information. Genetic information includes genetic tests, but also family medical history. An employer may not use this information in deciding whether to hire, promote, fire or offer health benefits to an individual. Further, employers may not inquire as to an individual's genetic information, including family history. There are several exemptions to this prohibition, including inquiries as part of a properly-designed wellness program, inquiries pursuant to the Family Medical Leave Act to verify that an employee needs leave to care for a family member who has a serious health condition, and inadvertently obtained information (such as accidentally overhearing an employee disclose genetic information). Finally, although employers may require medical examinations during the period after a job offer is made and before the individual starts work (and otherwise during employment if there is a business necessity such as a requested accommodation), such examinations must now be conducted with instructions to the healthcare provider not to inquire about, or convey to the employer, the employee's genetic information.

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[14] http://www.eeoc.gov/laws/regulations/gina_qanda_smallbus.cfm.

[15] 29 CFR 1635, *et seq.*, http://www.federalregister.gov/articles/2010/11/09/2010-28011/regulations-under-the-genetic-information-nondiscrimination-act-of-2008.

C. State Law

The Oregon Bureau of Labor has issued final regulations updating Oregon's law governing discrimination and accommodation of employees with disabilities.[16] The changes are intended to conform Oregon's disability law[17] to the changes imposed by the ADAAA, but the two laws still differ in some respects. Oregon's disability law applies to employers with six or more employees,[18] whereas the ADA applies to employers with 15 or more employees. The list of major life activities under the proposed Oregon regulations is broader than under the ADAAA and includes "education," "socializing," "ambulation," "transportation," and "ability to acquire, rent or maintain property." The Oregon regulations define "substantially restricts" as an impairment that "materially" restricts one or more major life activities. Use of the term "materially" to define "substantially" arguably broadens the reach of the law.

LESSON:

Employers should be applying the expanded reach of the ADAAA and the Oregon disability law. Employers will need to recognize chronic conditions in remission as current disabilities. Conditions that are controlled by medication will qualify an individual for protection if the condition would be disabling if left untreated (*e.g.* diabetes, heart disease). Finally, individuals who perform normal tasks of daily living and working, but who have an impairment of a "major bodily function" (such as digestion, immune system, lymphatic, etc.) will qualify as disabled. Employers should train supervisors and managers on the ADA's basic requirements (non-discrimination, accommodation, and confidentiality of medical information) and on the ADA's expanded scope. In order to guard against "regarded as" claims, employers should review and reconsider any pre-employment medical examinations currently conducted and review policies regarding the sharing of confidential medical information within the organization (for example, supervisors that are not part of an accommodation process need not know the nature of an individual's condition). Finally, human resources professionals should track the EEOC's Proposed Regulations to incorporate any requirements as they become final.

4. INCREASED SCRUTINY OF INDEPENDENT CONTRACTOR CLASSIFICATION

According to the *New York Times*: "Federal and state officials, many facing record budget deficits, are starting to aggressively pursue companies that try to pass off regular employees as independent contractors."[19] The federal government plans to expand investigations by hiring 100 more enforcement personnel, and the IRS has begun auditing 6,000 companies to see whether they are in compliance with the laws governing classification of workers.[20] The IRS has entered into a Questionable Employer Tax Practices MOU with over half of all state unemployment agencies.[21]

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[16] OAR 839-006-0200, *et seq.*
[17] ORS 659A.100.
[18] OAR 839-006-0205(2).
[19] http://www.nytimes.com/2010/02/18/business/18workers.html, February 17, 2010.
[20] http://www.irs.gov/businesses/small/article/0,,id=215350,00.html.
[21] http://www.irs.gov/newsroom/article/0,,id=175455,00.html.

The MOU allows the IRS and the state workforce agencies to exchange audit reports and audit plans, and to participate in side-by-side examinations, when appropriate. This project reportedly allows a centralized and uniform mechanism for IRS and state employment tax data exchanges.

Although much of the focus has been on stricter enforcement of existing laws, the Fair Playing Field Act of 2010 (HR 6128),[22] introduced in September of 2010, would amend the provisions of the Tax Code that provide for reduced penalties for failure to deduct and withhold income taxes and the employee's share of FICA taxes. Further, this bill would require persons who contract independent contractors on a regular and ongoing basis to provide a written statement to each independent contractor of the federal tax obligations of independent contractors, the labor and employment law protections that do not apply to independent contractors, and the right of the independent contractor to seek a status determination from the IRS.

At the state level, Oregon has increased its efforts in addressing misclassification of workers. In 2009, the legislature created the Interagency Compliance Network.[23] The Interagency Compliance Network consists of the Oregon Department of Justice, Department of Revenue, Employment Department, Department of Consumer and Business Services, Bureau of Labor and Industries, Construction Contractors Board, and State Landscape Contractors Board.

The network is tasked with creating consistency in agency determinations relating to the classification of workers; gathering and sharing information relating to businesses that violate laws relating to taxation or employment; gathering and sharing information relating to the misclassification of workers; developing investigative methods for auditing suspected violators; conducting joint audits of suspected violators; creating a coordinated enforcement process for the laws relating to classification of workers; and engaging in public outreach and education on misclassification.

In an effort to educate employers regarding the independent contractor classification standards, the Oregon Bureau of Labor and Industries recently held several educational seminars on the topic and published an updated guidance on worker classification.[24]

LESSON:

Businesses should be prepared to self-audit their worker classification and be proactive in correcting any misclassification that is identified. Arrangements that previously did not draw agency interest are likely to be closely examined. Arrangements that were previously considered borderline compliant may fall on the other side of the line given the trend toward stricter scrutiny. Owing to the cooperation among various agencies, employers faced with questions from the Employment Department about a single individual's unemployment claim may find that the inquiry grows to include a number of State agencies (Department of Revenue, Bureau of Labor) focusing on entire categories of workers. Finally, employers will need to track proposed new laws that may tighten the standards further in the coming year.

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[22] http://kerry.senate.gov/press/release/?id=cd7f5a6e-7feb-41ae-8e8f-6004669821fc; http://www.govtrack.us/congress/bill.xpd?bill=h111-6128.
[23] ORS 670.700; 670.705.
[24] http://www.oregonindependentcontractors.com/IC/docs/ic_handout_600c.pdf.

5. PERSISTENT PROBLEMS ADMINISTERING OFLA AND FMLA

A. When OFLA and FMLA Diverge

Although the Oregon Family Leave Act (OFLA) is construed to the extent possible in a manner that is consistent with similar provisions of federal Family Medical Leave Act (FMLA),[25] the two statutes diverge in many respects. In areas in which OFLA and FMLA differ, employers may not be able to count the time against the employee's allotment under both, which can make family leave very difficult to administer. The following are some highlights of some of the most significant differences between OFLA and FMLA.

➢ Coverage

Employers are covered by OFLA if they have 25 or more employees in the State of Oregon.[26] Employers are covered by FMLA if they have 50 or more employees.[27] Under both OFLA and FMLA, the coverage criteria must be met for at least 20 weeks in the current or preceding calendar year.[28]

➢ Eligibility

Employees are eligible under OFLA[29] if they are employed in Oregon on the date the leave is to begin and:

- For the purpose of taking parental leave, an employee has worked for the employer for at least 180 calendar days immediately preceding the date the leave begins, and
- For purposes of taking all other types of OFLA leave, including pregnancy disability leave, the employee worked for the employer for an average of at least 25 hours per week during the 180 calendar days immediately preceding the leave.

Employees are eligible under FMLA if the employee is employed in the United States and:

- The employee has worked for the employer for at least 12 months;
- The employee has at least 1,250 hours for the employer in the preceding 12 months; and
- At least 50 employees are employed by the employer within 75 miles of the worksite where the employee works.[30]

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[25] *See* OAR 839-009-0220(2).
[26] ORS 659A.153.
[27] 29 USC § 2611(4).
[28] *See* OAR 839-009-0210(3); 29 CFR 825.104(a).
[29] *See* ORS 659A.156; OAR 839-009-0210(6).
[30] 29 CFR 825.110(a).

Due to the difference in eligibility requirements, employees may exhaust their annual leave under OFLA before they qualify for leave under FMLA. If that happens, the employee may be eligible for an additional 12 weeks (or more) of leave under FMLA within the same leave year.

- **Qualifying Conditions and Military Service**

Under both OFLA and FMLA, employees may take family medical leave for their own serious health condition (including disabilities related to pregnancy and childbirth), to care for a covered family member with a serious health condition, or for the birth or placement of a child for adoption or foster care. Under OFLA, sick child leave is also available (the child's illness need not qualify as a "serious health condition").[31] Under FMLA, leave is available for qualifying exigencies[32] and to care for certain family members in the military who sustain a serious injury or illness during covered active duty.[33] In addition, under OFLA, leave due to a compensable injury that qualifies for time loss under workers compensation may not be counted against the employee's OFLA entitlement.[34]

Due to the difference in qualifying circumstances, employees may be eligible for leave under OFLA and not FMLA, or vice versa. When the leave qualifies under only one law, it may not be counted against the other.[35]

- **Covered Family Members**

OFLA covers a wider range of family members than FMLA:

- OFLA covers spouses, registered domestic partners, custodial parents, non-custodial parents, adoptive parents, foster parents, biological parents, parents-in-law, parents of registered domestic partners, grandparents and grandchildren of the employee, a person with whom the employee is or was in a relationship of *in loco parentis*, and the biological, adopted, foster or stepchild of the employee or the employee's registered domestic partner.[36]

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[31] ORS 659A.159(1)(d).

[32] 29 USC § 2612(a)(1)(E). The Armed Forces include Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve), or a retired member of the Regular Armed Forces or Reserve. An employee whose family member is on active duty or call to active duty as a member of the Regular Armed Forces is not eligible to take leave because of a qualifying exigency. 29 CFR 825.126(b)(2)(i). A call to active duty refers to a Federal call to duty. 29 CFR 825.126(b)(2)(ii).

[33] 29 USC §2612(a)(3); 29 CFR 825.127(b). Oregon military family leave, which counts against an employee's annual OFLA entitlement, is available to employees each time a family member is deployed for or on leave from active duty during a military conflict. ORS 659A.090(1); OAR 839-009-0380(5).

[34] ORS 659A.162(6); OAR 839-009-0240(8).

[35] *See, e.g.*, OAR 830-009-0245(6) (leave taken under FMLA will count as OFLA leave only if the employee is eligible under both laws).

[36] OAR 839-009-0210(7).

- FMLA covers spouses, parents, persons with whom the employee is or was in a relationship of *in loco parentis*,[37] and biological, adopted, foster- and step-children.

Notably, the FMLA does not cover parents-in-law, registered domestic partners and their parents and children, and employees' grandparents and grandchildren.[38] Consequently, OFLA leave taken for family members not covered under FMLA may not be counted against the employee's FMLA leave.

➢ Contacts with Treating Health Care Providers

Provided the employee agrees, FMLA now permits an employer to contact an employee's health care provider for clarification of a medical certification when the employee fails to cure deficiencies. The designated employer representative may not be the employee's direct supervisor.[39]

OFLA regulations were not changed to conform to the new FMLA regulation. Consequently, employers may *not* contact a health care provider directly for further information after receiving a signed medical certification. With written authorization from the employee or the employee's family member, employers are still permitted to have a health care provider contact the employee's or family member's health care provider on the employer's behalf for the purpose of clarifying or authenticating a medical certification.[40]

➢ Length of Leave

Under OFLA, eligible employees are entitled to take up to 12 weeks in a 12-month period,[41] except:

- A female employee may take up to 12 weeks of pregnancy disability leave, in addition to 12 weeks of OFLA leave for *any other qualifying reason*.[42]

- An employee taking the entire 12 weeks of OFLA leave for parental leave may take an additional 12 weeks of sick child leave within the same leave year.[43] However, if the employee uses less than 12 weeks of parental leave, no additional leave is available except for the balance of the initial 12 weeks, which may be used for any other qualifying purpose.[44]

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[37] Under both OFLA and FMLA, "*in loco parentis*" means in the place of a parent, having financial and day-to-day responsibility for the care of a child. No legal or biological relationship is required. OAR 839-009-0210(15); 29 CFR 825.122(c)(3).
[38] 29 CFR 825.113.
[39] 29 CFR 825.307(a).
[40] OAR 839-009-0260(8).
[41] ORS 659A.162(1).
[42] ORS 659A.162(2)(a); OAR 839-009-0240(1)(a).
[43] ORS 659A.162(2)(b); OAR 839-009-0240(1)(b).
[44] OAR 839-009-0240(1)(b).

- An employee may take up to 24 weeks of OFLA leave in one leave year if he/she takes 12 weeks of parental leave, followed by 12 weeks of sick child leave.[45]

- A female employee may take up to 36 weeks of OFLA leave in one leave year if she takes 12 weeks of pregnancy disability leave; followed by 12 weeks of parental leave; followed by 12 weeks of sick child leave.[46]

Under FMLA, eligible employees are limited to taking up to 12 weeks in a 12-month period.[47] The only exception is for covered service member leave, which may be taken for up to 26 weeks during a 12-month period. This type of leave may only be taken one time.[48] It begins on the first day the eligible employee takes FMLA leave to care for a covered service member and ends 12 months after that date.[49]

➢ **Compensation and Benefits**

- Deductions from Salary and Leave Banks

Employers may ordinarily reduce an *exempt* employee's pay only for certain full-day absences (*e.g.*, for personal reasons or due to illness).[50] However, FMLA allows employers to convert the salary of an exempt employee to an hourly equivalent and dock the employee's pay for the amount leave taken without jeopardizing the employee's exempt status. Therefore, when an exempt employee takes intermittent leave in blocks of less than one day, the employee's salary may be reduced for the partial-day absence.[51]

This is not the case under current OFLA regulations. If an exempt employee qualifies for family medical leave only under OFLA (*e.g.*, the employer has less than 50 employees, the employee takes leave for a sick child or for the serious health condition of a parent-in-law, registered domestic partner, or grandparent), the employee's salary cannot be reduced for a partial-day absence without jeopardizing the employee's exempt status.[52] However, provided notice requirements are met, employers are permitted to make deductions from an exempt employee's accrued leave for partial day absences taken under OFLA.[53] Once the leave bank is exhausted, no further deductions may be made.

- Payment of Group Health Care Premiums

While employees are on FMLA leave, employers must continue to pay for any applicable group health coverage on the same terms as applied before the employee took leave (*i.e.*, employers must pay their proportionate share of the premiums for health insurance benefits for employees

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[45] OAR 839-009-0240(3).
[46] OAR 839-009-0240(2).
[47] 29 USC § 2612; 29 CFR 825.200(a).
[48] 29 USC § 2612(a)(3) and (4).
[49] 29 CFR 825.127(c).
[50] Such deductions may be made only when they comply with state and federal wage and hour laws. *See*, e.g., 29 CFR 541.602.
[51] 29 CFR 825.206(a).
[52] OAR 839-009-0240(12)(b).
[53] OAR 839-009-0280(4).

on FMLA leave, but may require employees to continue to pay their corresponding share of the premiums).[54] In contrast, OFLA does not require employers to continue health or other benefits while an employee is on family medical leave, unless they do so for employees on non-OFLA leave. However, upon returning to work, the employee's benefits must be restored in full, except for accrued benefits used while on OFLA leave, or eliminated or changed for similarly situated employees who were not on family medical leave.[55] As a practical matter, this rule has required most employers to continue to pay for health insurance or other benefits while the employee is on leave. Oregon employers may be relieved of this burden as the Health Care Reform Act provisions kick in and eliminate waiting and exclusionary periods.

- **Reinstatement Following Leave**

An employee on OFLA leave is entitled to be reinstated to the *same* position the employee held when the leave commenced, unless the employee would have been bumped if OFLA leave had not been taken.[56] An employee returning from FMLA leave may be returned to the same position or an equivalent position (one with equivalent pay, benefits, and other terms and conditions of employment).[57]

LESSON:

The foregoing examples are merely some of the ways in which OFLA and FMLA differ. The extent to which FMLA and OFLA diverge can make administration of family medical leave policies quite complex. Leaves of absence under the recently-enacted Oregon Military Family Leave Act (which count against OFLA) and Oregon's domestic violence leave law (which *may* count against OFLA) further complicate the analysis, as complying with one of these leave laws does not automatically result in compliance with the others. Accordingly, when employees are absent due to their own illness, the illness of a family member, in connection with a family member's military service, or to address issues relating to domestic violence, it is important to conduct a separate review of the leave policies covering each of these subjects to determine what rights and obligations apply.

B. Managing the Benefits and Burdens of Mandatory Notice Requirements

Many employers have not yet updated their policies and forms to comply with the 2009 FMLA regulations and the 2010 OFLA regulations, which impose additional notice and reporting requirements on both employers and employees. While managing these forms may seem burdensome, they can be a useful tool for managing family medical leave if completed and used properly.

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[54] 29 CFR 825.209(a), 29 CFR 825.210(a).
[55] OAR 839-009-0270(6).
[56] OAR 839-009-0270(1). Unless the terms of a collective bargaining agreement, other agreement or policy provide otherwise, employees on OFLA leave have no greater right to a job or other employment benefits than if the employee had not taken leave. OAR 839-009-0270(5).
[57] 29 CFR 825.214.

FMLA requires employers to provide the following notices:

- FMLA Posting[58]
- Eligibility Notice[59]
- Rights and Responsibilities Notice[60]
- Designation Notice[61]

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[58] 29 CFR 825.300(a)(1).

[59] 29 CFR 825.300(b).

[60] 29 CFR 825.300(c). This notice must include all of the following:
(1) that any qualifying leave may be designated and counted against the employee's annual 12-month entitlement;
(2) any requirement that the employee furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of active duty or call to active duty status, and the consequences of failing to do so;
(3) the employee's right to substitute paid leave, whether the employer will require substitution of paid leave, conditions
relating to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave;
(4) any requirement that the employee make premium payments to maintain health benefits, the arrangements for making such payments, and the possible consequences of failing to make such payments on a timely basis;
(5) the employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial;
(6) the employee's rights to maintenance of benefits during leave and reinstatement to the same or an equivalent job upon returning from leave;
(7) the employee's financial exposure for the employer's payment of health insurance premiums during the employee's unpaid leave if the employee fails to return to work after taking leave;
(8) other terms and conditions the employer may wish to impose (e.g., whether the employer will require periodic reports of the employee's status and intent to return to work, call-in requirements, etc).
If there is any change in the information included in the notice (e.g., if the initial leave was paid and the subsequent leave will be unpaid), the employer must, within 5 business days of the employee's notice of need for leave subsequent to any change, provide written notice referencing the prior notice and explaining what terms have changed.

[61] 29 CFR 825.300(d). Employers must include in the designation notice:
(1) any requirement that the employee substitute paid leave for unpaid leave;
(2) if the employer requires a fitness-for-duty certification to return to work, and whether it must address the employee's ability to perform the essential functions of the employee's position (in which case the employer must say so and include a list of the essential functions of the employee's position);
(3) the number of hours, days, or weeks that will be counted against the employee's leave entitlement (if known, otherwise notice of the amount of leave counted against the employee's leave entitlement must be made upon the employee's request, but no more often than once every 30 days and only if leave was taken in that period. Such notice may be oral or written, but if oral, it must be confirmed in writing no later than the following payday unless the payday is less than one week after the oral notice, in which case the notice must not be later than the subsequent payday. Written notice may be in any form, including a notation on the employee's pay stub).

The DoL has issued sample forms for each type of notice, which may be used separately or in a combined format.[62] Employees must comply with the notice requirements set forth in the Rights and Responsibilities and Designation Notices, including the obligation to provide a complete and sufficient Medical Certification.

OFLA requires employers the following notices:

- Posting Requirement[63]
- Eligibility/Qualification Notice[64]
- Notice of Paid Leave Exhaustion Requirement[65]

BOLI has previously indicated that it approves the use of the DoL leave forms.[66] By using a modified version of the detailed DoL forms, employers may insure that employees provide information commensurate with that required under OFLA and FMLA.

LESSON:

Both OFLA and FMLA regulations impose multiple notice requirements on employers. These requirements are mandatory, time sensitive, and must be in writing. Employer may also require employees to comply with time sensitive, written notice requirements. Complying with these requirements can be burdensome for both sides. However, properly managing this aspect of family medical leave compliance can be beneficial for employers in terms of managing time off and insuring that employees are not taking extended leave that does not qualify for OFLA or FMLA.

6. NEW ISSUES IN SOCIAL MEDIA

A. Your Social Media Policy May Be an Unfair Labor Practice

The NLRA provides protections and rights to all non-supervisory employees, both union and non-union, under the National Labor Relations Act (NLRA).[67] The National Labor Relations

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If the information in the designation notice changes (*e.g.*, the employee exhausts the FMLA leave entitlement), then within five business days of receipt of the employee's first notice of the employee's need for leave subsequent to any change, the employer must provide written notice of the change.

[62] The forms, along with sample FMLA certification forms, are available on the DoL's website at http://www.dol.gov/whd/forms/index.htm.

[63] ORS 659A.180.

[64] OAR 839-009-0250(5).

[65] OAR 839-009-0280(3).

[66] *See* BOLI Brief: Implementing OFLA Under New FMLA Rules, http://www.oregon.gov/BOLI/CRD/docs/20090116_BRIEF_FMLA_OFLA.pdf?ga=t

[67] 29 USC § 151, *et seq*. The operative language appears under Section 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of

Board (NLRB or Board), which is comprised of members appointed by the President and confirmed by the Senate, has a long history of overturning its prior precedents shortly after the changes in Board membership that inevitably follow a shift in political power from one party to another. The recent filing of an NLRB charge against American Medical Response of Connecticut, Inc. (AMR),[68] suggests that the Board is reexamining is stance on the scope of permissible social media policies.

Disciplining an employee for Internet posts, such as blogging or social media, may violate Section 7 of the NLRA if the content solicits union support or otherwise qualifies as "concerted activity" (*e.g.*, discussing wages or other employment practices or policies), even when the language used is highly offensive. For activity to qualify as "concerted," the employee must be engaged in the action with or on the authority of other employees.[69] The Ninth Circuit has previously held that "[f]ederal law gives a union license to use intemperate, abusive, or *insulting* language without fear of restraint or penalty …."[70] However, it is unclear just how far an employee may go when union activity is not implicated.[71]

Against this backdrop, the NLRB in *AMR* has taken issue with the following language in the company's employee handbook:

(a) Blogging and Internet Posting Policy

- Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an

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this title." 29 USC § 157. A covered employer that fails to recognize Section 7 rights is subject to a charge that it engaged in an unfair labor practice under Section 8, under which it is unlawful to (1) interfere with, restrain, or coerce employees in the exercise of their Section 7 rights; (2) dominate or interfere with the formation or administration of a labor organization or contribute financial or other support to it; (3) discriminate in hiring, tenure, or any term or condition of employment to encourage or discourage union membership; (4) discharge or otherwise discriminate against an employee for filing charges or giving testimony under the NLRA; (5) refuse to bargain collectively with the employees' designated union representatives. 29 USC § 158.

[68] Case No. 34-CA-12576, complaint available at http://www.laborrelationstoday.com/uploads/file/CPT_34-CA-12576_AMR_10-27-10.pdf.

[69] *See, e.g., NLRB v. Hotel Employees Int'l Union Local 26*, 446 F3d 200, 207 (1st Cir 2006) ("'it is sufficient that the *** employee intends or contemplates, as an end result, group activity which will also benefit some other employees.'"), *quoting Koch Supplies, Inc., v. NLRB*, 646 F2d 1257, 1259 (8th Cir 1981).

[70] *Konop v. Hawaiian Airlines*, 302 F3d 868 (9th Cir 2002) (as part of his organizing efforts, employee's posting of insulting, false and defamatory statements critical of his employer, its officers, and the incumbent union, was protected activity under Railway Labor Act, which follows NLRA protected activity analysis).

[71] *Id.* at 883. The employee in *Konop* stated, among other things, that his employer's president did his "dirty work like the Nazis during World War II;" that "Soviet Negotiating Style [Was] Essential to [the President's] Plan;" and he was "Suspected in Fraud!" While the court acknowledged "that some organizing activity may be 'so flagrant, violent or extreme' or so 'egregious, 'opprobrious,' 'offensive,' 'obscene' or 'wholly unjustified' that it loses the protection of the RLA," the employee's activity in the case apparently did not reach that extreme.

ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;

- Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.

An employee of AMR posted a negative remark about a supervisor on her Facebook page using her home computer.[72] Co-workers posted supportive responses, which led to additional similar postings by the employee. The employee was terminated for her Facebook postings because they violated the company's Blogging and Internet Posting Policy. The NLRB investigation concluded that the employee's social media postings constituted protected concerted activity, and that the company's policy contained unlawful provisions that interfered with the employees' right to engage in protected concerted activity.[73]

In contrast, in December 2009, the NLRB found permissible a strikingly similar Sears' policy, which prohibited, among other things, "[d]isparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects."[74] The Sears policy, which was challenged by the union in the midst of an organizing campaign, began with the following explanatory statement:

> [I]n order to ensure that the Company and its associates adhere to their ethical and legal obligations, associates are required to comply with the Company's Social Media Policy. The intent of this Policy is not to restrict the flow of useful and appropriate information, but to minimize the risk to the Company and its associates.

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[72] According to CNET, the employee called her supervisor a "dick" in one post. In another post, she said "he's a scumbag as usual." One reply said: "I am sorry, hon! Chin up!" *See, Yes, insults on Facebook can still get you fired (Nov 9, 2010);* http://news.cnet.com/8301-13578_3-20022276-38.html. http://www.lctjournal.washington.edu/Vol2/a011Strege.html.

[73] *See* NLRB News Release (Nov 2, 2010), http://www.nlrb.gov/shared_files/Press%20Releases/2010/R-2794.pdf.

[74] NLRB Office of the General Counsel Advice Memorandum, Case 18-CA-19081 (Dec. 4, 2009). The policy prohibited posting of any of the following:

- Company confidential or proprietary information
- Confidential or proprietary information of clients, partners, vendors, and suppliers
- Embargoed information such as launch dates, release dates, and pending reorganizations
- Company intellectual property such as drawings, designs, software, ideas and innovation
- Disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects
- Explicit sexual references
- Reference to illegal drugs
- Obscenity or profanity
- Disparagement of any race, religion, gender, sexual orientation, disability or national origin

Moreover, in its e-mail announcing the Policy, Sears explained that the policy was a response to "some highly publicized examples of companies whose reputations have suffered as a result of inappropriate conduct (whether intentional or unintentional) by their employees in the social media."[75]

When analyzing the Sears policy, the NLRB stated that while the specific language "could chill the exercise of Section 7 rights if read in isolation, the Policy as a whole provides sufficient context to preclude a reasonable employee from construing the rule as a limit on Section 7 conduct." The Board also emphasized that there was no evidence that Sears had applied the rule to discipline an employee for engaging in protected activity or that the policy was promulgated in response to such activity.[76]

LESSON:

While we do not yet have a sufficient factual context to fairly compare the NLRB's charge in *AMR* to its decision in *Sears*, it may be that a social media policy passes muster only if it is not enforced against an employee who is voicing criticisms against the employer. However, the postings in *AMR* are not the sort that seem to implicate concerted activity. It does not appear that the employees were criticizing the employer's policies or practices, or the terms and conditions of employment, and there is no indication that the comments were made in the context of an organizing campaign. Accordingly, it is not surprising that the case that has attracted a lot of attention, and may, at least in the short term, affect the way social media policies are drafted and enforced.

B. Discovery of Social Media in Litigation

Most of the discussion about social media this year has been focused on controlling employees' use of social media to post confidential or disparaging information about their employers and co-workers. However, in the employment litigation context, social media is often an untapped treasure trove of information that can undermine the employee's claims against the employer. The question is how to access it. Despite what you might think after perusing OpenBook,[77] some users actually do utilize privacy settings, preventing a nosy public from viewing their information at will. In addition, the Electronic Communications Act ("ECPA")[78] prohibits communication providers such as Facebook from providing content in response to a civil subpoena. Nevertheless, parties may, at least in theory, get such information in the following ways:

- Ask someone who is a "friend" or other authorized user to obtain the information; or
- Make a discovery request for production of the information.

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[75] *Id.*

[76] The Sears employees that were the subject of the union campaign had communicated regularly on a Yahoo listserve, without incident. The listserve contained 57,000 messages for the eight-month period preceding the employer's promulgation of the social media policy.

[77] http://openbook.org/ (searches public Facebook posts without requiring a Facebook account).

[78] 18 USC §2701, *et seq.* (or more specifically, The Stored Communication Act that forms part of the ECPA).

Plaintiffs often resist requests for social media, claiming that the information is private. However, while the scope of information discoverable in social media has not yet been defined, the recent court cases on this issue confirm that social media is discoverable, much as any other information.

For example, after two employees asserted federal claims for sex discrimination in *EEOC v. Simply Storage Management, LLC*,[79] the employer sought content from the employees' social networking sites ("SNS"). The EEOC argued that that the employer's requests were overbroad, burdensome, not relevant, infringed on the employees' privacy, and would harass and embarrass the plaintiffs, and that production should be limited to content that directly addressed matters in the complaint. In deciding the appropriate scope of discovery from SNS, the court started with the premise that SNS is no different than other types of information; it simply "requires the application of basic discovery principals in a novel context." The challenge is to define the limits of discovery applicable to SNS.[80] With this in mind, the court reasoned that:

- SNS content is not shielded from discovery simply because it is "locked" or "private";
- SNS content must be produced when it is relevant to a claim or defense in the case;
- Allegations of depression, stress disorders, and like injuries do not automatically render all SNS communications relevant.[81]

The court ordered plaintiffs to produce "any profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and SNS applications for [the claimants] *** that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state." The court also required production of third-party communications that put the claimants' communication in context, as well as relevant pictures and videos posted on a Facebook or MySpace page.

In *Romano v. Steelcase Inc.*,[82] the plaintiff sued Steelcase after falling out of an allegedly defective chair,[83] claiming that the injury rendered her permanently disabled. However, her public social media postings revealed that she had an active lifestyle and travelled at a time that she claimed her injuries prohibited such activity. When she refused to answer questions about her postings at deposition, Steelcase filed a discovery request for access to her social media accounts, which plaintiff refused to provide. In response to Steelcase's motion to compel the discovery, the court ordered the plaintiff to provide an authorization to allow Steelcase access to her Facebook and MySpace records, including any postings marked private, or which were deleted or archived. The court explained:

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[79] 2010 WL 3446105 (SD Ind).
[80] *Id.* at *4-5.
[81] *Id.* at *5-6.
[82] 2010 NY Slip Op 20388 (Sept 21, 2010), http://www.courts.state.ny.us/Reporter/3dseries/2010/2010_20388.htm.
[83] *See* http://blogs.forbes.com/kashmirhill/2010/09/27/do-your-social-networking-privacy-settings-matter-if-you-get-sued/.

> [W]hen Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy. As recently set forth by commentators regarding privacy and social networking sites, given the millions of users, "[i]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking."
>
> Further, Defendant's need for access to the information outweighs any privacy concerns that may be voiced by Plaintiff.[84]

LESSON:

Although the scope of discovery applicable to SNS is not defined, it is clear that social media has become an important source of information in discovery and that employers should routinely be requesting production of social media in every employment case. Until the parameters of discovery have been determined, employers should be prepared to litigate their right to information from SNS and compel production when necessary.

7. WHISTLEBLOWING - WHEN REPORTING VIOLATIONS IS PART OF THE JOB

In the past year, we have seen an expansion of whistleblower liability in Oregon with the enactment of ORS 659A.199,[85] which went into effect on January 1, 2010. The law extends whistleblower protection to any employee who "in good faith reports information that the employee believes is evidence of a violation of a state or federal law, rule or regulation." Beyond reporting criminal activity, which was already covered by ORS 659A.230,[86] this law applies when "reporting violations of the law or health and safety dangers."[87] In addition to

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[84] *See note 82, supra.*

[85] That statute provides ("It is an unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation."); *see also* OAR 839-010-0100. Such broad protection was previously afforded only to public sector employees under ORS 659A.203.

[86] That statute provides "It is an unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that the employee has in good faith reported criminal activity by any person, has in good faith caused a complainant's information or complaint to be filed against any person, has in good faith cooperated with any law enforcement agency conducting a criminal investigation, has in good faith brought a civil proceeding against an employer or has testified in good faith at a civil proceeding or criminal trial." Examples may include "exposing a lack of required breaks or lunches, drinking on site, or reporting unfair trade practices and violations of consumer protection laws." *See* www.oregon.gov/BOLI/TA/T_FAQ_Whistleblowing.shtml

[87] *See* www.oregon.gov/BOLI/TA/T_FAQ_Whistleblowing.shtml.

Oregon's statutory retaliation claims and the usual common law claims, such as a wrongful discharge in violation of public policy, federal and multi-state laws may also protect whistleblowers under some circumstances.[88]

At the same time, employers need to assign certain managers the responsibility to audit and report potential problems without worrying that these managers will sue them for whistleblowing when they perform these tasks. Some courts have dealt with this issue by requiring proof that the manager stepped outside his or her role, for example, as safety manager, to report a suspected violation before allowing a claim in this situation. As the Fifth Circuit stated in *Hagan v. Echostar Satellite, LLC*:[89]

> If we did not require an employee to 'step outside the role' or otherwise make clear to the employer that the employee was taking a position adverse to the employer, nearly every activity in the normal course of a manager's job would potentially be protected activity .... An otherwise typical at-will employment relationship could quickly degrade into a litigation minefield, with whole groups of employees – management employees, human resources employees, and legal employees, to name a few – being difficult to discharge without fear of a lawsuit. For those reasons, we agree that an employee must do something outside of his or her job role in order to signal to the employer that he or she is engaging in protected activity ….

In *Hagan*, a field service manager objected to his field technicians' schedule change because of a potential decrease in overtime pay, and passed along his technicians' question regarding the legality of the change to the company's Human Resources department. The court held he did not step outside of his role as manager in doing so and, therefore, could not state the basis for an FLSA retaliation claim. The Court found nothing to suggest that the manager was "personally advocating on behalf of his technicians' statutory rights[,]" or that he had otherwise taken a position adverse to the company.[90]

The court reached a similar conclusion in *McKenzie v. Renberg's Inc.*,[91] in which the court held that for the purpose of a retaliation claim under the FLSA, "the employee must step outside his or her role of representing the company and either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting FLSA rights, or otherwise engage in activities that reasonably could be perceived as directed toward the assertion of rights protected by the FLSA." In denying the claim, the court explained:

> Here, McKenzie never crossed the line from being an employee merely performing her job as personnel director to an employee lodging a personal complaint about the wage and hour practices of her employer and asserting a right adverse to the company. McKenzie did not initiate a FLSA claim against the company on her own behalf or on behalf of anyone else. Rather, in her capacity

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[88] *See generally*, David Aron, *"Internal" Business Practices?: The Limits of Whistleblower Protection for Employees Who Oppose or Expose Fraud in the Private Sector*, 25 ABA J Empl Law 277 (2010) (discussing available federal and multi-state provisions permitting whistleblower claims).
[89] 529 F3d 617, 628 (5th Cir 2008).
[90] *Id.* at 629-630.
[91] 94 F3d 1478, 1486-87 (10th Cir 1996).

> as personnel manager, she informed the company that it was at risk of claims that might be instituted by others as a result of its alleged FLSA violations.[92]

Following the logic of *McKenzie* and *Hagan*, other courts have dismissed claims by plaintiffs who contended that they were engaged in "protected activity" when, in fact, they were simply doing their job. Examples include employees responsible for implementing safety regulations,[93] human resources,[94] sales and marketing,[95] and in-house attorneys.[96] On the other hand, not all courts have accepted this type of defense in all contexts. For example, in the recent case *Rangel v. Omni Hotel Management Corp.*,[97] the Human Resources Director alleged she was terminated in retaliation for counseling her supervisor about inappropriate behavior toward a young opposite-sex employee. The court rejected the employer's argument that the claim failed because she did not step outside her role as Human Resources Director, and refused to apply the rule in *Hagan* in the Title VII context. The court emphasized that "extending the rule would strip Title VII protection from 'whole groups of employees - management employees, human resources employees, and legal employees, to name a few' - employees who are in the best positions to advise employers about compliance."[98]

<u>LESSON</u>:

It remains to be seen how courts will handle a *Hagan*-type defense in the context of claims under ORS 659A.199. Employers, therefore, must be cautious in handling situations involving whistleblower claims by managers whose jobs it is to audit, report, and resolve compliance issues. Appropriate documentation of disciplinary action and termination criteria may help prevent liability in these circumstances, without having to rely on such a defense.

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[92] *Id.* at 1486.

[93] *See, e.g., Luchetti v. Hershey Co.*, 2009 WL 2912524, *5 (ND Cal 2009) (plaintiff who was responsible for implementing safety procedures had not engaged in protected activity by informing supervisor of safety violations, "a matter that plaintiff admit[ted] was within his job duties"); *Lund v. Leprino Foods Co.*, 2007 WL 1775474, *8 (ED Cal Jun 20, 2007) (Safety Supervisor's investigation and report of hazardous chemical spill was not protected activity when "part of his regular duties").

[94] *See Samons v. Cardington Yutaka Technologies, Inc.*, 2009 WL 961168, *7 (SD Ohio 2009) (plaintiff did not engage in protected activity when she notified superiors of federal wage and hour violations as part of her job duties as human resources manager); *Correa v. Mana Products, Inc.*, 550 FSupp2d 319, 330-31 (EDNY 2008) (Human Resources Manager's investigation of discrimination complaints was not protected activity when that "was actually part of her job description"); *Clemons v. Nike, Inc.*, 2007 WL 2890972, *9-10 (D Or 2007) (Senior Employee Relations Specialist did not engage in protected activity by raising concern over whether her employer had made adequate effort to comply with ADA; instead, she was "performing her job").

[95] *Stewart v. Masters Builders Ass'n of King and Snohomish Counties*, 2010 WL 3505101 (WD Wa 2010) (Sales & Marketing Director did not engage in protected activity and did not step outside his professional role and take on a role adverse to his employer when he sent e-mails questioning whether employees were properly classified as exempt).

[96] *Meadows v. Kindercare Learning Ctrs., Inc.*, 2004 WL 2203299, at *4 (D Or 2004), adopting the opinion at 2004 WL 1068793 (D Or 2004) (in-house counsel did not engage in protected activity under Title VII and Oregon discrimination statutes by reporting that some sexual harassment complaints had not been adequately addressed; an employee who handles discrimination complaints as part of her job cannot maintain an action for opposing discrimination, based on the giving of unwelcome advice).

[97] 2010 WL 3927744 (WD Tex 2010).

[98] *Id.*

8. KNOW WHEN TO HOLD 'EM, KNOW WHEN TO FOLD 'EM—UPDATE ON ELECTRONIC DISCOVERY AND RETENTION PRACTICES

A. Update on Electronic Discovery and Retention Practices

Discovery and retention of electronically stored information ("ESI") continue to receive national attention. The federal government and many states are promulgating rules to address how parties are expected to preserve and request ESI in pending litigation. Several recent high profile cases remind lawyers of the importance of preserving ESI because failing to do so, even inadvertently, can result in monetary sanctions, as well as an instruction to the jury that the information now lost would have been harmful to the party that failed to preserve it. As a result, lawsuits can become more focused on what evidence cannot be found as opposed to the evidence that is presented, and the results can be catastrophic. Therefore, it is essential for employers to establish pre-litigation retention policies and involve their legal counsel as soon as potential litigation becomes apparent -- or sooner.

While the federal courts in many other states have rules that explicitly address the discovery of electronically stored information, Oregon is in the minority of states that has yet to enact ESI rules. The Oregon State Bar Council on Court Procedures (the "Council"), which recommends state court rule changes to the legislature, has been examining possible changes to the rules regarding ESI.[99] The Oregon State Bar Procedure and Practice Committee urged the Council to adopt such rules, emphasizing that:

> Without any direction in the rules, parties are confused about their obligations regarding the preservation, retention, and production of ESI and the courts are also without guidance to resolve ESI disputes among parties.[100]

The most recent version of the proposed changes makes it clear that ESI is discoverable and that the requesting party may specify the form in which the information is to be produced (*i.e.*, native format with metadata intact).[101] Many issues will be left up to attorneys, judges and local rule promulgators to handle as they arise, including conferral obligations,[102] format issues, the

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[99] The history of the discussion of the proposal was recently discussed in detail at *E-Discovery in State Court: Proposed Rule Changes & Avoiding the Minefields* (Multnomah Bar Association CLE October 26, 2010). Copies of the current version of the proposed changes and minutes of related meetings are available at http://legacy.lclark.edu/~ccp/Current_Biennium.htm.

[100] Mustafa T. Kasubhai, Chair, OSB Procedure and Practice Committee, Letter to Council on Court Procedures' Consideration of ORCP Amendments Regarding Electronically Stored Information, Council on Court Procedures September 12, 2009, Meeting Appendix H1.

[101] Proposed ORCP 43E E Electronically Stored Information:

> A request for electronically stored information may specify the form in which the information is to be produced by the responding party but, if no such specification is made, the responding party may produce the information in either the form in which it is ordinarily maintained or in a reasonably useful form.

[102] The Council's materials emphasize that early conferral between the parties regarding the scope of the production of ESI, data sources, format, cost, search terms relevant to identifying responsive ESI, preservation of ESI, and issues of privilege pertaining to ESI is recommended. *See generally*, Council of Court Procedures' Memorandum on E-Discovery Rules (May 27, 2010); *see also generally The Sedona Conference Cooperation Proclamation* (2008), http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf.

standard for sanctions involving lost ESI and the ever-present cost issues involved with ESI.[103] Therefore, the standard of practice with respect to ESI in state court will continue to remain uncertain.

Because of the lack of specific guidance about the court's expectations with respect to ESI, employers should proactively develop policies and procedures to ensure that retention policies and litigation holds are defensible when litigation occurs. Taking these steps will reduce subsequent litigation costs and avoid confusion from internal players when a litigation hold is suddenly implemented. Implementation of effective retention policies will require HR and IT to collaborate regarding the scope of ESI and the reasonable capabilities and costs to retain it. If there are potential problems with retaining or segregating ESI, it is important to discuss these with counsel early on in order to mitigate against adverse inferences, sanctions, and increased litigation costs.

B. Spoliation

As soon as a party is aware of a potential claim, it has a duty to preserve evidence that it knows or reasonably should know is relevant to the action.[104] A party that anticipates litigation "must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."[105] The destruction of evidence after becoming aware of a potential claim can constitute spoliation and result in court sanctions.

"Spoliation involves a litigant's destruction of evidence that is either relevant to the litigation or reasonably calculated to lead to the discovery of admissible evidence, in violation of a duty to preserve that evidence."[106] Failure to preserve evidence or conduct an adequate search for electronic information may result in sanctions. Typically, the court will fashion an order that alleviates the prejudice to the other party resulting from the spoliation. Such sanctions may include an order allowing the opposing party direct access to the company's computer systems and hard drives; monetary sanctions; or an order to engage in expensive electronic restoration.[107] When the spoliation cannot be remedied by such measures, sanctions may include the exclusion

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[103] *See generally, id.* ("*** Oregon attorneys are a congenial bunch and prefer to allow the parties to work out the discovery problems on their own without stringent rules.").

[104] *Toste v. Lewis Controls, Inc.*, 1996 US Dist LEXIS 2359, *8 (ND Cal 1996); *compare Hamilton v. Signature Flight Support Corp.*, 2005 WL 3481423, *5 (ND Cal 2005) (obligation to preserve a surveillance tape arose when plaintiff made an internal complaint of discrimination and defendant undertook an internal investigation), *with United States v. Kitsap Physicians Service*, 314 F3d 995 (9th Cir 2002) (no obligation to preserve medical records where an internal investigation showed no wrongdoing and the records were kept for the time period mandated by law).

[105] *Zubulake v. UBS Warburg LLC*, 220 FRD 212, 218 (SDNY 2003); *see also, generally, Sedona Conference Commentary on Legal Holds* (September 2010).

[106] Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke LJ 561, 619 (2001).

[107] *See generally, Civil Justice Reform; Electronic Discovery: A Major Issue for Corporate Counsel You Can Assist the Effort to Ease the Burden*, The Metropolitan Corporate Counsel, p. 26 (Feb. 2001); Carey Sirota Meyer and Kari L. Wraspir, *E-Discovery: Preparing Clients for (and Protecting Them Against) Discovery in the Electronic Information Age*, 26 Wm Mitchell L Rev 939, 936 (2000).

of evidence, jury instructions affording an adverse inference against the party that failed to preserve evidence, civil monetary penalties, attorney fees, and dismissal of the case.[108]

The duty to preserve relevant evidence applies to all parties to the litigation. In *Leon v. IDX Sys. Corp.*,[109] for example, the plaintiff's age discrimination lawsuit was dismissed (and monetary sanctions imposed) because he wiped the unallocated space on his computer's hard drive before turning it over to defendant's expert. While it would seem that addressing the flagrant destruction of evidence is straightforward, it is much easier to be aggressive on these issues if the employer itself is doing everything right.

The potentially severe consequence of spoliation claims means it is important to educate employees about the consequences of destroying evidence. In *Swofford v. Eslinger,*[110] for example, the duty to preserve was disregarded to such an extent that the in-house counsel was personally sanctioned for his conduct prior to retaining outside counsel because he failed to instruct employees, who likely had relevant communications and evidence, to preserve everything concerning the incident forming the basis of plaintiff's claims. While the employees who destroyed the evidence testified that their actions were unintentional because they had no knowledge of the duty to preserve evidence, the court was not persuaded.

C. Effective Use of Document Retention Policies to Avoid Spoliation Claims

A reasonable document retention policy may provide a defense to a spoliation claim.[111] However, "a policy adopted or utilized to justify the destruction of relevant information is not a valid document retention policy."[112] To rely on a document retention policy as a defense to the destruction of documents, the retention policy must be in place in advance of any anticipated litigation and should be designed to serve legitimate business purposes. In addition, the company should have procedures in place to determine when the company "reasonably anticipates" litigation and the parameters of any litigation hold.[113] According to the Sedona Guidelines, a recognized authority on such matters, [114]

1. An organization should have reasonable policies and procedures for managing its information and records.

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[108] *Erlandson v. Ford Motor Co.,* 2009 WL 3672898 (D Or); *Advantacare Health Partners, LP v. Access IV,* 2004 WL 1837997 (ND Cal 2004).
[109] 464 F3d 951 (9th Cir 2006).
[110] 671 FSupp2d 1274 (MD Fla 2009).
[111] *See Arthur Andersen LLP v. United States,* 544 US 696, 705 (2005) ("It is *** not wrongful for a manager to instruct its employees to comply with a valid document retention policy under ordinary circumstances"); *McGuire v. Acufex Microsurgical, Inc.,* 175 FRD 149, 155-56 (D Mass 1997) (employer's policy allowing employees to discard drafts of investigation reports was reasonable).
[112] *Hynix Semiconductor Inc. v. Rambus, Inc.,* 2006 WL 565893 *20 (ND Cal 2006).
[113] A "litigation hold" is a procedure for insuring that appropriate evidence is preserved while litigation is pending. As part of a document retention policy, every company should designate a litigation response team responsible for preserving documents, halting any routine or planned document destruction (including e-mail), and alerting employees to the necessity of preserving all relevant documents.
[114] *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (2007).

2. An organization's information and records management policies and procedures should be realistic, practical and tailored to the circumstances of the organization.

3. An organization need not retain all electronic information ever generated or received.

4. An organization adopting an information and records management policy should also develop procedures that address the creation, identification, retention, retrieval and ultimate disposition or destruction of information and records.

5. An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, government investigation or audit.

By developing, understanding, and training employees on retention policies and litigation holds ahead of litigation, companies will save themselves many subsequent headaches and make their actions much more defensible.

LESSON:

The time to address electronic discovery and retention issues is now, preferably before litigation is staring you in the face. While courts are prepared to accept cost and other business reasons for destruction of electronic evidence pursuant to reasonable retention polices (before litigation is anticipated), developing such policies requires thought about the particularities of your individual business, and needs to be done before litigation is looming. Further, supervisors and HR employees need to understand the importance of implementing and enforcing litigation holds in order to avoid severe sanctions against the company.

9. INDIVIDUAL LIABILITY FOR UNLAWFUL EMPLOYMENT PRACTICES

A. Individual Liability for Employment Discrimination

The last thing a supervisor or an HR director wants to see is an employment discrimination complaint naming them individually as a defendant. Unfortunately, recent developments in Oregon law make it much more likely that such a circumstance will occur. Under state law, individual employees may be held personally liable for aiding and abetting employment discrimination, and there is a possibility that individual employees will be liable for retaliation as well. In addition to aiding and abetting liability, an owner or shareholder of a company could be held personally liable under the alter ego doctrine.

(1) Individual Liability for Retaliation and Aiding and Abetting under ORS 659A.030

Recent changes to Oregon law have resulted in individual liability for employment discrimination. Under ORS 659A.030(1)(g), it is an unlawful employment practice "for any person, whether an employer *or an employee*, to aid, abet, incite, compel or coerce the doing of

any of the acts forbidden under [ORS Chapter 659A] or to attempt to do so." While this provision has been around for years, prior to 2008, there were no remedies available to a plaintiff who sued an individual employee as an aider and abettor. This is because only equitable relief, such as injunctions, back pay, and reinstatement, was available and the Oregon Supreme Court held that plaintiffs could not recover such equitable relief from individuals accused of aiding and abetting.[115]

In 2007, the legislature amended ORS 659A.885, which sets out the damages available for unlawful employment practices. Under the amended statute, an employee can now recover compensatory damages and punitive damages. Now that such damages are recoverable from individuals, this amendment had the (perhaps unintended) effect of reviving individual liability for aiding and abetting employment discrimination. It is now common to see employment discrimination complaints naming both the employer and individual supervisors and HR staff as defendants.

As the statutory amendment expanding the remedies for aiding and abetting liability is fairly recent, there is no reported case law in Oregon defining the parameters of aiding and abetting. While there are similar statutes in several other states around the country, the courts in these states have interpreted the statutes very differently. Some courts in New York have held that any individual who participates in the conduct giving rise to a discrimination claim may be held personally liable.[116] Other states have established a higher standard. For example, New Jersey courts use the tort law standard for aiding and abetting, requiring both substantial assistance and knowledge that the conduct is assisting the company in violating the law.[117] Courts in some states hold that the mere failure to act to address another person's discriminatory behavior is insufficient to establish liability for aiding and abetting.[118] However, other courts have held that such inaction can constitute aiding and abetting.[119] Another key difference between states with similar statutes is the question of who is liable. In some states, only supervisors can be liable as aiders and abettors,[120] but in other states, co-workers can be liable as well.[121]

In addition to individual liability for aiding and abetting, the change in the available remedies in Oregon may also result in individual liability for retaliation. Under ORS 659A.030(1)(f), it is an unlawful employment practice "for *any person* to discharge, expel or otherwise discriminate against any other person because that other person has opposed any unlawful practice, or because that other person has filed a complaint, testified or assisted in any proceeding under this chapter or has attempted to do so." In contrast, ORS 659A.030(1)(a) prohibits "*any employer*" from discriminating on the basis of an individual's race, color, religion, sex, sexual orientation, national origin, marital status or age. It is unclear whether Oregon courts will interpret "any person" such that employees could be held be personally liable for retaliatory behavior.

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[115] *Schram v. Albertson's, Inc.*, 146 Or App 415, 934 P2d 483 (1997).
[116] *See, e.g., Tomka v. Seiler Corp.*, 66 F3d 1295, 1317 (2d Cir 1995).
[117] *Tarr v. Ciasulli*, 181 NJ 70,83-84,853 A2d 921 (2004) (citing with approval *Failla v. City of Passaic*, 146 F3d 149, 157-58 (3d Cir 1998)).
[118] *See, e.g., Fiol v. Doellstedt*, 50 CalApp4th 1318, 1327, 58 Cal Rptr2d 308 (1996).
[119] *See. e.g., Chapin v. University of Massachusetts at Lowell*, 977 FSupp 72, 80 (D Mass 1997).
[120] *See. e.g., Ivan v. County of Middlesex*, 595 FSupp2d 425, 462-63 (DNJ 2009).
[121] *See. e.g., Chapin, supra*, 977 FSupp. at 78.

(2) Individual Liability as an Alter Ego of a Corporation

In addition to the recent developments allowing individual liability for employment discrimination under state law, it is important to remember that an "owner" of a business can be held personally liable for unlawful employment practices under the alter ego doctrine. To establish personal liability, the plaintiff employee must show that 1) the person exercises such dominion and control with respect to the transaction in question that the corporation had no separate will of its own; and 2) that the domination and control were used to commit a wrong against the plaintiff which proximately caused the plaintiff's injuries.[122] Thus far, the only reported cases in which the court allowed plaintiffs to proceed under this theory have been in federal court.

LESSON:

The resurrection of individual liability for employment discrimination in Oregon means that any employee could be sued and held personally liable for discrimination. The viability of the applicable theories of liability are so new that much is unknown about how the courts will eventually interpret the law, especially given the disparate interpretations of other states. In the meantime, the possibility of individual liability should provide HR staff and supervisors with additional incentives to insure that proper procedures are in place and consistently followed. It is also important for a company to determine whether its insurance covers current and former employees for employment related claims. Companies without employment practices liability coverage should consider establishing a policy setting out the circumstances in which the company will pay defense costs of and/or indemnify current and former employees who are sued individually.

10. WHY EMPLOYERS LOSE DISCRIMINATION CASES

Most employers are well aware of all of the things they are supposed to do to prevent discrimination claims from being filed against them. They attend seminars, draft policies, and conduct sexual harassment training for employees. Yet, even with all of these preventative measures, companies still lose many of these lawsuits when they go to court. Mistakes happen, despite our best efforts. But employers lose cases more often due to a poorly-managed decision than a discriminatory manager.

A concept that often traps the unwary employer is "pretext," which basically means that the company's stated reason for its employment decision is not worthy of belief. A major factor in assessing credibility is determining whether the employment decision lacks consistency or believability. A jury's willingness to believe the employer's version of the events is far less likely if the employer is not truthful with the employee about the reasons for its decision or the employer fails to follow its own policies. Also problematic is the faulty investigation of sexual harassment and other discrimination claims.

Consider the following cases:

[122] *Grant v. Soloflex Inc.*, 2005 WL 477995, at *19 (D Or 2005).

➢ *Collins v. Clark County Fire Dist. No. 5*[123]

In April, the Washington Court of Appeals upheld a $3.2 million dollar verdict in favor of four women, plus an award of more than $500,000 to their attorney, in this case involving gender discrimination, sexual harassment and negligent supervision. The trial lasted four weeks and involved over 50 witnesses. The primary problem was Marty James, the chief administer at the Training Center where the plaintiffs worked. James also happened to be the contact person in Human Resources (HR) to whom employees were to report issues with harassment. There was evidence that James:

- regularly commented about the anatomy of females and employees while in the plaintiffs' presence;
- subjected female employees to a "boy's club" atmosphere and excluded them from staff meetings and other conversations;
- grabbed his crotch and complained about needing more testosterone in the workplace; and
- referred to female employees as "stupid women," "stupid bitches" and "lying bitches."

He targeted one plaintiff by making rude sexual comments and placing a wind-up penis toy next to her. She did not report this behavior to HR because James was the contact person, but she did report the problems to James' superior, the fire department chief, who said he would try to "steer" James away from her. When nothing happened, the plaintiff scheduled a follow-up meeting with the chief, who again promised to help, but provided no indication that anything had been done. Instead, James became more hostile toward this plaintiff. Shortly thereafter, a new employee who had a degree was hired and this plaintiff, who had no degree, was fired. At trial, the jury heard a plethora of evidence about James' sexual comments, and how the county failed to promptly investigate and take remedial action. The typical response to complaints was, "That's just Marty."

➢ *Valdez-Zontek v. Eastmont School Dist.*[124]

This case involved rumors of an affair between the plaintiff and her supervisor, the school superintendent, that spiraled out of control. A high-ranking employee accused the plaintiff of having an affair, and suggested that the superintendent was improperly paying the plaintiff for extra time as a result of the relationship. In support of her accusations, the accuser falsified the plaintiff's signature. The district conducted both an audit and investigation, in which plaintiff was cleared of any wrongdoing. However, the rumors continued, and the district took no steps to stop them. The plaintiff was subsequently demoted, resigned, and then sued. The jury found the employer liable for discrimination, retaliation, negligent infliction of emotional distress, and defamation for its mishandling of the investigation of the alleged affair, to the tune of $400,000.

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[123] 231 P3d 121, 155 Wash App 48 (2010).
[124] 154 Wash App 147, 225 P3d 339 (2010).

- *Lee v. TRW, Inc.*[125]

The employee in *Lee* brought an age discrimination complaint against his employer of more than twenty years after being laid off. The employer used a "skills matrix" to evaluate seven employees and decide which one to layoff. The plaintiff offered evidence that the employer ignored its own layoff policy in relying upon the "skills matrix," and provided other circumstantial evidence suggesting discrimination. The jury returned an age discrimination verdict in favor of the plaintiff.

- *Alvarado v. Federal Express Corp.*[126]

The jury in *Alvarado* found in favor of plaintiff Boswell on her claims for sexual harassment, retaliation, and constructive discharge. She presented evidence that her supervisor attempted to kiss and hug her and other female employees at every mandatory meeting, which took place as often as weekly when Boswell was a full-time employee. Boswell was embarrassed and humiliated by the unwelcome "chest to breast" hugs. One co-worker testified that "if you played the kissing game with Norman Stites, you got to do what you wanted to do. You got a golden ticket. And if you didn't play the kissing game, your life was hell. Period." Employees who submitted to the behavior were shown favoritism, in the form of dual standards for taking breaks and vacation time. In contrast, Boswell showed that she was retaliated against for not submitting to the behavior. She received multiple late paychecks, she was denied use of personal time, Stites criticized her performance, allowed Boswell's co-workers to yell at her, changed her shift and, ultimately forced her resignation. Plaintiff testified that she met with Stites and complained about his behavior, and also met with Stites' manager about it. The manager's response was, "Do you really want to do this, because you are going to get him in trouble?" The jury awarded $550,000 in compensatory damages, in addition to $2,450,000 in punitive damages.

LESSON:

What lessons can we learn so as to avoid these types of verdicts?

- Companies need to do a better job of training front-line managers and supervisors. Having well-drafted policies and procedures is a starting point, but for managers and supervisors to understand what the policies mean and insure that everyone complies, training is essential.

- Managers give performance reviews that are rampant with grade inflation and fail to address employee performance problems. Counsel managers to accurately complete performance evaluations so that they fairly assess employee performance. Have Human Resources review performance evaluations before they are given to employees.

- Review and update employment policies on an annual basis. Make sure that your policies accurately reflect the law, which changes frequently.

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[125] 361 FedAppx. 770 (9th Cir 2010) (California).
[126] 2010 WL 2465339 (9th Cir 2010) (California). The lower court opinion is available at 2008 WL 744824 (ND Cal 2008).

- Managers who receive discrimination and other employment related complaints from subordinates often do nothing. Train managers to report all complaints to Human Resources (or whoever is designated in your policy as the appropriate party to receive complaints) and to document both the complaint and the actions they take in response, even if the only action is to pass the information along to Human Resources.

- When you receive a complaint from an employee, take it seriously, even if you think the complaint lacks merit. Investigate promptly and follow-up with the employee who complained. Involve the complaining employee in the solution. Document your investigation and resolution of the complaint.

- Train *everyone* – including Human Resources personnel – on appropriate e-mail communication.