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2010 Means Increased Funding for Agencies

President Obama's administration is providing additional resources to agencies charged with enforcing employment laws and regulations. The Equal Employment Opportunity Commission (the "EEOC") and the Department of Labor (the "DOL") received an influx of funding this year. Such an increase in resources and capacity will surely enable these agencies to aggressively pursue President Obama's initiatives, described below.

EEOC Statistics

- The EEOC's budget for 2010 increased by $23 million – 6.7% over its 2009 budget
    - The agency is seeking an additional $18 million for 2011 in order to add staff and address additional systemic discrimination cases.
- By the end of 2009, the EEOC added 155 new employees to its investigative staff.
    - It expects to add 100 new investigators in 2011.
- In 2009, the EEOC received 93,277 workplace discrimination charges.
    - Charges are down from 95,402 filed in 2008.
    - The charges continued to focus on claims of race and sex discrimination, which together comprised 66% of the charges filed in 2009.
    - Similarly, claims based on religion (3.6%) and the Equal Pay Act (1%) are still at low levels.
- For 2009, the agency brought in $82.1 million in litigation settlements, down from $102.2 million in 2008.
    - $64.9 million came from settlements of alleged Title VII violations.
- In 2009, the EEOC filed 11 fewer lawsuits than it did in 2008.
    - Of these suits, there was a decrease in the number filed under Title VII and an increase in those filed under the American Disabilities Act.

DOL Statistics

- Obama's proposed 2011 budget allocates $14 billion to the DOL's discretionary fund, used to combat employment law violations, up from $13.3 billion in 2010.
- The Wage and Hour Division ("WHD") seeks $244 million for 2011, up more than $20 million from 2010.
    - WHD hired 250 new investigators, a 33% increase from 2008.
- The 2011 budget for the Office of Federal Contract Compliance Programs (the "OFCCP") would go up to $113.4 million from $103 million in 2010
    - The OFCCP is currently hiring 213 new employees to return its office to 2001 staff levels.

Misclassification Initiatives

Background

The Wage and Hour Division ("WHD") of the DOL has hired approximately 250 new investigators, which is a one-third increase in staffing. There were 739 investigators hired on Oct. 1, 2008; 894 on Sept. 30, 2009; and 953 in Nov. 2009. 100 of these new investigators are funded by the American Recovery and Reinvestment Act of 2009 ("ARRA") and focus on employers receiving stimulus funds. On February 1, 2010, Secretary of Labor Hilda Solis released the Obama administration's proposed fiscal year 2011 budget for the DOL. Adopting a theme of "good jobs for everyone," the DOL's FY2011 budget reshuffles the Department's discretionary funds to support new policy, program, and enforcement priorities for the DOL. As will be explained more fully below, an enforcement priority for the DOL will be misclassification of employees as independent contractors, and as exempt versus non-exempt.

The Misclassification Initiative: Protecting Vulnerable Workers

Independent Contractors

In likely response to increasing criticism from Congress and the General Accounting Office ("GAO"), the hallmark of the WHD's 2011 budget request is the Employee Misclassification Initiative, a joint Treasury-Labor initiative to detect and deter the inappropriate misclassification of employees as independent contractors, and to strengthen and coordinate Federal and State efforts to enforce labor violations arising from misclassification. This initiative includes $12 million for the WHD to hire 90 new investigators who will specifically target "industries with misclassification characteristics, such as construction, child care, home health care, grocery stores,

janitorial, business services, poultry and meat processing, and landscaping." In addition, the budget request separately includes a request for $1.6 million and 10 additional attorneys for the Solicitor's Office "to pursue misclassification litigation, including multi-State litigation to coordinate enforcement with States."

This initiative also provides funds for the DOL's Employment and Training Administration, to award competitive grants to states to increase enforcement of misclassification, and to reward states that are most successful at detecting and prosecuting employers that fail to pay the proper taxes due to misclassification. Finally, as an indication of the closer working relationship DOL is trying to foster among its constituent agencies, the Employee Misclassification Initiative also includes funding for OSHA, to modify its inspector training and investigative guidelines "to allow inspectors to identify potential employee misclassification and to share information with WHD."

The budget proposes legislation, similar to the Taxpayer Responsibility, Accountability, and Consistency Act of 2009 (S. 2882) introduced in the Senate in December 2009, to ensure the proper classification of employees by (1) shifting the burden of proof to employers to demonstrate that their employees are classified correctly, (2) closing the loophole created by Section 530 of the Revenue Act of 1978, and (3) making misclassification a violation of the Fair Labor Standards Act (the "FLSA"). This initiative comes on the heels of one of the most significant IRS audit initiatives in decades—audits intended to "study" compliance in the areas of payroll taxes, independent contractor status, fringe benefits, and executive compensation.[1] A number

[1] In October 2009, the Internal Revenue Service ("IRS") quietly unveiled its most significant audit initiative in decades. At that time it announced that in the next few months, it would commence the first wave in its audit initiative—audits intended to

of states recently Maryland and Delaware, among others—have also recognized the potential tax revenue at stake in misclassification and have moved quickly to enact laws to close existing gaps.

Exempt v. Non-Exempt Classifications and "Administrator Interpretations"

Because of a concern that there is a lack of clarity surrounding which employees are exempt versus non-exempt, it is expected that the WHD will give a great deal of attention to this kind of classification issue, and will give careful review to any cases and issues involving managers and assistant managers at retail establishments, insurance adjusters, loan officers/originators, stockbrokers, pharmaceutical sales representatives, and many other similar jobs. The first aggressive step taken by WHD towards this effort came on March 10, 2010, when the WHD issued its first ever "Administrator Interpretation" to announce that mortgage loan officers do not qualify for the administrative exemption.

According to the WHD, these broad general pronouncements are designed to replace the more narrowly focused and fact-specific opinion letters that have been a fixture of Wage and Hour interpretation for decades. While not entirely foreclosing opinion letter requests, the WHD's announcement suggests that meaningful opinion letters that provide guidance to employers on fact-specific situations will rarely, if ever be written. The WHD explained: "Requests for opinion letters generally will be responded

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"study" compliance in the areas of payroll taxes, independent contractor ("IC") status, fringe benefits, and executive compensation. The primary audit goals include (i) reducing the tax gap by increasing tax compliance and payroll tax collections and (ii) reducing the number of "misclassified" independent contractors. A likely secondary objective, and one urged by the Government Accountability Office ("GAO"), was to ensure benefits coverage and "labor protections" traditionally associated with employee status.

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to by providing references to statutes, regulations, interpretations and cases that are relevant to the specific request but without an analysis of the specific facts presented."

Not only is this development a stunning departure from decades of established practice, the content of the Administrator's first "Interpretation" strongly suggests that the WHD's concerted efforts to cut back on the white collar overtime exemptions will continue. In fact, the first Administrator Interpretation purported to overturn prior opinion letters by concluding that as a general matter, the "typical" mortgage loan officer is not exempt under the FLSA's administrative exemption.

For decades, the WHD has provided individualized wage and hour guidance and advice in response to individual requests for the issuance of opinion letters, as well as more generalized guidance through its Field Assistance Bulletins and Wage and Hour Advice Memoranda. It now appears that going forward, the WHD will focus almost entirely, if not exclusively, on providing general guidance intended to "clarify the law as it relates to an entire industry, a category of employees, or to all employees," without referring to any actual job or analyzing any specific set of facts. This dramatic and unexpected change in approach could have far-reaching implications for employers who will no longer be able to obtain specific guidance regarding individual positions through requests for opinion letters.

The WHD's decision not to respond to specific requests for opinion letters will likely limit employers' opportunity in the future to seek the statutory protection of the Portal-to-Portal Act. Under the Portal-to- Portal Act, employers have a good-faith defense to liability under the FLSA for actions taken "in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation."

29 U.S.C. § 259(a). This defense to liability does not require a specific opinion letter to have been issued to the employer seeking the defense. For example, employers can rely on opinion letters issued to another employer if the facts are essentially the same as those recounted in the opinion letter. However, it may be more difficult for employers to receive the protections of the FLSA under a generalized interpretation, which may not fully describe the specific facts necessary to trigger that protection.

It also seems clear that the WHD intends to use this new tool to try to reclassify as nonexempt employees who were previously thought to be exempt based on prior DOL regulation and guidance. In fact, in announcing the new Administrator Interpretations, the WHD explained: "Guidance in this form will be useful *in clarifying* the law as it relates to an entire industry, a category of employees, or to all employees." However, the first Administrator Interpretation did not merely "clarify" the law, but in fact purported to overrule a number of prior opinion letters and thus clearly sought to change the law.

This new tool is plainly part of the WHD's larger efforts to narrow the scope of the FLSA's white collar exemptions, especially in key industries that have been the target of the plaintiffs' bar. For example, late in 2009, the WHD filed an amicus brief in support of the plaintiffs-appellants in the Second Circuit case *In Re Novartis Wage and Hour Litigation*. In that brief, the WHD expressed the view that pharmaceutical sales representatives could not meet either the administrative or the outside sales exemptions. In doing so, the WHD asked the court to apply a more stringent interpretation of these exemptions, warning that failure to do so "would effectively swallow the 'rule' requiring the payment of the minimum wage and overtime compensation under the FLSA."

Employers are not without tools to challenge this Interpretation. Employers can argue that the facts of their situation differ from the more generalized amalgamated facts contained in the Administrator Interpretation. The WHD acknowledges that "as the regulations make clear, a job title does not determine whether an employee is exempt. The employee's actual job duties and compensation determine whether the employee is exempt or nonexempt." This position was recently successfully argued to at least one court of appeals to distinguish the WHD's amicus brief in the *Novartis* case. The Third Circuit recently held in *Patty Lee Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010), that the administrative exemption applied to a pharmaceutical sales representative who testified to "the independent and managerial qualities that her position required" and "described herself as the manager of her own business who could run her own territory as she saw fit." *Smith*, 593 F.3d at 285. Moreover, employers can argue that the WHD's interpretation—whether in an amicus brief or in a new Administrator Interpretation—is entitled to no deference because it is inconsistent with the 2004 regulations and preamble.

The WHD's first "Administrator Interpretation" is a clear example of its new stricter interpretation of the administrative exemption. In Administrator Interpretation 2010-1, WHD Deputy Administrator Nancy Leppink expressed the view that the "typical" mortgage loan officer does not qualify for the administrative exemption because his or her primary duty is to make sales. This Administrator Interpretation largely focused on whether or not the primary duty of a "typical" mortgage loan officer

was "directly related to the management or general business operation" of the employer or his customers.[2]

The WHD noted that the administrative exemption is largely reserved for employees whose primary duty relates to the "administrative, as distinguished from the production, operations of a business." Although the 2004 regulations significantly reduced the applicability of the administrative-production dichotomy, the WHD seems to be trying to revive this distinction—in contravention of its own regulations—in industries such as the financial services, where the dichotomy should not properly be used.

In contrast to its previously issued opinion letters, the WHD did not render its opinion based on an actual job whose duties were described by an actual employer. Rather, the WHD's characterization of mortgage loan officers' job duties was an amalgam of descriptions culled from case law and prior WHD investigations. From these sources, the WHD assumed that a typical mortgage loan officer's duties include collecting required financial information from customers, running credit reports, and entering such information into a computer program designed to identify available loan products. The WHD further described that after obtaining that information, mortgage loan officers then work with customers, explaining the terms and conditions of each loan and helping customers decide which loan is most appropriate for them. Finally, according to the WHD, mortgage loan officers are responsible for forwarding all relevant paperwork to loan underwriters and other employees for further processing.

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[2] The Interpretation explained that the "financial services industry assigns a variety of job titles," including mortgage loan representative, mortgage loan consultant, and mortgage loan originator, to what the WHD calls "mortgage loan officers."

After a discussion of the statute, regulations, relevant case law, and administrative guidance, the WHD concluded that the "typical" mortgage loan officer does not qualify for the administrative exemption because his or her primary duty is sales. In analyzing whether the "typical duties" were sales, the WHD relied on factors from the outside sales exemption, including how a typical mortgage loan officer is compensated. The WHD placed significant weight on the fact that many mortgage loan officers are paid based on commissions and also receive sales training. According to the WHD, such sales duties do not relate to an employer's internal management or general business operations, and therefore fall squarely on the production side of the dichotomy, rendering these employees ineligible for the administrative exemption.

The WHD reached its conclusion without respect for the DOL's regulations or opinion letters. Rather, the WHD relied on cases such as those involving employees working in a call center, and concluded that"[w]ork such as collecting financial information from customers . . . and explaining the terms of the available options and the pros and cons of each option . . . constitutes the production work of an employer engaged in selling or brokering mortgage loan products."

In an apparent effort to downplay the applicability of the specific regulation providing an example of an employee who meets the administrative exemption in the financial services industry, see 29 C.F.R. §541.203(b), the WHD stated that the former administration purportedly created an "alternative standard for the administrative exemption for employees in the financial services industry" by finding that employees in the financial services industry generally meet the administrative exemption's duties requirements by performing many of the tasks described above. The WHD then

concluded its first Administrator Interpretation by purporting to overturn two prior opinion letters, contending that they used a "misleading assumption and selective and narrow analysis."

Immigration Initiatives

Background

In April 2009, the Department of Homeland Security issued updated worksite enforcement guidance emphasizing the major enforcement priorities of the U.S. Immigration and Customs Enforcement (ICE), specifically focusing on dangerous criminal aliens and employers that cultivate illegal workplaces by breaking the country's laws and knowingly hiring illegal workers. In this guidance Form I-9 audits, followed by traditional investigative methods, were identified as ICE's most important tool in building criminal cases and bringing employers into compliance with the law. Under a recent expansion of the Administrative Site Visit and Verification Program, onsite visits to employers of H-1B and L non-immigrants by U.S. Citizenship and Immigration Services (USCIS) are on the rise. This kind of worksite enforcement is a key initiative under the Obama Administration. In addition, the increased use of E-Verify is a top priority of the Administration.

ICE Inspections

On November 19, 2009, ICE Assistant Secretary John Morton announced the issuance of Notices of Inspection (NOIs) to 1,000 employers associated with critical infrastructure, alerting business owners across the country of ICE's intent to audit their I-9 Forms to determine compliance with employment eligibility verification laws. The notices were sent to employers selected for inspection both as a result of investigative leads and intelligence and due to their connection to public safety and national security.

In July 2009, ICE sent audit letters to 654 employers that were selected for investigation based on information that had led ICE to believe that the businesses were using illegal labor. According to ICE, as a result of those audits:

- ICE agents reviewed more than 85,000 I-9 Forms and identified more than 14,000 suspect documents—approximately 16% of the total number reviewed
- To date, 61 Notices of Intent to Fine (NIFs) have been issued, resulting in $2,310,255 in fines
- 267 cases are being considered for NIFs
- ICE closed 326 cases after businesses were found to be in compliance with employment laws or after businesses were served with a Warning Notice in expectation of future compliance.

Audits involve a comprehensive review of Forms I-9, which employers are required to complete and retain for each individual hired in the United States after November 6, 1986. I-9 Forms require employers to review and record each individual's identity and work eligibility document(s) and determine whether the document(s) reasonably appear to be genuine and related to that specific individual. Audits may result in civil penalties and lay the groundwork for criminal prosecution of employers that knowingly violate the law.

Since its implementation of the April 30 worksite enforcement strategy, ICE reports the following results:

- 45 businesses and 47 individuals debarred from government contracting, versus 0 businesses and 1 individual debarred during same period in FY 2008
- 142 NIFs totaling $15,865,181, versus 32 NIFs totaling $2,355,330 in all of FY 2008
- 45 Final Orders totaling $798,179, versus eight Final Orders totaling $196,523 during the same period in FY 2008
- 897 cases initiated, versus 605 cases during the same period in FY 2008
- 1,069 Form I-9 Inspections, versus 503 Form I-9 Inspections in all of FY 2008

The aggressive use of worksite audits and inspections under the Obama Administration has indicated a shift in ICE's enforcement efforts, from dramatic worksite raids focusing on detention of unlawful workers to investigation and prosecution of employers who engage in unlawful hiring practices leading to an illegal workforce. During the late 1980s and 1990s, federal efforts at worksite enforcement were largely anemic, with I-9 audits resulting in administrative fines that many employers viewed as a cost of doing business. In the past several years, federal enforcement shifted to dramatic worksite raids involving the detention and deportation of thousands of undocumented workers; however, many viewed this policy as focusing too little on the employers who benefited from and sometimes exploited or encouraged the use of undocumented workers. This recent ICE initiative appears to be a synthesis and invigoration of past enforcement efforts. Recent congressional appropriations ensure that this effort will be well funded. Moreover, it appears that this is merely the first wave in what will be an energized, sustained, and broad worksite enforcement initiative.

ICE plans to conduct Form I-9 audits at businesses selected based on "leads and information obtained through other investigative means." This is typically the first step in a larger investigation that, where indicated, could include undercover investigations, wiretaps, and other surveillance and investigative techniques intended to provide the basis for civil charges and criminal prosecution. A NOI typically provides the employer with three days in which to turn over the requested material.

USCIS Site Inspections

Recent media reports have indicated that U.S. Citizenship and Immigration Services (USCIS) intends to conduct approximately 20,000 new site visits as

part of its data-mining initiative. Under this initiative, funded by the $500 Fraud Prevention and Detection fee it levies with new H1B and L-1 petitions, USCIS is dispatching inspectors from both its Fraud Detection and National Security (FDNS) unit and private contractors to perform the onsite inspections.

USCIS site inspectors have been visiting employers of H-1B and L nonimmigrants unannounced, to verify information in specific nonimmigrant petitions. In an effort to assist USCIS in determining whether the employer is in compliance with the terms and conditions stated in the petition, the USCIS inspectors may verify the existence of a petitioning entity, request relevant documents, photograph the premises, and speak with company representatives to confirm the beneficiary's work location, hours, salary, and duties.

USCIS site inspectors have also been requesting access to business records beyond those required for nonimmigrant petitions, including corporate leases and employment and consulting contracts. In addition, the USCIS site inspector have at times asked to speak with the H or L employee and his or her supervisor regarding the foreign national's job title and responsibilities, education, previous employment, residence, and family members in the United States.

Companies that have already been subjected to a site inspection have reported USCIS inspectors discouraging the presence of immigration attorneys to assist with gathering documents and answering the agents' questions.

Employers must ensure that they abide by H-1B and L legal requirements, and should be prepared for an unannounced visit by a USCIS site inspector. It is important that employers establish a policy for handling such visits, ensuring ahead of

time that all relevant records are up to date and easily accessible and determining which employees are authorized to speak with an inspector.

Employers should also make their receptionists aware of the possibility of such visits, and ensure that they know to immediately notify the person responsible for the company's immigration compliance upon the arrival of USCIS inspectors.

Increased Use of E-Verify

E-Verify is a federal web-based database operated jointly by the Department of Human Services (DHS) and the Social Security Administration (SSA). Employers enter information from the Form I-9, and E-Verify responds with either a confirmation of employment eligibility or some form of non-confirmation.

E-Verify is controversial. Critics claim that it is ineffective because it fails to detect instances of identity impersonation. Though nominally free, many employers find that it is costly to implement and maintain. It can also increase employers' exposure to discrimination claims when E-Verify is used improperly. For example,

- E-Verify cannot be used to prescreen applicants. It may only be used after a person is hired
- No adverse action may be taken while a "tentative non-confirmation" is being challenged by the new hire
- It must be used for ALL new hires, and cannot be used selectively
- It is not to be used for existing employees.

E-Verify is now mandatory for many federal contractors. The regulations require that a new E-Verify clause be included in certain federal contracts awarded or solicited on or after September 8, 2009, are valued at over $100,000, and contain a performance period that exceeds 120 days. In a departure from voluntary E-Verify,

employers that are a party to a contract (or subcontract) containing this E-Verify clause will be required to use E-Verify to confirm the employment eligibility of (a) all new hires and (b) all employees who perform work directly under the contract. A provision allows employers the option of using E-Verify for all employees as an alternative to identifying and processing those who perform work directly under the contract.

A number of states and local governments are passing laws that make E-Verify use mandatory, creating a patchwork quilt of E-Verify requirements across the country. E-Verify is mandatory for employers in Arizona, Mississippi, South Carolina, and most recently Utah. E-Verify is required of most contractors and vendors to state governments in about a dozen other states.

The National Equal Pay Enforcement Task Force

Background

During the State of the Union Address this year, President Obama announced that "[w]e're going to crack down on violations of equal pay laws – so that women get equal pay for an equal day's work." The purpose of this initiative is to improve compliance, public education and enforcement of equal pay laws.

The Equal Pay Enforcement Task Force

As part of the initiative, President Obama established earlier this year the National Equal Pay Enforcement Task Force (the "Task Force"). The Task Force will ensure that agencies charged with equal pay enforcement are working together and not overlooking any enforcement area. The EEOC, the Department of Justice Civil Rights Division, the DOL and the Office of Personnel Management will be represented on the Task Force. These agencies will work together to conduct inter-agency reviews of existing regulations, reporting requirements and administrative practices relating to equal pay. Ultimately, the Task Force will make recommendations to improve compliance and conduct a public education campaign for employers and employees to learn about their rights.

Implications

There are few public details regarding the Task Force and its plans. However, employers can expect that the agencies on the Task Force will prioritize equal pay enforcement during the coming years.

EEOC's Systemic Discrimination Initiative

Background

Systemic discrimination is a term used to describe pattern or practice, policy and/or class cases where the alleged discrimination broadly impacts an industry, profession, company or geographic location. The EEOC's prior attempts to focus on tackling systemic discrimination have been frustrated, but it appears poised to renew its efforts with respect to such cases in light of increased funding.

Past Challenges and Current Progress

In April 2006, the EEOC adopted a recommendation from an internal task force to prioritize systemic discrimination. Because the EEOC did not receive an increase in funding after it announced the initiative, the agency struggled to accomplish its goals. In fact, subsequent to the announcement, the EEOC implemented a hiring freeze, resulting in a significant reduction in the number of attorneys and investigative positions.

Notwithstanding these setbacks, the agency began to shift its focus to systemic cases. In 2008, the agency filed 17 lawsuits that were considered systemic because they involved at least 20 claimants when they were filed. Additionally, the EEOC resolved 15 systemic cases in which over half involved 100 or more claimants. However, the EEOC only filed 12 systemic cases in 2009, a decline from both 2007 and 2008. Of these cases, only three included 100 or more claimants. The low number of EEOC filings are likely attributable to a shortage of attorneys in district offices and understaffing of the Office of Field Programs, the office that processes charges.

However, with the influx of funding and the additional hiring that the EEOC anticipates doing this year and next year, employers should expect to see a more

aggressive agency. If the EEOC's funding requests are granted, its 2011 budget will increase 16.5% from 2008 levels. The hiring freeze has thawed and the EEOC is beginning to beef up staffing across the board – making it easier for the agency to focus on systemic discrimination.

Implications

The impact of the budget increases will probably not be felt in 2010, but the EEOC will likely be filing significantly more lawsuits beginning in 2011 on behalf of systemic discrimination claimants. In the interim, actions such as commissioner charges, directed investigations and charges filed by claimants with class implications are more likely to lead the EEOC to pursue systemic litigation; further, the EEOC may seek to consolidate several charges for investigation or it may request broad statistical information from employers.

EEOC's Guidance on Waivers and Releases

Background

A massive increase in the number of employee terminations has been an unfortunate result of the extraordinary economic downturn over the last couple of years. To minimize the risk of potential litigation from terminations, most employers offer terminated employees severance packages in exchange for waivers releasing the employers from all claims, including, without limitation, discrimination claims.

Recognizing the economic downturn, the EEOC issued guidance in July 2009 in question and answer format entitled "Understanding Waivers of Discrimination Claims in Employee Severance Agreements" (the "Severance Agreement Guidance"). While the Severance Agreement Guidance does not break much new ground, it provides a useful summary of the requirements for a legally enforceable severance agreement and the potential pitfalls into which an employer may stumble.

Guidance Provisions

When is a Waiver Valid?

As recognized in the Severance Agreement Guidance, a waiver of claims generally is valid when an employee knowingly and voluntarily consents to the waiver; most courts look beyond the language of the severance agreement and consider the totality of the circumstances to determine whether an employee has knowingly and voluntarily waived the right to sue the employer. For example:

- Has the severance agreement been written in a clear manner for the employee to understand the agreement based on his or her education and business experience?
- Has the employer induced the acceptance of the agreement based on improper conduct?
- Has the employee been given adequate time to consider the agreement?

- Has the employee consulted with an attorney or been encouraged or discouraged by the employer from doing so?
- Has the employee been given the opportunity to negotiate the terms of the agreement?
- To be valid, the severance agreement must also offer some sort of consideration in exchange for the employee's waiver in excess of what the employee already was entitled to by law or contract, not require the employee to waive future rights and comply with applicable state and federal laws.

The Severance Agreement Guidance expressly recognizes that an employee may file a charge with the EEOC if the employee believes he or she has been discriminated against on any protected basis even if the employee has signed a waiver releasing the employer from all claims. Accordingly, an agreement should not purport to limit the employee's right to testify, assist or participate in an investigation, hearing or proceeding conducted by the EEOC, and any provision that attempts to waive such rights is invalid and unenforceable. In the event the employee settles his or her claims and files a charge of discrimination with the EEOC, the EEOC may nevertheless conduct an investigation and pursue claims against the employer. *See EEOC v. Watkins Motor Lines, Inc.*, 553 F.3d 593 (7th Cir. 2009).

The Severance Agreement Guidance also includes the EEOC's position that an employee does not need to return his or her severance pay received under a severance agreement prior to filing a charge of discrimination with the EEOC, although it recognizes that an employee may waive in such an agreement the right to recover damages from the employer either in his or her own lawsuit or any action brought on the individual's behalf by the EEOC. The EEOC also takes the position that the employee does not have to return his or her severance pay if he or she files a claim in court under The Age Discrimination in Employment Act of 1967 (the "ADEA"), but the agency

acknowledges that the law is less clear under other federal statutes. The EEOC further recognizes that even if a court does not require the employee to return the consideration before proceeding with the lawsuit, the court may reduce the amount of any money awarded if the employee is successful in the action by the amount of consideration the employee receives under the severance agreement.

Waivers of Age Discrimination Claims Pursuant to the
Older Workers Benefit Protection Act (the "OWBPA")

The Severance Agreement Guidance also identifies the factors necessary to obtain a valid release of claims under the ADEA:

- The waiver must be written in a manner that can be clearly understood;
- The waiver must specifically refer to rights or claims arising under the ADEA;
- The waiver must advise the employee in writing to consult an attorney before accepting the agreement;
- The employee must be provided with at least 21 days to consider the agreement;
- The waiver must give the employee seven days to revoke his or her consent;
- The waiver must not extend to rights or claims that may arise after the date on which the waiver is executed; and
- The waiver must be supported by consideration in addition to that to which the employee already is entitled.

In the event the release of claims is sought in connection with a group termination program (which the EEOC explains may include a program involving as few as two employees):

- The employees must be provided with at least 45 days to consider the agreement and
- Additional information must be provided to the employees, including (i) the decisional unit for the program, (ii) the eligibility factors for the program, (iii) the time limits applicable to the program and (iv) the job titles and ages of all individuals who are eligible for or who were selected for the program and the ages

of all individuals in the same job classifications or organizational unit who are not eligible or selected for the program. An appendix to the Severance Agreement Guidance provides an example of one way in which the required OWPBA information necessary for group termination programs may be presented to employees.

The most controversial aspect of the Severance Agreement Guidance concerns the EEOC's position with respect to the employer's continuing obligations under the severance agreement if the employee challenges the age discrimination waiver. The EEOC takes the position that if an employee challenges an age discrimination waiver in court, the employer must continue to comply with its obligations under the severance agreement, including the continuation of severance payments under the agreement.

Implications

In light of the Severance Agreement Guidance, employees should review their form of severance agreements – both group termination agreements and forms used in connection with individual terminations – to ensure they are legally enforceable. In conducting this exercise, employers should ensure that:

- Their severance agreements are understandable by the average employee and no longer than necessary. Is that ten-page form of agreement necessary, or can the main goal of the agreement from the employer's perspective – a legally enforceable release – be effectuated in a much shorter agreement?

- Their severance agreements do not expressly limit the employee's ability to challenge the release, file a charge with the EEOC (or analogous state or local agency) or testify, assist or participate in an investigation, hearing or proceeding conducted by the EEOC. A severance agreement that includes a covenant not to sue in addition to a general release of claims potentially creates confusion for the employee and unnecessary headaches for an employer. A valid general release of claims (which complies with the OWBPA, if applicable) will serve as a complete defense to claims an employee has or may have for any period prior to the individual's execution of the release, but is less likely to cause the sort of confusion created by inclusion of a covenant not to sue.

- They pay attention to state and local law requirements in their severance agreements. By way of example only, the Severance Agreement Guidance notes that under California law, a waiver cannot release unknown claims unless the

severance agreement contains certain language specifically providing for such a waiver and under the Minnesota Age Discrimination Act, a release must give the employee fifteen days after signing the agreement to revoke it. Employers should review their agreements to ensure that their severance agreements are compliant with the requirements in all applicable jurisdictions.

- Consider whether their agreements should state that the severance payments or other benefits cease if the employee challenges the agreement. The EEOC may be more inclined to take interest in a charge of discrimination in which the agreement being challenged includes such a provision. In practice, however, an employer will likely frown on continuing to make such payments at the same time the benefit it bargained for – the release of claims – is frustrated. Employers should contact counsel prior to cutting off the payment of severance benefits under a severance agreement.

- They have reviewed the checklist included by the EEOC in the Severance Agreement Guidance. The checklist provides tips to employees regarding what they should do when offered a severance agreement. Employees and their counsel will likely review the checklist closely; employers should similarly review the checklist when preparing their agreements.

Labor Relations

The Employer Free Choice Act

The Employee Free Choice Act (EFCA) was introduced in the House and Senate in March 2009 as H.R. 1409 / S. 560. The bill provides for:

- Certification of a union based on a showing of majority support through authorization cards.
  - The NLRB would create model authorization language and develop procedures to establish validity of cards.
- Mediation after 90 days and binding arbitration after 120 days for first contract negotiations.
  - Bargaining must start within 10 days after either party sends written notice.
  - The Federal Medication and Conciliation Services (FMCS) "shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service."
- Increased penalties for unfair labor practices committed during an organizing campaign or first contract negotiations:
  - The bill provides for civil fines up to $20,000 per violation against employers for willful or repeat violations.
  - The bill provides for a triple back pay award when an employee is illegally discharged or discriminated against.
- Requires NLRB to seek an injunction whenever there is reasonable cause to believe the employer has illegally discharged or discriminated against employees during an organizing campaign or first contract negotiations.

As of January 2010 and the election of Senator Scott Brown (D-Mass.), Senate Democrats lost their 60-vote filibuster-proof majority. There are limited signs that EFCA, or an EFCA-alternative, will be placed on the legislative calendar in 2010 given the mid-term elections and the lack of bipartisan support for labor law reform. President Obama's March 2010 recess appointment of two additional Democrats to the

National Labor Relations Board (NLRB) will shift the focus to potential administrative action that will "reform" labor law.

RESPECT Act

The Re-empowerment of Skilled and Professional Employees and Construction Tradeworkers (RESPECT) Act was introduced in the House and the Senate in the 110th Congress as H.R. 1644/S. 969. The bill, if passed, would amend the definition of "supervisor" as set forth in Section 2(11) of the NLRA to require that for an individual to be classified as a supervisor, the individual must spend the majority of his or her time engaged in supervisory activities.

The RESPECT Act has not been re-introduced in the current 111th Congress. The legislation, if enacted, would radically alter the supervisor/employee distinction and grant millions of first-line supervisors NLRA protections and rights.

NLRB Rulemaking Initiatives

The National Labor Relations Board (NLRB) has traditionally avoided administrative rulemaking while other federal agencies have embraced the process. Chairwoman Liebman has stated publicly her support for NLRB rulemaking. Early in the Clinton Administration, the NLRB attempted, but did not succeed in establishing the appropriateness of single-location units through formal rulemaking. Based on lessons learned, the NLRB may pursue new rulemaking, especially in light of the recent recess appointments made to the NLRB by President Obama.

Potential rulemaking items are likely to include: (1) requiring all employers to post workplace notice of National Labor Relations Act (NLRA) rights; (2) expediting election procedures and establishment of standard, appropriate units; and (3)

requiring employers to bargain with union representatives representing a "minority" of employees. At minimum, the NLRB may issue non-binding interpretative guidance as to where the Board is headed prior to reversing precedent or engaging in rulemaking.

Oregon Law Prohibiting Captive Audience Speeches

A new Oregon law took effect on January 1, 2010 that prohibits private and public-sector employers from disciplining employees who refuse to attend employer-sponsored meetings if the primary focus of the meeting is about political or religious matters. "Political matters" include political party affiliation, campaigns for legislation or candidates for political office and the decision to join, not join, support or not support any lawful political or constituent group or activity – including labor unions. "Religious matters" include religious affiliation or the decision to join, not join, support or not support a bona fide religious organization.

Given the impact on an employer's right under the NLRA to generally hold "captive audience" meetings with employees during union organization drives, the Oregon law may be preempted by the NLRA. The U.S. Chamber of Commerce filed a complaint on December 22, 2009 for injunctive and declaratory relief in the U.S. District Court for the District of Oregon. The complaint contains both federal preemption and First Amendment challenges to the new Oregon law.

Wage Discrimination - Paycheck Fairness Act

Background

The Paycheck Fairness Act (S. 182, H.R. 12) ("PFA"), was passed by the House of Representatives on January 9, 2009. Then the PFA and the Lilly Ledbetter Fair Pay Act ("FPA") were combined and sent to the Senate; however, the Senate only passed the FPA. One year after the FPA was signed into law, the Senate called for hearings on the PFA. On March 11, 2010, the Senate Committee on Health, Education, Labor and Pensions held a hearing on the bill. It is expected that the Senate will vote on the bill in April or May of this year.

Proposed Statutory Changes

The legislation would amend the Equal Pay Act of 1963 ("EPA") to provide certain additional remedies and procedural advantages to plaintiffs claiming discrimination in the payment of wages on the basis of sex. The EPA currently provides several affirmative defenses for employers, such as where "payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." (29 U.S.C. § 206(d)(1)).

The PFA would modify the EPA in several ways, including:

- Change in an Employer's Affirmative Defense: The PFA would replace the EPA's fourth defense that the pay differential was "based on any other factor other than sex." Instead, employers would have to show that the reason for the difference in pay is job-related, consistent with a business necessity requirement.
- Non-Retaliation Provision: Changes to this provision would more closely reflect provisions in Title VII and other civil rights laws:
    - Employers would be prohibited from retaliating against employees who have "inquired about, discussed or disclosed" the wages of the employee or another employee.

- The provision does not apply to situations where the employee has "access to the wage information of other employees as a part of that person's essential job functions" and discloses the information to other employees without the same access.
    - HR professionals may only disclose this information when responding to a complaint or charge or in furtherance of an investigation

- "Same Establishment" Definition: The EPA requires that men and women at the "same establishment" receive equal pay for equal work. Under the PFA "same establishment" means:
    - Same employer at workplaces in the same county; or
    - Similar political subdivision of the State.

- Class Actions: Because the EPA was adopted prior to the Federal Rules of Civil Procedure, classes may only be certified based on individuals opting in to the class. The PFA would make access to class action status easier by automatically counting class members as part of the class, unless those individuals opt out (this process would conform to the Federal Rules of Civil Procedure).

- Damages: The availability of damages would change in the following ways:
    - The Secretary of Labor could seek additional compensatory or punitive damages.
    - Plaintiff's could seek payment of expert fees, in addition to attorneys fees and compensatory damages.
    - Punitive damages are available where the plaintiff can show malice or reckless indifference.

- Miscellaneous Provisions: The PFA would also (1) establish grants for entities to conduct negotiation skills training programs for girls and women; (2) establish a national award for pay equity in the workplace; (3) direct the Secretary of Labor to conduct studies on pay equity; (4) amend section 709 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-8) to give the EEOC the responsibility to establish guidelines for the collection of pay data from employers regarding the sex, race, and national origin of employees for use in the enforcement of federal laws prohibiting pay discrimination; and (5) direct the Commissioner of Labor Statistics and the Office of Federal Contract Compliance Programs to collect and analyze data concerning pay equity

Implications

Critics of the PFA predict increased pay discrimination litigation due to the additional remedies, the switch from opt-in class actions to opt-out class actions, and change in the affirmative defense standard.

Notably, unlike Title VII, the PFA does not provide for any cap on potential damages. As this is an area marked by the Obama Administration for increased attention, employers should begin carefully reviewing their internal compensation policies and uncover and remedy any potential pay differentials.

Wage Discrimination – Judicial Application of Lilly Ledbetter Fair Pay Act

Background

The Lilly Ledbetter Fair Pay Act ("FPA") was signed by President Obama on January 29, 2009 – the first act he signed as president. The legislation was specifically designed to overturn the United States Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), in which the Supreme Court held that a plaintiff must challenge a pay decision within Title VII's statutory period (300 days in most jurisdictions, 180 days in others). In *Ledbetter*, the plaintiff alleged that for ten years she received poor performance ratings as a result of discrimination. Due to these poor performance evaluations, her pay raises were low. Each year, her raise was calculated based on her salary at the time – an amount that was kept low due to the prior year's alleged discriminatory raise.

The Supreme Court in *Ledbetter* held that a pay-setting decision is a "discrete act," and that the "EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." The Court reasoned that to "shift intent from one act . . . to a later act that was not performed with bias or discriminatory motive . . . would . . . impose liability in the absence of the requisite intent." The Court found that Ledbetter's claim was untimely. The dissent called the majority decision a "cramped interpretation of Title VII" and urged Congress "to correct this Court's parsimonious reading of Title VII."

Within two weeks of the *Ledbetter* decision, the House Committee on Education and Labor (the "Committee") conducted a hearing regarding the case,

featuring Lilly Ledbetter as a witness, titled "Justice Denied? The Supreme Court's Ledbetter v. Goodyear Employment Discrimination Decision." Ten days later, on June 22, 2007, Committee Chairman George Miller introduced H.R. 2831, also known as the "Lilly Ledbetter Fair Pay Act of 2007."

The Republicans successfully filibustered the bill and it became a hot topic within the 2008 presidential race. In fact, Lilly Ledbetter herself campaigned with Barack Obama. An almost identical version of the FPA was introduced in January 2009. Within 19 days of its introduction, it was passed by both the House and the Senate.

Statutory Changes

- The FPA amended Title VII and ADEA and applies to the Americans With Disabilities Act and the Rehabilitation Act.
- The FPA stated that discrimination in compensation occurs when:
    - a discriminatory compensation decision or other practice is adopted;
    - an individual is subjected to a discriminatory compensation decision or other practice; or
    - an individual is affected by the application of a discriminatory compensation decision or other practice, including each time wages, benefits or other compensation is paid, resulting in whole or in part from the decision or other practice.
- The FPA permitted plaintiffs to receive two years of backpay.

Judicial Application of the Act

Confusion remains regarding when an action must have occurred in order to fall under the FPA and what types of acts or decisions constitute "a discriminatory compensation decision or other practice" that is actionable under the FPA. So far, courts have somewhat clarified the timing concerns, yet more litigation is expected on the latter issue.

Recent Decisions Interpreting the FPA:

- Plaintiffs in *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962 (2009), tried to make a Pregnancy Discrimination Act ("PDA") claim based on "prior acts." The Court held that because the prior acts occurred before the passage of the PDA, no discriminatory act occurred.

- A decision regarding the denial of tenure was still timely, even though it occurred two years prior to filing the charge. *Rehman v. State of Univ. N.Y.*, 596 F. Supp. 2d 643, (E.D.N.Y. 2009).

- Prior failures to promote were discrete decisions that do not constitute a continuing violation – only the last decision was timely under the FPA. *Grant v. Pathmark*, 2009 U.S. Dist. LEXIS 65393 (S.D.N.Y. July 29, 2009).

- Job assignments, with potential to impact a plaintiff's compensation, qualify as discriminatory acts under the FPA. *Gilmore v. Macy's Retail Holdings*, 2009 WL 305045 (D.N.J. Feb. 4, 2009).
    - Unlawful differences in job responsibilities, unrelated to compensation, were not encompassed within the FPA. *Leach v. Baylor Coll. Of Med.*, 2009 WL 385450 (S.D. Tex. Feb. 17, 2009).

- Denial of tenure, resulting in no salary increase, qualified as a compensation decision. *Gentry v. Jackson State Univ.*, 610 F. Supp. 2d 564 (S.D. Miss. 2009).

- Failure to promote is a discriminatory "practice" within the meaning of the FPA. *Lipscomb v. Winter*, 2009 WL 1153442 (D.C. Cir. 2009); *Gertskis v. N.Y. City Dept. of Health and Mental Hygiene*, 2009 WL 812263 (S.D.N.Y. Mar. 26, 2009)
    - But, the trend is to hold that failure to promote is not an "other practice," but a discrete act. *Vuong v. N.Y. Life Ins. Co.*, 2009 WL 306391 (S.D.N.Y. Feb. 6, 2009).

- Employer's unwillingness for five years to convert an employee from a temporary position to a permanent position did not fall within the purview of the FPA. *Miller v. Kempthorne*, 2009 U.S. App. LEXIS 27952 (2d Cir. Dec. 21, 2009).

- FPA is not applicable to claims regarding hiring, harassment, retaliation, or termination. *Stewart v. Gen. Mills, Inc.*, 2009 WL 350639 (N.D. Iowa Feb. 11, 2009); *Masterson v. Wyeth Pharm.*, 2009 WL 1106748 (E.D. Va. Apr. 23, 2009); *Arters v. Univision Radio Broad. TX, L.P.*, 2009 WL 1313285 (N.D. Tex. May 12, 2009); *Johnson v. Watkins,* 2009 WL 1507572 (S.D. Miss. May 29, 2009); *Craig v. Thomas Jefferson Univ.*, 2009 WL 2038147, (E.D. Pa. July 7, 2009); *Johnson v. District of Columbia*, 632 F. Supp. 2d 20 (D.D.C. 2009).

- FMLA claims, unrelated to compensation, are not covered by the FPA. *Maher v. Int'l Paper Co.*, 2009 U.S. Dist. LEXIS 17064 (W.D. Mich. March 5, 2009).

Implications

As discussed in the prior section regarding the Paycheck Fairness Act, President Obama has clearly indicated that pay inequities will be a major focus of agency enforcement. As a result, employers should review their compensation policies and any pay disparities. Due to the increasing conflicts within district courts of the interpretation of "other practices," commentators predict that the Supreme Court will resolve the issue within the next three or four years. In the interim, management attorneys will attempt to cast an employer's actions as discrete decisions. In fact, many employers are contemplating altering their pay schemes to emphasize one-time incentive compensation payments that are not calculated based on the prior year's award.

Additionally, as discussed during the hearings on the FPA, an employer's access to equitable defenses such as waiver, estoppel and laches remain available under the FPA. Because this law permits employees to go years and years into their employment to show a discriminatory employment action, employers may want to retain documents regarding the determination of an employee's compensation, including performance reviews, until at least the expiration of the relevant statute of limitations. While such retention may serve the plaintiff in providing documentation of her or his compensation decisions, it could also help reconstruct a solid defense for employers, especially in a case where the decision-maker is no longer employed. If feasible, employers may also consider creating detailed records regarding the determination of compensation for each employee in order to enable them to present a stronger defense in the event of a lawsuit years down the road.

Interestingly, critics were wrong in their predictions that the FPA would increase the number of pay discrimination actions. In fact, the EEOC received fewer

charges claiming violations of the EPA in 2009 than it did in 2008. EPA charges accounted for only 1% of all charges filed with the EEOC in 2009.

ADA Amendments Act

Background

The United States Supreme Court has steadily narrowed the breadth of protected individuals under the Americans with Disabilities Act of 1990 ("ADA") since its passage and excluded individuals the ADA was originally designed to protect, including individuals with epilepsy, diabetes and muscular dystrophy. Congress' original intent was for the ADA's definition of "disability" to draw on pre-1990 case law that expansively interpreted the definition of "handicap" under The Rehabilitation Act of 1973. As a result, Congress passed the ADA Amendments Act of 2008 (Pub. L. 110-325) (the "ADAAA") with the stated purpose of:

> "carry[ing] out the ADA's objectives of providing ''a clear and comprehensive national mandate for the elimination of 'discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA." (*Id*. at § 2(b)(1)).

The ADAAA makes significant changes to the ADA's definition of "disability" and broadens the scope of coverage under both the ADA and Section 503 of the Rehabilitation Act. Taking effect on January 1, 2009, the ADAAA also requires the EEOC, the agency charged with enforcing the ADA, to rewrite its regulations drafted pursuant to the ADA. The EEOC published its proposed rules on September 23, 2009 and expects to announce the final regulations in mid-2010.

Statutory Changes

The ADAAA stresses that the definition of "disability" should be interpreted generously – favoring broad coverage of individuals and downplaying the importance of extensive analysis into whether an "impairment" is a "disability."

Although the ADAAA preserves the ADA definition of “disability” as (i) a physical or mental impairment that substantially limits one or more major life activities of an individual; (ii) a record of such an impairment; or (iii) being regarded as having such an impairment, it changes the interpretation of the definition’s terms. With the ADAAA, Congress was committed to restoring the expansive interpretation of the term “disability” articulated in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), which noted the Rehabilitation Act aimed to prevent discrimination based on “myths, fears and stereotypes.”

<u>The ADAAA requirements affect the definition of “disability” by</u>:

- Requiring that the EEOC revise the portion of its regulations that define the term **“substantially limits”** to be consistent with the more expansive definition in the ADAAA .
    - Under the ADA, the EEOC had defined “substantially limits” as “significantly restricted” (Pub. L. 110-325 §(2)(b)6)), which the ADAAA characterizes as being inconsistent with Congressional intent. (*Id*. at § (2)(a)(8)).
    - The ADAAA explicitly rejects the Supreme Court’s interpretation of “substantially limits” in *Toyota Motor Mfg., Ky., Inc. v. Williams*, which required that, “an individual must have an impairment that prevents or severely restricts the individual.” (*Id*. at § 2(a)).
- Expanding the definition of **“major life activities”** and dictating that an individual need only show that an impairment substantially limited one’s life activity to qualify as disabled. The enumerated activities are:
    - <u>Basic activities</u>: “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” (*Id*. at § 4, amending ADA § 3(2)(A)).
    - <u>Major bodily functions</u>: “a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” (*Id*. at § 4, amending ADA § 3(2)(B)).

- Disallowing the consideration of **mitigating measures** other than "ordinary eyeglasses or contact lenses" when assessing whether an individual has a disability. The ADAAA gives the following examples of mitigating measures:

    - (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications. (*Id*. at § 4, amending ADA § 3(4)(e)).

    - If uncorrected vision is a qualification for a job, the employer must show that the standard is job-related and consistent with business necessity. *Id*. at § 5(b), amending ADA § 103(c)).

- Clarifying that even if an impairment is **episodic or in remission**, it is nonetheless a disability if the impairment would "substantially limit a major activity when active." (*Id*. at § 4(a), amending ADA § (3)(A)).

- Modifying the requirements for being **"regarded as**" having an impairment so that all that is required is that an individual i) be subject to an action prohibited by the ADA (*e.g.*, failure to hire, denial or promotion, or termination) ii) based on an actual or perceived physical impairment.

    - The ADAAA does not require that the impairment or perceived impairment limits or is perceived to limit a major life activity.

        - Before the ADAAA, an individual had to show that the employer (i) regarded the individual as impaired and (ii) substantially limited in a major life activity; AND (iii) that the employer perceived the limitations as disqualifying.

    - <u>Exception</u>: Congress narrowed the scope of coverage slightly by providing an exception for impairments that are "transitory and minor." (*Id*. at § 4(a) amending ADA § (3)(B)).

- Providing that individuals who fall into the definition of "disability" ONLY by being regarded as having an impairment are <u>not</u> entitled to **reasonable accommodation** (*Id*. at § 6(h)).

    - Congress explained that if an individual requires an accommodation, their disability should fall under one of the sections of the definition.

The EEOC regulations implement and add to the ADAAA. For example:

- The focus of the inquiry should shift from whether a person is disabled to whether discrimination has occurred. ("Regulations to Implement the Equal Opportunity Provisions of the Americans With Disabilities Act, as Amended," 74 Federal Register 183 (Sept. 23, 2009), pp. 48431 – 48450).

- The proper focus should be on an analysis of the limitation, not on what the individual can do in spite of the impairment. (*Id.* at 48440).

- An individual who has experienced no limitations or only minor limitations due to a mitigating measure related to an impairment, nevertheless has a disability if the impairment would be substantially limiting without the mitigating measure. (*Id.* at 48441).

- Surgical interventions, except for those that "permanently eliminate the impairment" can be considered a non-considerable mitigating measure. (*Id.*)

- Any appropriate comparison between an individual with an impairment and "most people" would be based on a common-sense approach and not on exacting or scientific analysis. (*Id.* at 48440).

- Adding to the ADAAA's non-exhaustive list of basic functions: sitting, reaching and interacting with others. (*Id.*)

- Adding to the ADAAA's non-exhaustive list of bodily functions: special sense organs and skin, genitourinary, hemic, lymphatic, and musculosketal. (*Id.*)

- A non-exhaustive list of examples of impairments that are episodic or in remission include: epilepsy, hypertension, multiple sclerosis, asthma, cancer, and psychiatric disabilities such as depression, bipolar disorder, and post-traumatic stress disorder. (*Id.* at 48441).

- A non-exhaustive list of examples of impairments that will consistently meet the definition of a disability include: deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia. (*Id.*)

- Impairments that are not disabilities include: "Temporary, non-chronic impairments of short duration with little or no residual effects (such as the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to hear completely) usually will not substantially limit a major life activity." (*Id.* at 48443).

- "Transitory," for purposes of the exception for being "regarded as" disabled, is an impairment lasting or expected to last six months or less. (*Id*.)
- An impairment substantially limits the major life activity of "working' when it substantially limits an individual's ability to perform, or meet the qualifications for a "type of work." (*Id*. at 484423).
    - o Note that usually an individual with a disability will be substantially limited in another major life activity, therefore generally making it unnecessary to consider whether the individual is substantially limited in working.

Implications

Employee-Friendly Effects

The expanded definition of "disability" will have several employee-friendly effects. By broadening coverage, not only will more employees be encouraged to bring charges, but it will be less likely for an ADA claim to be dismissed on summary judgment. Employees will find it easier to allege being "regarded as" disabled since it now only requires proof of an actual or perceived impairment. Although the regulations identify impairments that will "consistently" be determined to be covered disabilities, it is important to note that it does not create a list of *per se* disabilities. Rather, they are a quick and easy tool and meant to be used as a guide, but individual assessment still applies.

The enlarged scope of "disability" will also shift the focus away from deep probing into whether or not the employee is disabled and focuses the analysis on the employer's actions. Inquiries will now concentrate on the availability of accommodations, whether offered accommodations were reasonable, the good faith of the employer during the interactive process, the reasonableness of the employer's description of essential job functions and, ultimately, whether the employer made the employment decision based on the employee's impairment or an unrelated reason. Also relevant will be the reasonableness of

the accommodations requested by the employee, the employee's good faith participation in the interactive process and whether the employee was, in fact, qualified for the job.

2009 Increase in EEOC Enforcement Actions and Charges

That employees and the EEOC believe the terrain has shifted in their favor is underscored by the increase in enforcement actions and charges following the enactment of the ADAAA:

- The EEOC has filed more than twice as many actions asserting ADA claims in 2009 as compared with 2008.
- There has been roughly a 2.3% decrease in charges filed with the EEOC, down to 93,277 from 95,402 in 2008.
- Despite the decrease in charges overall, there has been an increase in charges asserting ADA violations.
    - 21,451 charges in 2009, up from 19,453 in 2008.
    - Charges with disability claims also made up 23% of the overall charge total. In 2008 disability claims comprised 20.4% of all charges.

The Conscientious Employer

Notwithstanding the increase in such claims, the ADAAA will likely impose few, if any, substantial changes on a conscientious employer. For example, the ADAAA did not change the definition of "reasonable accommodation." While it is likely employers will need to go through the interactive process of identifying a reasonable accommodation more often, the ADAAA does not provide any new requirements or guidelines for the process. In fact, the ADAAA does not change an employer's burden with respect to adopting reasonable accommodations; it does not force employers to accept an employee's suggested accommodation; it does not alter their right to refuse an unreasonable accommodation; it does not require accommodation for a disabled employee who presents a threat to the workplace; it does not abolish an employer's right

to ask an employee for documentation of an impairment; and it still allows for the business necessity defense. Unless an employer regularly relied on the restrictive definition of disability under the ADA as justification for, as a matter of practice, refusing to hire individuals with medical conditions or refusing to engage employees asking for accommodation in any interactive process, very little should change regarding employer's routine employment practices.

The most volatile issue for the courts will likely surround the phrase "substantially limits." EEOC's definition for "substantially limits" is fairly unhelpful:

> An impairment is a disability with the meaning of this section if it "substantially limits" the ability of an individual to perform a major life activity as compared to most people in the population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability.

It will likely be up to the courts to flesh out just how disabling an impairment must be to qualify as a disability.

ADEA - Legislative Response to *Gross*

Background

The Age Discrimination in Employment Act of 1967 (the "ADEA") was enacted with the purpose of preventing discrimination based on age, promoting employment of older workers and solving problems caused by an aging workforce. In 2009, the Supreme Court determined, in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), that under the ADEA, a plaintiff must prove that age was the but-for cause of an adverse employment action and not merely a motivating factor.

In 1991, Congress amended Title VII so that it allowed for liability when the improper consideration was a motivating factor of the adverse employment action. Because Congress did not similarly amend the ADEA, the Court in Gross held that it was not bound by Title VII's mixed-motive, burden-shifting rubric. Instead, the Court found that the burden of persuasion remains with the plaintiff even when the plaintiff has produced evidence that age was one motivating factor of the adverse employment decision. In short, employers do not have to prove that they would have taken the same action regardless of age, but rather employees must prove that the employer would not have made the decision but-for the employee's age.

Aiming to overturn *Gross*, several members of Congress have introduced the Protecting Older Workers Against Discrimination Act (the "POWADA"). POWADA would bring the ADEA in line with Title VII analysis for mixed-motives cases.

Proposed Statutory Changes

POWADA would amend the ADEA so that if a plaintiff can establish an unlawful employment practice by showing that age was "a motivating factor for the practice complained of, even if other factors also motivated that practice; or . . . the

practice complained of would not have occurred in the absence of an impermissible factor." This would effectively adopt the mixed-motive, burden shifting rubric of Title VII. Under Title VII's approach, when a plaintiff demonstrates alleged unlawful employment practices, the burden shifts to the employer to show it would have made the same decision in the absence of the improper motivating factor. The proposed legislation is retroactive, applying to all claims pending on or after June 17, 2009 – the day before the Gross decision.

POWADA Provisions

- **Title VII Analysis**: is proper for aged-based claims. The bill stresses that Title VII was meant to inform the interpretation of the ADEA:
    - Section 2 (a)(3): "Congress has relied on a long line of court cases holding that language in the Age Discrimination in Employment Act of 1967, and similar anti-discrimination and anti-retaliation laws, that is nearly identical to language in Title VII of the Civil Rights Act of 1964 would be interpreted consistently with judicial interpretations of title VII of the Civil Rights Act of 1964, including amendments made by the Civil Rights Act of 1991. The Supreme Court's decision in Gross v FBL Financial Services, Inc., 129 S. Ct. 2343 (2009), has eroded this long-held understanding of consistent interpretation and circumvented well-established precedents."
    - Section 2 (b): "PURPOSE. – The purpose of this Act is to ensure that the standard for proving unlawful disparate treatment under the Age Discrimination in Employment Act of 1967 and other anti-discrimination and anti-retaliation laws is no different than the standard for making such a proof under title VII of the Civil Rights Act of 1964, including amendments made by the Civil Rights Act of 1991."
- **Causes of Action**: a plaintiff has two avenues for establishing an unlawful employment practice – mixed-motive or but-for cause.
    - A plaintiff can demonstrate that an impermissible factor was a motivating factor "even if other factors also motivated that practice."
    - A plaintiff can demonstrate that "the practice complained of would not have occurred in the absence of the impermissible factor."

- **Burden Shifting**: For mixed-motive claims only, an employer may rebut by establishing that it would have made the same decision "in the absence of the impermissible motivating factor."

- If the employer **successfully rebuts** the plaintiff's mixed-motives claim, a court:

    - May grant declaratory relief, injunctive relief, and attorneys' fees and costs; but

    - May not "award damages or issue an order requiring any admission, reinstatement, hiring promotion or payment."

- **Umbrella Provision**: the proposed amendment would apply to:

    - The ADEA, including subsection (d), which protects employees from retaliation for opposition to unlawful practices and participation in investigations, proceedings, or litigation.

    - Any federal law forbidding employment discrimination.

    - Any law forbidding:

        - *Discrimination* described in subsection (d) (opposition to unlawful practices, participation in investigations, etc.);

        - *Retaliation* for engaging in any federally protected activity including the exercise of any right established by federal law (including whistleblower laws); and

        - *Interference* with any federally protected activity including the exercise of any right established by federal law (including whistleblower laws).

    - Any provision of the Constitution that protects against discrimination of retaliation.

Implications

POWADA's enactment would, of course, reverse the *Gross* decision, make summary judgment harder to obtain and result in more unfavorable jury verdicts for employers. Nevertheless, since *Gross* has been seen as a departure from established law and a narrowing of previously enjoyed ADEA protections, it is unlikely that POWADA will have a significant impact on employer's established practices.

ADEA - Proposed Rule Regarding Reasonable Factor Other Than Age Defense

Background

The ADEA creates an exemption for employer actions "otherwise prohibited" by the ADEA that are "based on reasonable factors other than age" ("RFOA"). The Supreme Court further clarified this exemption in *Smith v. City of Jackson*, 544 U.S. 228 (2005), and *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008).

In *Smith*, the Court held that an employment practice that has a disparate impact on older workers is discriminatory unless the practice is justified by RFOA, effectively creating a rebuttable presumption of discrimination. This presumption was later expanded upon in *Meacham*, where the Court held that employer actions based on RFOA is an affirmative defense, on which employers bear *both* the burden of production and burden of persuasion.

The EEOC has proposed regulations with the aim of clarifying the meaning of "reasonable" as related to RFOA. The EEOC was guided by tort law when drafting the proposed regulations and seems to rely heavily on an employer's purported duty to reasonably avoid discrimination. The regulations are open for comment until mid-April 2010.

Proposed Statutory Changes

The EEOC's proposed regulations codify the holdings of the Court's decisions in *Smith* and *Meacham*. Additionally, the proposed regulations attempt to clarify both "reasonable" and "other than age." To that end, they provide lists of factors to help determine whether an employment practice allows for a RFOA defense.

Reasonableness

- A "reasonable" factor is one that is:

    1. "objectively reasonable"
    2. when viewed form the position of a reasonable employer under like circumstances
    3. both in its design and in the way it is administered." (Definition of Reasonable Factors Other Than Age" under the Age Discrimination in Employment Act, 75 FR 32 (Feb. 18, 2010), pp. 7212 – 7218).

    - A "reasonable" employer is prudent and mindful of its responsibilities under the ADEA. (*id*. at 7215).
    - The EEOC notes that a prudent employer would know about *Smith* and *Meacham* and thus exercise reasonable care to avoid limiting employment opportunities of older persons. (*Id*.)

- How to establish a RFOA defense:

    - Show that the employment practice was "reasonably designed to further or achieve a legitimate business purpose" and
    - Show that the employment practice was administered in a way that "reasonably achieves that purpose in light of the particular facts and circumstances that were known or should have been known to the employer." (*Id*. at 18).

- The regulations also add the affirmative duty for employers to evaluate a process in light of whether it has a disproportionate impact based on age.

- Factors to determine reasonableness of a practice:

    - Whether the employment practice and the manner of its implementation are common business practices;
    - The extent to which the factor is related to the employer's stated business goal;
    - The extent to which the employer took steps to define the factor accurately and to apply the factor fairly and accurately (*e.g.*, training, guidance, instruction of managers);
    - The extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;

- The severity of the harm to individuals within the protected age group, in terms of both the degree of injury and the numbers of persons adversely affected, and the extent to which the employer took preventive or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps; and

- Whether other options were available and the reasons the employer selected the option it did. (*Id.*)

- The EEOC notes that an employer need not prove that all of the reasonableness factors enumerated in the regulations are present and that there may be non-enumerated factors that are relevant to the analysis. Furthermore, the factors do not necessarily carry the same weight in all circumstances and are dependant on the facts of the situation. (EEOC Background Information Memo).

Other than Age

- The proposed regulations clarify that the RFOA defense is only available when the employment practice is not based on age.
  - However, they caution that disparate-impact challenges typically involve factors that are seemingly unrelated to age.
  - Nonetheless, the seemingly neutral factor is really an age-based practice in disguise. The regulations provide criteria for investigating seemingly neutral practices to uncover potential age-based practices. (75 FR 32 (Feb. 18, 2010), 7218).

- Factors to determining "other than age" practices:
  - The extent to which the employer gave supervisors unchecked discretion to assess employees subjectively;
  - The extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes; and
  - The extent to which supervisors were given guidance of training about how to apply the given factors and avoid discrimination.

- An employer need not prove that all "non-age" factors are present. Similar to the EEOC's list of "reasonableness" factors, the factors of this non-exhaustive list will be weighted differently depending on the surrounding circumstances. (*Id.*)

Implications

Although the regulations will help employees by ostensibly ferreting out illusory neutral business decisions that were, in reality, aimed at discriminating against

older workers, the most notable impact of the regulations will be on employers; employers will have to work harder to avail themselves of the RFOA defense. The practical effect of the regulations, however, is that it will be harder for employers to make business decisions. Most business decisions affect employees and each such decision affecting employees will require in-depth analysis of its effect on the older work force. Not only will employers need to vet those business decisions, they will also need to search for alternatives that less disparately affect older workers – and then vet those business decisions. The regulations do not specify when enough is enough on the part of the "reasonable" employer and instead rely on the enumerated "factors" in the regulations. The proposed regulations seem to shift the inquiry from the reasonableness of the employment action to the reasonableness of the employer when adopting the employment action.

Critics have noted that as a result of the regulations making it more difficult for employers to assert the RFOA defense, employers will become liable for negligently failing to mitigate the disparate impact of an otherwise neutral employment practice. This imposes a greater burden than current law on employers. Interestingly, in *Meacham*, the Court stated that "the reasonableness inquiry includes no such requirement [for an employer to have considered less discriminatory alternatives]." Additionally, if an employer chooses an alternative to an employment practice that disproportionately affects older employees, that alternative will likely unduly affect some other segment of the work force. And because age is not a binary classification but rather a range, it is possible for an alternative practice to disproportionately affect some segment within the

older employee population. Ultimately, these regulations set no bright-line rules and force employers to mitigate disparate impact in advance of any dispute

Employment Non-Discrimination Act

Background

For over 35 years, lawmakers have attempted to pass a law prohibiting employment discrimination based on sexual orientation and gender identity. In 2007, their efforts came close to fruition when a bill passed the House, but contained no protection for transgender individuals. The Employment Non-Discrimination Act ("ENDA") would ban employment discrimination based on sexual orientation and gender identity. The bill has 45 co-sponsors in the Senate, including the two Republican senators from Maine. In September and November, the bill was heard before the House Education and Labor Committee and the Senate Health, Education, Labor and Pensions Committee, respectively. While many proponents expected EDNA to pass in 2009, the healthcare bill negotiations made it too difficult for lawmakers to focus its attention on certain other controversial matters, including ENDA.

Proposed Statutory Changes

ENDA would amend Title VII to prohibit discrimination against an employee because of that employee's *actual or perceived* sexual orientation or gender identity. It would also prohibit discrimination based on the sexual orientation or gender identity of a person with whom an employee associates. Under ENDA, "gender identity" is defined as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."

ENDA would not apply to employers with fewer than 15 employees and would exempt the military, private membership clubs and religious organizations (regardless of whether the religion's teachings oppose homosexuality) and there is no

requirement under ENDA that employers extend benefits to domestic partners. There are certain pro-employer provisions in ENDA:

- Facially neutral business practices are not prohibited.
- The EEOC is prohibited from collecting any statistics on sexual orientation or gender identity.
- Plaintiffs may not make claims based on a theory of disparate impact.
- Employers may still have dress and grooming standards. However, protected individuals are permitted to conform to the standards of the gender to which the individual identifies.
- An employer may deny an employee access to shared shower or dressing facilities. However, it must provide the employee with reasonable access to adequate facilities that are not inconsistent with his or her gender identity Employers are not required to construct new or additional shower or dressing facilities.

Implications

Senator Tom Harkin went on the record at the end of last year to say that his committee, the Health Education Labor and Pensions Committee, would vote on the bill in 2010. Conservatives in the Senate are threatening to filibuster the legislation. Reportedly, lawmakers are negotiating sections of the bill relating to attorneys' fees and whether plaintiffs claiming gender identity discrimination may also make sex discrimination claims under Title VII. If passed, ENDA would be the first major expansion of federal civil rights law since 1990 when the Americans With Disabilities Act was passed.

ENDA would not break new ground for employers in twelve states, plus the District of Columbia, whose local laws already ban discrimination based on sexual orientation and gender identity. Additionally, a significant percentage of Fortune 500

companies already include sexual orientation and gender identity in their nondiscrimination policies.

As the bill stands, it does not clarify what types of restroom facilities must be provided to gay, lesbian and transgender individuals. If EDNA is passed, employers will want to follow the law's guidance on shower and dressing facilities and ensure that employees have access to reasonable facilities that are not inconsistent with their gender identities.

Arbitration Fairness Act

Background

The Arbitration Fairness Act (the "AFA") was introduced in each of the last two Congresses, but failed to be enacted. The Democratic leadership in 2009 renewed its commitment to pursuing the passage of the AFA.

If passed, the AFA would reverse the Supreme Court's 5-4 decision in *Circuit City Stores Inc.*, v. *Adams*, 532 U.S. 105 (2001), which validated employers' right to enter into pre-dispute, binding arbitration agreements with employees as a condition of employment or continued employment: "The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in Gilmer, '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum,'" *Id.* at 123 (internal citations omitted). The AFA would amend the Federal Arbitration Act (9 U.S.C. 1 – 14) (the "FAA") to make pre-dispute agreements to arbitrate in a number of sectors, including employment disputes, unenforceable.

Proposed Statutory Changes

The AFA seeks to amend the FAA in several ways. The relevant changes would be:

- Expanding the definition section to include employment disputes and pre-dispute arbitration agreements (9 U.S.C. 1):
    - "(3) 'employment dispute', as herein defined, means a dispute between an employer and employee arising out of the relationship of employer and employee as defined by the Fair Labor Standards Act."
    - "(6) 'pre-dispute arbitration agreement', as herein defined, means any agreement to arbitrate disputes that had not yet arisen at the time of the making of the agreement."

- Changes to the Enforceability Section (9 U.S.C. 2):
    - "(b) No pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of—
        - (1) an employment, consumer, or franchise dispute; or
        - (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.
    - (c) An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, t*he validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator*, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement."
    - The act specifically exempts collective bargaining agreements from the Enforcement provision.

However, the Senate's version of the AFA makes the following alterations to the House bill:

- The Amendment will be placed in Chapter 4, a stand-alone chapter of the FAA, in an effort to limit the amendment to employment, civil rights, and consumer matters;
- Changes the applicability of the bill to certain franchise agreements; and
- Provides a more specific definition of a civil rights dispute.

Implications

If the AFA is enacted, it will undo over twenty years of case law and significantly alter the manner in which many employers resolve employment disputes. Additionally, it will invalidate existing arbitration agreements. These proposed changes, along with the coverage of the Franken Amendment, have reignited the debate concerning the benefits and detriments of arbitration generally.

Franken Amendment

Background

Section 8116 of the 2010 Department of Defense Appropriations Act (H.R. 3326) was passed by Congress and signed into law by President Barack Obama on December 19, 2009. Section 8116 of the bill, sponsored by Senator Al Franken (D-Minn.) and supported by a vote of 68 to 30, prohibits covered contractors from entering into mandatory employment arbitration agreements on certain subjects and prohibits these contractors from enforcing existing arbitration agreements.

Overview of Section 8116(a)

Based on the perceived injustice of requiring defense contractor employees to pursue rape or sexual assault claims in arbitration rather than in state or federal court, Senator Franken introduced his Amendment to prohibit new mandatory arbitration agreements covering certain claims and prohibit covered contractors from enforcing any such "existing agreement." Section 8116(a) specifically provides that:

> None of the funds appropriated or otherwise made available by this Act may be expended <u>for any Federal contract for an amount in excess of $1,000,000 that is awarded more than 60 days after the effective date of this Act</u>, unless the contractor agrees not to:
>
> (1) <u>enter into any agreement</u> with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision or retention; or

> (2) <u>take any action to enforce any provision of an existing agreement</u> with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.

(emphasis added). Section 8116(b) extends the above limitations to subcontractors that have a subcontract in excess of $1,000,000 under a covered contract. Section 8116(c) exempts those arbitration agreements with employees or independent contractors that "may not be enforced in a court of the United States." Finally, Section 8116(d) provides a limited authorization to the Secretary of Defense to waive the requirements of subsection (a) or (b) if the "Secretary or the Deputy Secretary personally determines that the waiver is necessary to avoid harm to the national security interests of the United States."

Retroactive Application of Section 8116 to "Existing Agreements"

While it is clear that defense contractors, after entering a covered contract in 2010, may not require new arbitration agreements for the claims specified in Section 8116(a)(1), Section 8116(a)(2) effectively applies to <u>all existing arbitration agreements</u> in a retroactive fashion, once the 60 day threshold is met. Congress has the power to impair property and contract rights through retroactive legislation. The United States Supreme Court has long rebuffed "due process" and other constitutional challenges to retroactive statutes. Like other "economic" legislation, a Congressional statute impacting existing contractual rights is valid if "the legislation itself is justified by a rational legislative purpose." *United States v. Carlton*, 512 U.S. 26, 31 (1994). The judiciary is highly

deferential to a Congressional determination that it acted with a "rational" purpose when impacting existing property or contractual interests. Moreover, in addition to the general power to pass retroactive statutes, Congress has considerable authority through its constitutional "spending power" under Article I, § 8, cl. 1 to impose conditions on recipients of federal monies or contracts. *See, e.g.*, *South Carolina v. Dole*, 483 U.S. 203, 206 (1987) ("Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives.'").

Despite the acknowledged Congressional power to enact retroactive legislation, the Supreme Court has recognized that disruptions to settled contract rights are generally undesirable, and that Congress must be explicit when intending legislation to operate retroactively. For example, in *Landgraf v. USI Film Products*, the Court addressed the retroactivity of certain provisions in the Civil Rights Act of 1991 and stated "[i]n a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." 511 U.S. 244, 265 (1994). The Court continued with the proposition that "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Id.* at 266.

Because of the negative implications raised by retroactive legislation, the Court imposes a minimal requirement, in addition to a rational basis, that Congress "expressly prescribe the statute's proper [temporal] reach." *Id.* at 280. Without an "express command" to operate retroactively based on exact language or operative dates,

the courts will determine whether the statute's natural impact would result in retroactive effects. If it does, the traditional presumption favors only prospective application absent a "clear congressional intent favoring such a [retroactive] result." *Id.* Thus, clear congressional intent for retroactivity may, in some cases, overcome the lack of an express command for retroactive application. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311 (1994) (discussing retroactive intent behind legislation).

With respect to Section 8116(a)(2) and "existing agreements," it appears that Congress has "expressly commanded" retroactive application to agreements made <u>prior to</u> a covered Federal contract. Arguably, any other interpretation would render Section 8116(a)(2) superfluous in many respects and well established statutory construction rules do not favor ineffective or meaningless clauses in legislation. *See* William Eskridge, Jr. & Philip Frickey, *The Supreme Court, 1993 Term – Foreward: Law as Equilibrium*, 108 Harv. L. Rev. 26, 97-108 (1994) (citing the Supreme Court rule to "[a]void interpreting a provision in a way that would render other provisions of the Act superfluous or unnecessary"); *see Landgraf*, 511 U.S. at 286 ("[A] contrary reading would render [the provision] ineffective.").

Recently, a federal district court analyzed a provision of the October 2008 Emergency Economic Stabilization Act ("EESA" or the "Act") with language analogous to Section 8116. In the EESA, Congress included a prohibition on enforcing "any existing ... agreement" regarding certain acquisitions. *Wachovia Corp. v. Citigroup, Inc.*, 634 F. Supp. 2d 445, 449 (S.D.N.Y. 2009). Citigroup argued that the Act's language did not impact causes of action that "accrued prior to the EESA's enactment." *Id.* at 458-59. The court rejected this argument and held that "Citigroup cannot escape the conclusion

that Congress intended for the provision to apply retroactively because the provision expressly applies to 'existing' contracts." *Id.* at 459. Moreover, the court explained that even though a cause of action may have accrued prior to the Act, "there is no dispute that Citigroup brought its enforcement action ... after the enactment of the statute. *Id.* (emphasis added).

Likewise, the logic employed in *Wachovia v. Citigroup* could apply to Section 8116(a)(2)'s restriction on enforcing "existing agreements" to arbitrate certain claims. The prohibition likely would extend to cases already in the arbitration pipeline if an employer seeks to judicially enforce an agreement once the entity is covered by Section 8116.

Scope of Coverage for Title VII Claims

The statutory language of Section 8116 broadly identifies "any claim under Title VII of the Civil Rights Act of 1964 . . . ." Section 8116(a)(1),(2). The Amendment then continues with "or any tort related to or arising out of sexual assault or harassment . . . ." The modifying phrase, "related to or arising out of sexual assault or harassment," following "or any tort," may or may not modify "any claim under Title VII." Principles of statutory construction arguably support the conclusion that the reference to Title VII, based upon a plain language interpretation, is not modified by the qualifying language after "or any tort."

First, the word "or" used between Title VII and tort claims is generally regarded to be disjunctive meaning that "or" is used to separate terms or phrases within a clause. *See* Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 21:14, p. 180-89 (7th ed. 2009). Similarly, courts have applied the "rule

of the last antecedent" to analogous language where a second term or phrase, like "or any tort," is modified by additional language, and one party seeks to modify an earlier term or phrase based on the additional language. The rule of the last antecedent states that "referential and qualifying words refer only to the last antecedent, unless contrary to the statute's punctuation or policy." William N. Eskridge, Jr. et al., *Legislation and Statutory Interpretation* 266 (2d ed. 2006). While certainly not a concrete rule mandated by law, the rule of the last antecedent aligns with the standard "disjunctive" use of the word "or" and provides a significant statutory construction barrier to modifying the phrase "any claim under Title VII" with the restrictive language following "or any tort." At base, the language of Section 8116, devoid of legislative history or intent, covers all Title VII claims.

Legislative History Interpretation Regarding Scope of Coverage of Title VII Claims

The limited legislative history from the Senate leaves some room for debate on the Title VII scope issue. The theme of rape and sexual assault pervades the legislative intent and justification, but Senator Franken's remarks and statements of purpose include an equal number of references to "discrimination," "civil rights" and the vulnerability of women in the workplace. There is no question that the context of the remarks and legislative history makes it difficult to logically connect all of Title VII's prohibitions against race, color, religion, and national origin discrimination to situations of rape or sexual assault. That said, gender discrimination or harassment, even without rape or sexual assault, may be more logically and factually inseparable from the legislative intent.

Thus, the legislative history blurs the lines between the covered Title VII claims and torts based on "sexual assault or harassment." Because courts may preclude reliance on legislative history in this context, standard statutory construction rules alone may drive the interpretation of Section 8116. If so, it is prudent to expect inclusive coverage of Title VII actions regardless of their connection to rape or sexual assault and harassment.

Recent Senate Bill Makes No Reference to Title VII Claims

Finally, on December 18, 2009, Senator Corker (R-Tenn.) introduced S. 2915 to legislatively ban mandatory employment arbitration agreements, for most employers nation-wide, "with respect to any claim related to a tort arising out of rape." The legislation makes no reference to Title VII claims or the Franken amendment. Although anecdotal, S. 2915's failure to mention Title VII at all may imply that the recently debated Franken Amendment was intended to cover all Title VII claims, or at least gender discrimination claims, not just Title VII claims related to rape or sexual assault and harassment.

Ultimately, the scope of Title VII coverage under Section 8116(a) must be resolved through adjudication, administrative proceedings, or future Congressional action. For now, it would be prudent to assume that a broader array of Title VII claims are covered than simply claims related to rape or sexual assault and harassment.

Employee Misconduct, Including Workplace Violence

The Effects of the Recession on Employee Misconduct

Employers have undertaken a series of cost-cutting measures as a result of the extraordinary economic downturn, including, without limitation, mass layoffs, reductions in compensation and benefits, hiring freezes and reductions in hours. Such actions contribute to an increased state of anxiety and distrust among employees. The 2009 National Business Ethics Survey published by the Ethics Resource Center (the "Misconduct Survey") has confirmed what anecdotally employers suspected – these cost-cutting measures have resulted in significant increases in employee misconduct.

Among other things, the Misconduct Survey also found that:

- Compensation and benefit reductions and adjusted work schedules were tied to more dramatic increases in misconduct than other cost-cutting measures. According to the survey, reduction in compensation and/or benefits resulted in a 43% increase in the percentage of employees observing misconduct in the prior twelve months; adjusted work schedules were linked to a 38% increase.

- The increase in misconduct associated with cost-cutting measures is more dramatic in small organizations (those defined by the survey as less than 500 employees) than in large companies (those defined by the survey as 10,000 or more employees). According to the survey, 48% of all employees in small companies observed misconduct in the prior year, compared with 58% in large companies; however, when small companies implemented cost-cutting measures, this gap was virtually eliminated.

- Cost-cutting measures are linked to significantly reduced rates of employee commitment, leading to a decrease in the number of employees who planned on remaining with their employers for more than five years. Not surprisingly, the decreases among more senior employees was relatively small, while among the youngest group of employees (18-29 years of age) there was a 25% decline in those intending to spend a significant portion of their career at their current employer.

In the face of this increased rate of employee misconduct, two issues employers have had to address more frequently concern (i) what does the law require employers do when confronted with employee misconduct, particularly when

psychological illnesses are thereafter raised by the employee as the cause of the conduct and (ii) how to confront the most serious of employee misconduct, workplace violence.

Interplay Between the Americans With Disabilities Act and Employee Misconduct

A common fact pattern concerns an employee who has committed misconduct and thereafter claims that the conduct was the result of some alleged psychological illness, such as depression, anxiety, schizophrenia or compulsive behavior; the employee requests that his or her conduct be excused or that he or she be provided with a reasonable accommodation. It is well-settled that the law does not immunize an allegedly disabled employee from termination for incidents of misconduct in the workplace, regardless of whether the employee's conduct was a manifestation of his or her alleged disability. *See, e.g.*, *Pruitt v. Metcalf & Eddy Inc.*, 2006 WL 39621, at *16 (S.D.N.Y. Jan. 6, 2006) ("Defendants are correct that, even if Plaintiff suffered from a disability covered by the ADA, he cannot invoke the statute's protections because he engaged in misconduct."); *Valentine v. Standard & Poor's*, 50 F. Supp. 2d 262, 289 (S.D.N.Y. 1999) (relying on numerous cases within New York and elsewhere applying this basic principle, holding that "whether [plaintiff's] misconduct was a manifestation of his disability is immaterial because the ADA does not immunize disabled employees from discipline or discharge for incidents of misconduct in the workplace"), *aff'd*, 205 F.3d 1327 (2d Cir. 2000) (unpublished table decision); *see also Falso v. Salzman Group, Inc.*, 545 F. Supp. 2d 295, 300 (W.D.N.Y. 2008) ("Disruptive and inappropriate behavior is a legitimate nondiscriminatory reason for termination, and an employer's termination of an employee for such behavior does not violate the ADA, even where the misconduct was occasioned by the employee's alleged disability."), *aff'd*, 327 Fed. Appx. 303 (2d

Cir. 2009); *LaBella v. New York City Admin. for Children's Servs.*, 2005 WL 2077192, at *18 (E.D.N.Y. Mar. 28, 2005) (regardless of whether the employee's conduct was caused by his alleged depression, compulsive behavior, anxiety and paranoia, the termination of his employment due to, among other things, his inappropriate and disruptive conduct was not actionable under the ADA).

This well-settled law is fully supported by the Equal Employment Opportunity Commission, which issued guidance in 2008 entitled "The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities" (the "ADA Guidance"). Among other things, the ADA Guidance provides that "[t]he ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability." Further, the guidance provides that "[i]f an employee states that her disability is the cause of the conduct problem or requests accommodation [following the unacceptable conduct], the employer may still discipline the employee for the misconduct" and "[i]f the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for reasonable accommodation." Thus, the employer can and should take appropriate action with respect to any employee who has committed misconduct.

Workplace Violence

The murder of Yale student Annie Le in September 2009 returned the issue of the most dangerous form of employee misconduct – workplace violence – to the front burner of corporate America. Notwithstanding the efforts of employers, workplace violence may not be completely preventable. Employers can, however, reduce the risk of

violence occurring in the workplace by having and enforcing policies addressing workplace violence, and being vigilant and taking affirmative steps to reduce the risk of violence.

Policy Adoption and Enforcement

Employers should adopt policies forbidding workplace violence. The policy should state that:

- The employer expressly prohibits any act or threat of violence by a company employee against any other employee or otherwise in connection with the employer's business;
- It is the employer's policy to (i) take disciplinary action, up to and including termination of employment, against any employee who engages in any threatening behavior or acts of violence in the workplace, (ii) take action when dealing with visitors to the employer's facilities who engage in threatening behavior or acts of violence and (iii) prohibit employees and third parties from bringing firearms or other weapons on to the employer's premises;
- Such action may include notifying the police or other law enforcement personnel and prosecuting violators of the policy to the maximum extent of the law;
- All employees are responsible for respecting the safety of others and have a responsibility to alert the Human Resources Department of any potentially troublesome workplace situations, activities or incidents that they observe or of which they are aware, including, without limitation, threats or acts of violence, aggressive behavior and threatening comments or remarks; and
- Any employee who fails to comply with the policy will be subject to appropriate disciplinary action, up to and including termination of employment.

Of course, it is not enough for an employer simply to have such a policy. The employer must enforce the policy rigorously and consistently. If the employer becomes aware that an employee has been threatening violence against another employee or has acted in a violent manner, it must promptly investigate the situation and consider removing from the premises pending such investigation any employee it suspects of such misconduct or believes might be in harm's way. In addition, employers should bear in

mind that taking different disciplinary action for the same or similar conduct has at least two adverse consequences: (i) it causes confusion among employees as to what conduct is prohibited and what conduct is permitted and (ii) it creates legal risk of a disparate treatment claim.

Being Vigilant and Taking Affirmative Steps to Reduce the Risk of Violence

As a result of the economic downturn, millions of workers have lost their jobs through reductions-in-force and other termination events. When conducting mass terminations or terminating employees who have exhibited aggressive behavior in the past, employers should consider having security on hand to dissuade or respond to any threats or acts of violence.

Difficult economic times also have increased the anxiety of those employees who have maintained their positions. In many industries, compensation has been frozen or reduced and remaining employees frequently have greater workloads in light of the downsizing or lack of hiring at their firms. In this environment, employers should look for warning signs of potential trouble, such as where two employees are becoming increasingly rude to one another, and deal with the issue before it mushrooms into something more dangerous.

There are affirmative actions an employer can take to reduce the anxiety that workers are currently experiencing. Employee Assistance Programs ("EAPs") permit employees to contact trained professionals in a confidential manner about personal issues they are experiencing. Many employers have EAPs; those that do not may wish to consider implementing them. In the event an employer has an EAP, it should publicize the availability of such a program – it is likely many employees are unaware of the existence of the program – to employees in regular communications to them. In addition,

many employees are foregoing vacation time, fearing that taking such time may increase the likelihood they will be terminated; employers should encourage employees to take vacation days to help minimize the negative effects of stress.

Social Networking and Personal Internet Postings

Social networking sites permeate the workplace and developing case law. Even judges are searching Facebook to screen potential clerks, inform their sentencing decisions and determine whether individuals have violated probation. With such widespread use of social networking and the ease at which the lines between personal and professional blur, employers should develop policies regarding these sites and internet postings in general.

Internet Searches in the Hiring Process

If information on a potential candidate is just a Google search away, why should a Human Resources Specialist refrain from learning more about the candidate? A candidate's presence on the internet not only reveals random personal information, but can also indicate the quality of the candidate's judgment. However, the following are the potential problems when decision-makers use social networking sites or other internet postings at the hiring stage:

- <u>Negligent Hiring</u> – An employer is liable for negligent hiring when at the time of the hiring it knows or should have known that the employee has a propensity for certain injurious conduct. While there is no duty to utilize specific procedures when investigating a candidate, if facts are revealed that would lead a reasonably prudent person to investigate a candidate, an employer could be liable for negligent hiring. In short, an employer who uses the internet to conduct background checks is more likely to be liable under a theory of negligent hiring than an employer who does not. On the other hand, an argument could be made that hiring someone without "googling" her is negligent.

- <u>Revelation of Protected Information</u> – When employers use the internet to research potential candidates, an employer will likely learn information that it may not consider when deciding whether to hire the candidate. For example, many social networking sites allow users to provide their race, sex, age, national origin, religion and sexual orientation. If a decision-maker is conducting the internet search, she should remember that she cannot use this information to form the basis of her decision. One potentially helpful practice is to have a non-decision-maker conduct the search and screen the protected information (restrictions of the Fair Credit Reporting Act may apply).

- Privacy Laws – For the most part, a focus on the violation of so-called "privacy laws" is a red herring in this context. However, employers may not circumvent a candidate's privacy settings (*i.e.*, have an employee become the candidate's "friend" in order to access personal information regarding the candidate).

- Off-Duty Conduct Statutes – Twelve states prohibit employers from discriminating against an employee for her participation in "legal recreational activities outside of work hours." For these states, any information regarding these protected activities may not form the basis of an employer's hiring decision.

Potential Pitfalls for Employers When Employees Post on the Internet

An employee may harm her employer with her personal internet postings in a myriad of ways, including the following:

- Undermining the employer's reputation.

- Creating liability due to a discriminatory comment made online because such statements may constitute evidence of state of mind or harassment, especially if made by a supervisor.

- Generating liability based on harassing comments or contact via social networking tools. As technology changes, so do the methods of inappropriate communications.

- Revealing trade secrets and confidential information of both the employer and its clients.

- Incurring liability under the rules of the Federal Trade Commission requiring individuals posting testimonials or reviews of products online to disclose their affiliation with the company.

- Putting managers or supervisors that are "friends" with their subordinates on notice of an employee's membership in a protected class or serious health conditions requiring accommodation.

- Violating non-solicitation clauses by using LinkedIn or other modern day Rolodexes.

Tips for Drafting Policies Regarding Employees' Internet Postings

Now more than ever, employees have the ability to greatly affect the reputations and liability of their employers with their online after-work activities. Almost one-third of all states have laws regarding whether an employer may discipline its

employee due to the employee's "off-duty" conduct. The National Labor Relations Act also prevents employers from banning or regulating employees' discussions of wages, hours or working conditions. These laws greatly affect a company's ability to regulate the online conduct of its employees. Prior to developing an internet policy, an employer should research the applicable laws in its jurisdiction to ensure that its policies are not violative. Most of all, policies must strike a balance between an employee's free expression and an employer's legitimate business interests in protecting company information, other employees and its reputation.

A comprehensive policy regarding an employee's personal internet postings should do the following:

- Present a clear policy, directly addressing the issue of harmful or embarrassing internet postings.
- Remind employees that use of the company's network is limited to business purposes, and employees should have no reasonable expectation of privacy when they use company computers.
- Inform employees that if they comment on the company, its products, its clients, or its competitors, they should disclose their identities and relationship with the company and advise readers that the comments reflect their personal opinions and not those of the company.
- Emphasize that employees are personally responsible for the contents of their online postings and that such postings may be publicly available long after they are deleted.
- Underscore the need for employees to comport themselves professionally both on and off duty when using social media, even if their use is solely personal.
- Repeat the employee's obligation to keep client information confidential.
- Remind employees that the company does not tolerate discriminatory or harassing behavior, referencing the company's anti-discrimination policy.
- Urge employees to treat internet postings as they do other communications that may be regulated in the employer's industry.

- Forbid employees from posting information that would embarrass, insult, demean, or damage the reputation of the company, its products, its clients, or any of its employees.

- Ban employees from using company logos or marks on their personal websites.

- Develop and implement an even-handed comprehensive disciplinary procedure. In doing so, an employer should carefully consider how it will conduct investigations into alleged wrongdoing online.

- Consider identifying an individual with whom employees may consult for direction and guidance as to the parameters of the policy.

- Prohibit supervisors, managers, or human resources representatives from circumventing online privacy settings (*i.e.*, asking a different employee to login to her account in order to look at the target employee's profile) and coercing an employee into providing the company with her login information (which violates the Stored Communications Act). Any access to an employee's personal site must be sought properly.

- Implement consistent internet searching of candidates. If an employer decides to use the internet in order to screen applicants, the employer should do so for all applicants, not just those of a particular class and such searches should be permissible within federal, state, and local anti-discrimination and background check laws.

- Restate that employees have a duty to refrain from disclosing trade secrets and other confidential information.

    - Client lists can be considered protected information. As a result, employers should review the ways in which employees use Facebook and LinkedIn for business purposes.

- Incorporate the use of LinkedIn or any other social networking tool often used by employees into the employee's non-solicitation agreement.

- Encourage employees to use good judgment at all times, including when posting their personal information or opinions on the internet. Poor judgment reflects badly not only on the employee, but also on the company.

- State that an employee found to violate company policy through online postings may face disciplinary actions, including termination.

- Train employees regarding the existence and contents of these policies.

Wage and Hour Law

Wage/Hour Rules and Modern Technology

The FLSA requires employers to pay their employees a minimum wage for all hours worked in a workweek and to pay overtime to those nonexempt (i.e., hourly) employees in any workweek that exceeds 40 hours. 29 U.S.C. §207(a). All time from an employee's first principal activity of the day until the last principal activity, excluding meal periods, is compensable. 29 U.S.C. §251 *et seq*. Simple enough – at least when Congress passed the FLSA in 1938. Since 1938, however, the confines of both the workday and the workplace, have changed, forcing employers and employees to rethink what compensable work really means.

Under the FLSA, employees are entitled to be paid beginning only with their first "principal activity," that is, the first activity that the employee is hired to perform, and to be paid only through their last principal activity. 29 U.S.C. § 254(a). However, those concepts do not necessarily include everything an employee might do to get ready for work at the beginning of the day, or that they may do after the traditional or scheduled workday has ended. Time can be spent turning on, booting up, and opening certain computer programs needed to perform an employee's duties. Employees may have to print out and read certain reports. Employees may have to check in with security or go through other screening processes just to be able to get to a work station to perform their job. At or after the end of the scheduled workday, an employee may need time to log off from a computer or may choose to check emails. Historically, employees have not been paid for these kinds of activities.

As a result, employees have sought clarification in the courts as to what it means to "work"—arguing that beyond the things their employers had hired them to

perform from the beginning to the end of the workday there were certain additional tasks they had to complete in order to perform these principal activities, and that they should be paid as well for the time spent doing them. Their efforts have led to a major expansion of the concept of "work," to encompass not only the principal activities themselves, but also activities that are "integral" and "indispensable" to the principal activities.

While plaintiffs have attacked a wide variety of activities as "compensable" under the FLSA, courts have reached different results, depending on the unique facts and circumstances presented in each case. In *Kuebel v. Black & Decker (U.S.), Inc.*, 2009 WL 1401694 (W.D.N.Y. May 18, 2009), for example, plaintiffs sought compensation for time spent carrying out job related duties at home, including reviewing and responding to company emails, receiving directives from their managers, printing and reviewing sales reports, training, assembling sales materials, and synchronizing a company provided PDA. The court granted defendant's motion for summary judgment, finding that these tasks were the types of "at home" duties which were not considered compensable and further, they were not "integral" and "indispensable" to plaintiffs' principal job duties.

That was not the case in *Boudreaux v. Bantec, Inc.*, 366 F. Supp. 2d 425, 428 (E.D. La. 2005) (denying cross-motions for summary judgment as to off-the-clock claims). In *Boudreaux*, computer repair technicians that worked out of home offices and traveled to service calls claimed compensation for time spent on daily review of emails containing the day's assignments, organizing assignments into an efficient route, calling computer owners to make appointments, packing up computer parts and picking them up from courier services, logging service calls into a database, boxing computer parts and

filling out accompanying paperwork, and responding to after-hours service calls from customers. The court found that some of these "administrative activities" were not preliminary activities, but rather, could be construed as "integral and indispensable" activities. Whether they were integral and indispensable depended on whether plaintiffs were, as they claimed, "doing the tasks necessary to prepare for service calls."

Because changes in technology have made it easy for employees to extend their workdays well beyond the hours indicated by the time clock at the plant or the office—and thus more difficult for employers to monitor and control—employers now have to manage the use of technology carefully to avoid potentially crushing exposure to overtime claims for hours worked outside of the traditional compensable workday, and outside of the traditional workplace. There are steps an employer can take to control and limit this exposure:

- Establish policies to limit the distribution of technology. Remote work devices (BlackBerrys, cell phones, laptops) can be issued only to exempt personnel, who are not entitled to overtime pay, and only as needed. If nonexempt personnel need short-term access to company technology off-site, a company can require that they acknowledge, preferably in writing via an acknowledgement form, that these tools may not be used outside scheduled work hours (except at the direction of a supervisor), that they must record and report all time spent performing off-site business activities, and that they will be required to return their electronic devices when the work is complete.

- Encourage nonexempt employees to adopt practices that keep work at the workplace. Encourage employees to go home and rest, not work. Establish limits for time that can be spent checking emails and voicemails during non-work hours. Consider refusing remote access to email for nonexempt employees altogether. The policy's goal is to make sure that only those nonexempt employees who have to work off-site are given access to work-related technology and that they use it no more than is necessary.

- Monitor compliance with any company policies limiting the use of remote work devices. Consider requiring nonexempt employees who use remote devices to sign an annual acknowledgement form signifying their understanding of the policy. Employers can also audit or sample email and voicemail logins and other records of employee time spent using remote electronic devices and compare

these records to pay records to ensure that all compensable time is being paid. Employers should also make sure that managers have a firm grasp of all of the policies as well. Require managers to confirm in writing that they have no knowledge of uncompensated off-site work performed by nonexempt employees, train them not to encourage and not to ignore such work, and discipline those managers who permit it.

- <u>Do not assume that the employer can accept the benefits of work performed off-site</u>, even if it was done without permission and/or in violation of company policy. If a nonexempt employee works out of the office, pay him or her. Then enforce any rules against such work with disciplinary measures.

Are Financial Advisors Exempt Under The FLSA?

For decades, interpretative regulations from the DOL provided that an employee working as a "customers' man in a brokerage house" (also known as a stockbroker or financial advisor) was exempt from overtime. 29 C.F.R. § 541.207(d)(2) (2003). In 2004, the DOL issued new regulations reconfirming the exempt status of stockbrokers and financial advisors with the preface that "our approach is consistent with existing section 541.207(d)(2) which provides that a 'customer's man in a brokerage house' exercises discretion and independent judgment 'in deciding what recommendations to make to customers for the purchase of securities. . . .'" Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 69 Fed. Reg. 22122, 22146 (April 23, 2004). The 2004 regulation, designed to confirm stockbrokers' exempt status, provides:

> Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

29 C.F.R. §541.203(b).

The DOL again confirmed its position that financial advisors are exempt from overtime in its November 27, 2006 Opinion Letter. DOL Opinion Letter, FLSA 2006-43 (Nov. 27, 2006). In short, in the DOL Opinion Letter, the Administrator of the Wage and Hour Division concluded that "registered representatives" in the financial services industry with job titles such as "financial advisor," "investment professional," "financial consultant," and "stockbroker" qualify for the administrative exemption contained in Section 13(a)(1) of the Fair Labor Standards Act (FLSA). The DOL concluded that financial advisors satisfy the requirements of the administrative exemption for two reasons: (1) financial advisors perform administrative duties that include the exercise of discretion and independent judgment; and, (2) the compensation structure for financial advisors satisfies the salary basis requirement for the administrative exemption.

As to whether a financial advisor's "primary duty" is the performance of work directly related to the management or general business operations of the employer or the employer's customers within the meaning of the administrative exemption, 29 C.F.R. § 541.200(a), the DOL noted that financial advisors' primary duties consist of using their expertise and knowledge of the securities industry and markets to analyze clients' financial information and investment objectives, evaluating possible investment options and strategies in light of various factors, and providing individualized investment advice suited to clients' investment objectives. As a result, the DOL concluded that financial advisors satisfy the duties requirements of the administrative exemption by performing nonmanual work directly related to their employers' management or general business operations.

The DOL further concluded that financial advisors exercise sufficient discretion and independent judgment in the performance of their duties to qualify for the administrative exemption. Generally, the exercise of discretion and independent judgment involves comparing and evaluating possible courses of action and acting or making a decision after considering the various possibilities. 29 C.F.R. § 541.202(a). Because financial advisors' duties include evaluating a client's individual financial circumstances and investment needs, assessing and comparing alternative investment options, and making recommendations to the client based on that analysis, financial advisors exercise discretion and independent judgment within the meaning of the administrative exemption. Moreover, the fact that financial advisors may use computer software or other technology to assist them in assessing investment options for their clients does not disqualify them from the administrative exemption, insofar as the financial advisor ultimately assesses various alternatives and makes recommendations tailored to each client.

In addition to the "duties" test, an employee also must be compensated on a salary or fee basis at a guaranteed rate of not less than $455 per week to qualify for the federal administrative exemption. 29 C.F.R. § 541.200(a). The DOL concluded that financial advisors meet the "salary" test for the administrative exemption when they are paid a guaranteed minimum draw of at least $455 per week, coupled with a component above the guaranteed minimum of commissions, fees for assets under management, or some combination of commissions and fees. This result applies even if the commission and/or fee component is calculated based on a formula that accounts not only for the transactional or other fees incurred by clients but also factors in certain adjustments for

prior draw deficits, cancelled trades, trade errors, expenses, and other trade-related losses. Significantly, the DOL withdrew four prior opinion letters to the extent that they could be interpreted as inconsistent with this conclusion.

Federal courts faced with challenges to the exempt status of financial advisors have agreed with the DOL's interpretation. Recently, for example, a federal court dismissed the claim of a stockbroker (i.e., financial advisor) who was suing his employer for overtime pay, ruling that the stockbroker was "plain[ly] and unmistakabl[y]" an exempt administrative employee who was not entitled to overtime pay under the FLSA. *Hein v. PNC Fin. Servs. Group, Inc.*, No. 06-2713, 2007 WL 1795684 (E.D. Pa. June 20, 2007); *but see In re: RBC Overtime Litigation,* Civ. No. 06-3093 (D. Minn. Mar. 31, 2010) (denying summary judgment where issue of material fact exist as to whether financial advisors met administrative exception).

Also, the opinion letter helped employers defeat efforts to certify class or collective actions for overtime asserted on behalf of financial advisors insofar as the letter states that determining an employee's primary duty should be evaluated based on "all the facts in a particular case." In *Bachrach v. Chase Investment Services Corp.* Civ. No. 06-2785, 2007 WL 3244186 (D.N.J. Nov. 1, 2007), a group of financial advisors alleged that they were improperly classified as exempt from overtime pay and claimed unlawful deductions from their pay. The court denied class certification because proving that putative class members were not entitled to overtime compensation "would require individual exploration of each member's specific work habits." *Id.* at *3.

In short, the DOL's opinion letter has helped stem the tide of litigation challenging the exempt status of financial advisors under the FLSA, especially when

cited in combination with another DOL opinion letter (dated September 8, 2006), which concluded that mortgage loan officers also satisfy the administrative exemption for similar reasons. However, as noted above (*supra* at p. 5), on March 10, 2010, the Wage and Hour Division of DOL issued its first ever "Administrator Interpretation" to announce that mortgage loan officers do not qualify for the administrative exemption. This interpretation is likely to spark another round of litigation involving the issue of whether financial advisors are exempt under the FSLA.

Significant Developments in Wage/Hour Class Actions

Wage and hour litigation continued to outpace all other workplace class actions in 2009, and that trend is not expected to subside anytime soon. In fact, a recent survey reported that the top 10 private wage-and-hour settlements paid or agreed to in 2009 under the FLSA totaled $363.6 million -- a 43.9% increase from 2008. Out of those 10 claims, 5 were pending in state and federal courts in California. By way of substantive trends, "hot topics" in wage and hour include: a continued expansion – both in terms of class size and damage amounts – in misclassification claims, and developments in both California and New York state wage and hour law.

Attacks on misclassification of employees continue to be industry and job specific. Specifically, and along with attacks against financial analysts (addressed above), accountants, information technology specialists, loan officers, promotion and sales employees, analysts and underwriters were popular targets – with somewhat mixed results.

In *Nguyen v. BDO Seidman* (C.D. Cal. 2009), for example, plaintiffs brought a purported class action alleging that accounting firm BDO Seidman improperly classified non-licensed accounting professionals as exempt from overtime. The District

Court held that individualized questions as to the purported class members' job duties and qualifications precluded treatment as a class action. Specifically, class certification was denied under the administrative exemption in part because at least some, if not all, class members performed high-level tax-related work in areas requiring the evaluation of "grey areas" in preparing tax returns and analytical skills in researching tax issues. As to the professional exemption, the court found that the putative class members "have a wide variety of advanced degrees, certificates, and training that they use in the performance of their tax and audit job duties."

On the other hand, in *Sobek v. PricewaterhouseCoopers, LLP* (E.D. Cal. 2009), the Court granted summary judgment to plaintiff class, finding that the class of unlicensed associates in defendant's Attest Division was not exempt from California's overtime laws because they did not qualify for California's professional, executive or administrative exemption. Specifically, he court found that plaintiffs did not qualify for the professional exemption because they could not be considered "learned professionals" without a license; plaintiffs did not qualify for the executive exemption because they did not manage a recognized department or subdivision of the business (managing individual projects or "engagements" did not count); and plaintiffs did not qualify for the administrative exemption because they were subject to "more than general supervision." This case has been certified for interlocutory appeal to the Ninth Circuit and PricewaterhouseCoopers has submitted its brief on appeal.

Classification of information technicians are also under attack, and courts seem, at least for now, open to plaintiffs' arguments. In *Lewis v. Wells Fargo & Co.* (N.D. Cal. 2009), for example, the Northern District of California granted conditional

certification to a class of technical support workers "with the primary duties of installing, maintaining, and/or supporting software and/or hardware, including but not limited to network engineers, but excluding PC/LAN Engineers," who allege that defendant violated the FLSA by misclassifying them as "exempt." The court found that "[p]laintiffs me[t] their burden of showing that all technical support workers are similarly situated with respect to their FLSA claim: all technical support workers share a job description, were uniformly classified as exempt from overtime pay by Defendant and perform similar job duties." *See also Malloy v. Richard Fleischman & Associates Inc.* (S.D.N.Y. 2009)(granting conditional certification to a class of information technology support specialists, finding that "[a]t this preliminary stage, plaintiff has more than satisfied his de minimis burden of showing that he is 'similarly situated' to the proposed class members.")

The courts have not been as sympathetic to misclassification claims by loan officers. In *Vinole v. Countrywide Home Loans, Inc*. (9th Cir. 2009), external home loan consultants alleged that they were misclassified as "exempt" and denied overtime and other wages lawfully due to non-exempt employees. The district court denied class certification and the Ninth Circuit affirmed, holding that "Plaintiffs' claims will require inquiries into how much time each individual [loan officer] spent in or out of the office and how the [loan officer] performed his or her job."

California continues to be the primary breeding ground for wage and hour litigation. California's administrative exemption, in particular, is at issue with respect to insurance claim adjusters. In *Harris v. The Superior Court of Los Angeles County and Liberty Mutual Insurance Company* (Cal. 2009), parties are awaiting a decision from the

Supreme Court of California as to whether insurance claim adjusters are exempt. Notably, the DOL filed an amicus brief supporting the defendants, arguing that insurance claim adjusters are generally exempt employees under the DOL's regulations; generally satisfy the "directly related" prong of the Administrative Exemption; and have been found to be exempt in every relevant federal court decision addressing this issue.

California has also revisited the scope of the Private Attorney General Act of 2004 ("PAGA"), which allows private citizens to sue as a "private attorney general" for penalties for underlying violations of state wage and hour laws). In *Arias v. Superior Court* (Cal. 2009), the California Supreme Court held that the class does not have to be certified before bringing a "representative action" under the Private Attorney General Act of 2004 ("PAGA")(allowing private citizens to sue as a "private attorney general" for penalties for underlying violations of state wage and hour laws). Defendant argued that if class certification is not required, plaintiffs could continually bring PAGA claims against their employer for the same issues. In response, the Court stated that "[b]ecause an aggrieved employee's action under the Labor Code Private Attorneys General Act of 2004 functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government."

Also, in *Schachter v. Citigroup,* 47 Cal. 4th 610 (Cal. 2009), the California Supreme Court affirmed summary judgment against an employee who claimed that his incentive compensation plan violated the California Labor Code. The California Supreme Court has affirmed that employers and employees may agree to prospectively alter terms of the employee's employment including, but not limited to, the employee's

wages. For California employers presently offering or considering incentive compensation plans, *Schachter* clarifies that employers can offer such plans conditioned upon future events, such as an employee's continued employment.

New York has also changed its state law landscape with respect to wage and hour law. On October 26, 2009, Governor Patterson signed into law an amendment to N.Y. Labor Law Section 195, the New York Pay Rate Notification Law, that requires:

> Every employer shall notify his or her employees, in writing, at the time of hiring of the rate of pay and of the regular pay day designated by the employer in accordance with section one hundred ninety-one of this article, and obtain a written acknowledgement from each employee of receipt of this notice. <u>Such acknowledgement shall conform to any requirements established by the commissioner with regard to content and form.</u> For all employees who are eligible for overtime compensation as established in the commissioner's minimum wage orders or otherwise provided by law or regulation, the notice must state the regular hourly rate and overtime rate of pay" (emphasis added).

Employers should continue to watch for similar state action on wage and hour issues across the country.