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# IMA UPDATE

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Volume 16 Issue 4

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## Congress Votes to Repeal Health Care Law's 1099 Provision

**A**s early as today, President Obama is expected to sign [signed April 14, 2011] into law a bill that repeals a new business reporting requirement involving IRS Form 1099. The objectionable provision had been created by the March 2010 health care reform law. It is the first substantive change to the health reform law – additional efforts to modify the law will be difficult in the current environment.

In passing the bill (H.R. 4), Congress eliminated a measure that, starting in 2012, would require all businesses to report to the IRS every transaction of \$600 or more with any vendor. In the end, both political parties supported repeal of the 1099 provision, despite it providing a projected \$19 billion in revenue to the federal treasury.

Repeal of the provision had been among SHRM's top legislative goals in 2011. Last month, during our Employment

Law and Legislative Conference, more than 200 HR professionals visited Capitol Hill, urging their elected officials to support repeal of the 1099 requirement. SHRM President and CEO Hank Jackson also wrote a letter to congressional leaders, asking them to provide HR professionals with some certainty by eliminating the controversial provision.

The deciding congressional vote came this Tuesday, April 5, when the Senate agreed to the House bill by a vote of 87-12. The bill was sponsored by Rep. Daniel Lungren (R-CA).

*SHRM 4/7/2011*

### **N.J. Minimum Wage Advisory Commission Recommends Maintaining the Current Minimum Wage**

**O**n February 11, 2011, the New Jersey Department of Labor and Workforce Development released the Minimum Wage Advisory Commission's report, which recommends that the state minimum wage remain at \$7.25 per hour, the current federal rate. The Commission based this recommendation on the overall cost of living in New Jersey, the cost of living in New Jersey as compared to other states, and employment self-sufficiency standards.

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***Update from the President***

Calendar Year Plans Need to File Form 5500 by August 1, 2011. The Form 5500, Annual Return/Report of Employee Benefit Plan, including all required schedules and attachments, is used to report information concerning employee benefit plans. Generally, any administrator or sponsor of an employee benefit plan subject to ERISA must file information about each benefit plan every year. Typically, Form 5500 reports must be filed by the last day of the 7th calendar month after the end of the plan year. For calendar year plans, this means the Form 5500 is due by August 1, 2011 (as July 31 is a Sunday), unless a Form 5558 (extension) is submitted and received by the IRS on or before the Form 5500 report's normal due date.

For welfare benefit plans, Form 5500 reports must be filed for both fully-insured and self-insured plans. Welfare benefit plans include health plans, dental plans, vision plans, disability plans, life insurance plans, accidental death and dismemberment plans, and certain employee assistance programs that have more than 100 participants at the beginning of a plan year.

For retirement plans, the filing deadline for Form 8955-SSA, which employers must file directly with the IRS (i.e. not electronically as the Form 5500 is filed) for plan years beginning on or after January 1, 2009, is the same as the Form 5500 filing deadline.

IRS penalties for late filing are \$25 per day up to a maximum of \$15,000. DOL penalties can run up to \$1,100 per day (no maximum). For willful violations, individuals face up to a \$100,000 fine and/or imprisonment up to 10 years.

We encourage you to contact us with any questions, needs or suggestions you may have.

Thank you for your membership.

Larry Donnelly

**National Position Evaluation Plan  
A Measure of Value**

**NPEP** is a Point Factor Evaluation System. It evaluates each position according to 11 established criteria that can be applied to any position in any organization. As a result, your salary structure is Objective, Equitable, and Non-discriminatory. It will help you to use your salary dollars more efficiently, organize your Wage & Salary system, improve employee morale and have a system that is defensible against discrimination claims.

**Affirmative Action Plan Preparation**

Are your AAP's up to date and ready in the event of an audit?

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Changes have been made to the regulations that give an OFCCP investigator options on how to proceed with a contractor. As a result, fewer companies are having full audits and many more companies are being audited. Being prepared, will reduce the chances of your organization going through a complete audit.

***Contact IMA for information on the above services***

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## New York Wage Theft Prevention Act Takes Effect on April 9, 2011

**E**mployers should be aware that the New York Wage Theft Prevention Act (the “Act”) takes effect beginning on Saturday, April 9, 2011. . . . The Act makes a number of critical changes to the New York Labor Law, including harsher penalties for Labor Law violations and expanded enforcement powers for the New York Department of Labor (“DOL”).

Of most immediate concern for New York employers are the Act’s provisions regarding notice to employees. For each employee located in New York, employers must provide a notice advising the employee of his/her rate of pay, the basis of pay, any minimum wage allowances, the regularly designated pay date, the employer’s name (including any d/b/a’s), the employer’s physical address or place of business, the employer’s telephone, and (for non-exempt employees) the regular hourly rate and overtime rate of pay.

The notice must be provided upon the employee’s hire and at minimum every year between January 1 and February 1 [**NOTE: The first annual notice is due in 2012**]. Notice must also be provided whenever there is a change in the above information, especially a decrease in pay, although the Act permits employers to include any changes on paystubs provided that they otherwise comply with the Labor Law’s requirements.

The notice must be provided in English and, in certain cases, in the language identified by the employee as his/her primary language. The latter is required only where the DOL has determined that the language is predominantly spoken in New York State and has provided a

template notice in that language. As of April 6, 2011, the DOL has published notices in English, Spanish, Chinese and Korean; it has stated that future templates will be in Russian, Haitian Creole and Polish. The DOL recently posted **form notices and a FAQ** on its website, available at <http://www.labor.state.ny.us/workerprotection/laborstandards/workerprot/lshmpg.shtm>.

Employers must obtain signed acknowledgments of all notices and retain them for six years. The DOL has indicated that electronic signatures, including emails, will suffice as acknowledgments, provided that employees are able to print a copy of the notice at work. Failure to provide notices may result in assessments of \$50 per week per worker. In addition, workers can sue for damages and recover up to \$2,500.

### Other important changes implemented by the Act include the following:

1. Section 198.1-a of the Labor Law now permits liquidated damages of 100% of wages due (up from 25%) for willful violations.
2. Section 215 of the Labor Law now permits the DOL to order additional remedies in the event of retaliation, including injunctions, liquidated damages up to \$10,000, reinstatement with back pay, and/or front pay instead of reinstatement. Unlawful retaliation is also deemed a class B misdemeanor.
3. Section 218 of the Labor Law now subjects employers engaged in continuous or egregious violations to financial penalties up to double the total amount of wages due. Further, if an employer fails to make payments owed more than 90 days after an order by the DOL, it may be assessed an additional 15% penalty.
4. Section 663 of the Labor Law now requires an award of attorneys’ fees, interest, and liquidated damages rather than leaving such an award to the court’s discretion.

*Seyfarth Shaw LLP, 4/2011*

## Labor Board Further Expands Employee Rights in Trio of Cases

Promoting union organizing, continued representation and greater bargaining strength, the National Labor Relations Board has decided a trio of cases that further expands employee rights despite behavior that may be deemed objectionable by employers and past Boards. The Agency turned a blind eye to behavior that can interfere with employee free choice while favoring unions in *Terry Machine Co.*, faulted employers for policy statements having no demonstrable effect on the exercise of employees' statutory rights in *Jurys Boston Hotel*, and berated management for trying to restrict expressive activity meant to embarrass the employer with its customers in the interest of mobilizing public opinion for a union in *Southern New England Telephone Co.*

### **Pro-union Supervisor Solicitation Does Not Nullify Election Results**

Seven different supervisors' soliciting signatures on a union representation petition did not call for setting aside the election results, the Board held in *Terry Machine Co.*, 356 N.L.R.B. No. 120 (2011). The supervisors "were actively engaged in the union's organizing drive" and oversaw the work of approximately half the eligible voters in the election. The employer, however, "engaged in an extensive antiunion campaign," according to the

Board.

In deciding the supervisors' actions were not objectionable, the Board found the effect of any pro-union solicitations was "mitigated" by the employer's own conduct and did not materially affect the election results. In particular, the Board majority noted the employer threatened to terminate the pro-union supervisors, and the supervisors communicated that threat to the employees, demonstrating that the employer was not backing the supervisors' actions. Despite the fact that the election took place in 1999, the Board reaffirmed the certification of the union almost 12 years later.

Board Member Brian Hayes dissented. He argued that the supervisors actions were "objectionable and materially affected the outcome of the election." He disagreed with his colleagues that the employer's antiunion campaign could mitigate the effect of the supervisors' conduct in opposing that very campaign. Member Hayes also dissented over the union's certification saying, "I believe the time has long passed when we can regard the results of that election as a reliable indicator of current employees' choice on the issue of collective bargaining representation."

### **Mere Existence of Objectionable Rules in Employee Handbook Sufficient to Set Aside Decertification**

### **Election**

Three employer rules regarding solicitation, loitering and wearing emblems, badges and buttons published in an employee handbook alone constituted objectionable conduct and were cause to set aside decertification election results, the Board held 2-1 in *Jurys Boston Hotel*, 356 NLRB No. 114 (2011).

Approximately nine weeks before a decertification election, the union filed an unfair labor practice charge against the employer alleging that seven rules in its employee handbook were unlawful. The union had not protested any of the rules before the decertification petition was filed. After losing the election by one vote, the union filed objections, challenging the rules.

The hearing officer held that although the rules were objectionable, they "did not require setting aside the election because they were promulgated before the employer recognized the union, were not enforced or cited by the employer during the critical period, and were not shown to have deterred any employee from exercising Section 7 rights."

But the Board majority disagreed. It held that the employer's rules regarding solicitation, loitering and prohibiting wearing emblems, badges and buttons were objectionable and found that

“[e]ach of these rules, in force during the critical election period, reasonably tended to interfere with employee free choice.” The Board also said that the election was decided by a single vote was proof that these rules could have affected the results.

Board Member Hayes again dissented. He argued that the Board majority did not follow controlling precedent and that the employer’s rules, even if unlawful, could not have affected the election. In addition, he noted that the closeness of the election is a factor that should be taken into account, but it cannot be controlling.

**Board Protects Pro-Union T-Shirts that Could Disparage Employer’s Reputation with Customers**

It is a violation of Section 8(a)(1) of the National Labor Relations Act to prohibit employees from wearing tee shirts with a message supporting the union during collective bargaining and to threaten and suspend employees who defied the prohibition, even though the message might disparage the employer, the Board held in *Southern New England Telephone Co.*, 356 NLRB No. 118 (2011).

During the course of collective bargaining, employees wore “Prisoner” shirts during the work day, including during visits to customer homes and businesses. The shirt itself was “mostly a plain white T-shirt with ‘Inmate #’ in relatively small print on the upper-left front. On the back of the shirt,

two sets of vertical stripes appeared with ‘Prisoner of AT&T’ in between.” Although recognizing employees have a protected right to wear union insignia in the workplace, the employer argued that there were “special circumstances” here that warranted prohibiting the employees from wearing the shirts. It argued the shirts would cause fear and alarm its customers.

The Board disagreed, noting that the “Prisoner” shirt was not reasonably expected, under the circumstances, to cause fright or distress among the employer’s customers because the tee shirt itself could not be mistaken for a prison garb — “the totality of the circumstances would make it clear that the technician was one of Respondent’s employees and not a convict.”

Board Member Hayes dissented, arguing the employer “proved that ‘special circumstances’ justified its selective prohibition on the wearing of these shirts, while generally permitting displays of union affiliation and support.” He gave substantial weight to the “potential for the ‘prisoner’ shirt to alarm customers and thereby damage the Respondent’s reputation.”

\* \* \*

These decisions illustrate anew the impact of the Board on workplace policies and conduct and serve as cautionary tales. Employers must stay abreast of the Board’s position on various issues and may have to follow a precautionary principle to avoid possible adverse decisions.

*Jackson Lewis LLP, 4.12.2011*

## We're All Individuals with Disabilities Now

The Equal Employment Opportunity Commission just issued final regulations interpreting the Americans With Disabilities Act Amendments Act of 2008. Published at 29 CFR Part 1630, the new regulations take effect on May 14, 2011. Employers and their lawyers should become familiar with the Commission's new interpretation of the Act's definition of "disability."

Title I of the original Americans With Disabilities Act of 1990, the employment-related provisions, took effect in 1992. The law in essence prohibits discrimination against individuals with disabilities, and requires employers to provide reasonable accommodation of those individuals unless doing so would cause an undue hardship.

But Congress did not agree with several Supreme Court decisions limiting the original law's coverage. The purpose of the Americans With Disabilities Amendments Act is to overturn several of those decisions and expand the law's coverage.

To constitute a covered disability, a physical or mental "impairment" must "substantially limit" one or more "major life activities." The Amendments Act and regulations ensure that these terms are broadly construed to allow for maximum coverage. For example, the Commission emphasizes that the term "major" is not intended to impose a demanding standard. Additionally, the Amendments Act and the new regulations specifically reject the Supreme Court's interpretation of "major life activities" as limited to

activities "of central importance to daily life."

The new regulations include a non-exhaustive list of major life activities, some of which are not listed in the statute. These include "interacting with others," which likely will result in litigation over whether someone has a recognized mental impairment or merely a difficult personality. The Amendments Act clarifies that major life activities also include major bodily functions. The regulations list major bodily functions such as special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal functions, even though these are not listed in the Amendments Act.

The Amendments Act's and new regulations' treatment of the term "substantially limits" is the most significant change to the law. The Commission emphasizes that the term "substantially limits" should not be an onerous standard. Thus, "an impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting."

To that end, the determination of whether an impairment substantially limits a major life activity now must be made without regard to whether the individual ameliorates the effect of the impairment with "mitigating measures." For example, a diabetic who controlled blood sugar levels with medication in the past might not be considered "substantially limited." Now, the limitation must be evaluated *without* the medi[c]ation. So, a diabetic by

definition will be substantially limited in the endocrine system's functioning and likely the major life activity of eating as well. The elimination of "mitigating measures" from the analysis make federal law consistent with California's Fair Employment and Housing Act, except that federal law still allows consideration of whether eyeglasses remedy a sight impairment.

The Commission clarified that even an impairment's temporary or episodic limitation on major life activities can be substantially limiting. For example, epilepsy may qualify as a disability, even if seizures occur infrequently, because its effect on life activities and bodily functions is measured when the seizures occur. The regulations also recognize that impairments caused by pregnancy may qualify as a covered disability if substantially limiting, even though pregnancy itself, however, is not considered a disability and is temporary.

The Commission's stated intention is that employers will not routinely challenge whether an individual seeking "reasonable accommodation" has a disability. Thus, the regulations include a list of impairments and corresponding substantial limitations of major life activities, thereby establishing medical conditions that will nearly always qualify as disabilities: "Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the

use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function." Interestingly, the Commission expressly states there are no "per se" disabilities, but it is hard to understand how that statement is consistent with this list.

The new regulations also expand the Act's coverage beyond "substantially limiting" impairments in cases alleging discrimination, as opposed to denial of reasonable accommodation. The Commission points out that individuals claiming discriminatory treatment merely have to prove the employer "regards" them as having a disability. This is a significant issue because individuals claiming they are "regarded as" disabled do not have to prove they are substantially limited in one or more major life activities or bodily functions. Rather, an individual claiming discrimination must establish only that he or she "has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both 'transitory and minor.'" The term "transitory" means that the

impairment lasts fewer than six months. The term "minor" will be litigated. And the employer will have to prove the "transitory and minor" defense applies.

On the other hand, the new law and regulations clarify that only persons with an "actual" disability are entitled to reasonable accommodation. People erroneously "regarded" as having an impairment may not claim the employer denied a reasonable accommodation.

Finally, the regulations also include "interpretive guidance" set out in an appendix to the regulations. The interpretive guidance provides more detailed information than the regulations themselves, and confirms that the new law protects many individuals who were not covered by the original law.

The Commission's key message is that courts and employers should not devote much time to whether someone has a disability under the law. "The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity."

Put another way, employers must focus more on the functional job limitations that a claimed disability causes, and whether reasonable accommodations are effective and feasible. Employers should also train managers to avoid bias against employees with impairments. Our advice for California employers has long been "assume disability" in most cases; the same will hold true under the new law.

*D. Gregory Valenza, The Daily Journal, 2011-04-12*

## Repeat, Health Violations Add Up to \$95,240 in Fines for Georgia Manufacturer

Three violations are health-related, including failing to provide a hearing conservation program, exposing workers to airborne styrene that exceeded the permissible exposure limit, and not providing suitable protective clothing and gloves for employees whose skin was exposed to styrene-containing resin.

Carolina Skiff LLC has been cited for 19 safety and health violations by OSHA. The citations, carrying fines of \$95,240, were issued after OSHA conducted a follow-up inspection to evaluate the abatement of violations found during a 2008 site-specific targeting program inspection. The program focuses on industries with high injury and illness rates.

OSHA has issued the company, which manufactures fiberglass boats, six repeat citations with \$45,740 in fines. Four violations are safety-related, including using compressed air and unapproved electrical equipment in areas where the dust concentrations are high enough to lead to a fire or deflagration hazard; failing to clean up dust accumulations; and a lack of exit signage resulting in emergency escape hazards. Two violations are health-related, including failing

to train welders regarding hexavalent chromium hazards and not implementing engineering controls to reduce high noise levels. A repeat violation exists when an employer previously has been cited for the same or a similar violation of a standard, regulation, rule or order at any other facility in federal enforcement states within the last five years.

The agency has also issued Carolina Skiff 10 serious citations with \$48,510 in fines. Some of the safety-related violations include exposing employees to fall hazards; improperly storing and transferring flammable liquids used during spray painting operations; using compressed air greater than 30 pounds per square inch for cleaning; and an improperly installed electrical service system resulting in an electrical hazard. Three violations are health-related, including failing to provide a hearing conservation program, exposing workers to airborne styrene that exceeded the permissible exposure limit, and not providing suitable protective clothing and gloves for employees whose skin was exposed to styrene-containing resin.

"Carolina Skiff continues to leave its employees at risk of

serious injury or illness by failing to implement the proper safety and health protections," said Robert Vazzi, OSHA's area director in Savannah, Ga.

The company also received three other-than-serious health citations with \$990 in proposed penalties for not posting OSHA's noise standard in the workplace, failing to ensure respirator face pieces had adequate seals, and not conducting additional air samples for hexavalent chromium when stainless steel production increased.

*Occupational Health & Safety,  
Mar 24, 2011*

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# IMA UPDATE

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## Supreme Court Dramatically Expands the Concept of Illegal Retaliation

**E**mployers beware. The U.S. Supreme Court has issued two significant decisions which dramatically expand the concept of illegal "retaliation" under federal job bias and wage hour laws. Both cases make it easier for employees to sue for retaliation.

The first case, *Thompson v. North American Stainless, LP*, was unusual because it involved two co-workers at North American Stainless who were engaged to be married. The company fired male employee Eric Thompson after Thompson's fiancée, Miriam Regalado, filed a sex discrimination charge against the company with the Equal Employment Opportunity Commission (EEOC). Thompson sued North American, claiming that North American fired him in retaliation for his fiancée's EEOC filing.

The anti-retaliation provision in Title VII prohibits discrimination against an employee because the employee has filed a charge and permits a person claiming to be aggrieved by an alleged employment practice to file a civil suit.

The trial court ruled for NAS and dismissed the case on the ground that third-party retaliation claims like this were not permitted by Title VII. The Sixth Circuit Court of Appeal also upheld dismissal of the suit, reasoning that Thompson's termination could not be "retaliatory" as that word is used in Title VII since Thompson himself had not engaged in any activity protected by the statute.

A unanimous Supreme Court disagreed and reinstated Thompson's case. The Supreme Court said that if the facts Thompson alleges are true, his firing by NAS would indeed constitute unlawful retaliation. In allowing his case to proceed, the Court said that Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct that might dissuade a reasonable worker from making or supporting a discrimination charge. According to the Court, a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.

While the Court thought it "obvious" that a reasonable worker

might be dissuaded from engaging in protected activity if she knew her fiancé would be fired, it declined to identify a fixed class of relationships for which third-party reprisals are unlawful. In fact, the only guidance given by the high court on the issue was to say that firing a close family member would certainly count, whereas a milder reprisal on a mere acquaintance will almost never do so. As for everything in between, that will be a matter for future litigation.

In *Kasten v. Saint-Gobain Performance Plastics Corp.*, which was handed down by the high court just last week, the Supreme Court expanded potential employer liability for retaliation under the FLSA. In this second ruling, the high court was asked to decide whether a mere oral complaint about wages to a supervisor was enough to form the basis of a retaliation case.

The employee, Kevin Kasten, claimed that he had been terminated in retaliation for orally complaining to

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*Update from the President*

**We will be emailing the 2011 Wage & Salary Survey Questionnaire to all members. If you would like a paper copy please email me at the address below and we will send you a questionnaire immediately.**

Later this year or early next, the U.S. Department of Labor ("DOL") is expected to announce a new regulatory strategy — called "**Plan, Prevent and Protect**" (which has been dubbed "**P-Cubed**" or P<sup>3</sup>) This plan would require employers, as DOL puts it, to "find and fix" violations of federal wage/hour and other laws "before DOL investigators find them." The impetus for this, according to DOL, is the need to crack down on employers who DOL believes have a "catch me if you can" mentality.

Under this new program, for the first time, federal regulations may require employers not only to draft and issue written compliance programs for a variety of federal laws in advance of any claim or lawsuit, but also to give employees a strong voice, or at least an oversight function, with regard to both the formulation and the enforcement of the employer's compliance plans.

P-Cubed will be a multi-agency initiative, involving a slew of agencies overseen by DOL, including Wage and Hour Division ("WHD"), Occupational Safety and Health Administration ("OSHA"), Mine Safety and Health Administration ("MSHA"), Office of Federal Contract Compliance Programs ("OFCCP"), and Employee Benefits Security Administration ("EBSA"). All will be expected to issue regulations requiring employers to take affirmative steps to ensure compliance with federal wage-and-hour, safety and anti-discrimination laws.

**The U.S. Department of Labor (DOL) on May 9, 2011, launched its first application for smart phones, a timesheet to help employees independently track the hours they work and determine the wages they are owed.**

**How many ways can the government find to waste taxpayers' and employers' money.**

We encourage you to contact us with any questions, needs or suggestions you may have.

Thank you for your membership.

Larry Donnelly

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*Contd from p. 33*

company officials about the time clocks. Among other comments, Kasten had told supervisors that he was "thinking about starting a lawsuit about the placement of the time clocks."

The FLSA provides minimum wage, maximum hour, and overtime pay rules. Like Title VII, the FLSA also forbids employers from discharging an employee because the employee has "filed any complaint". The high court ruled that the term "filed any complaint" is not limited to written formal complaints with the Department of Labor, but is broad enough to include oral complaints to management like those made by Kasten.

Responding to a concern that employers won't be able to know whether an employee is actually making a protected complaint or just letting off steam, the Court offered the following guidance: a complaint "must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection."

Both decisions by the high court expand the concept of illegal retaliation under federal job bias and wage-hour laws. The Court made it abundantly clear that the anti-retaliation provisions apply to a broad range of employer conduct and that the words an employee utters to even a low level management member can be legally significant. In light of this development, employers should double their efforts to educate managers about how retaliation laws apply in the workplace.

Your contact in the firm is available to discuss our wide range of management training programs or to answer any other questions you may have about these important legal developments.

*Richard S. Rosenberg, Ballard Rosenberg Golper & Savitt, LLP, 5/2011*

## **New Jersey Passes Law Prohibiting Exclusion of Unemployed Individuals for Job Vacancies**

**A** new New Jersey law prohibits employers in the state from publishing job advertisements, in print or on the Internet, that exclude unemployed individuals from applying. This makes New Jersey the first state to enact an explicit prohibition against such limiting language. The legislation, effective June 1, 2011, provides a penalty for employers that "knowingly and purposefully" publish advertisements excluding unemployed individuals from consideration for a position.

The law subjects an employer to a \$1,000 fine for the first violation, \$5,000 for the second, and \$10,000 for each subsequent violation. Importantly, and unlike most laws addressing disparate treatment, the law excludes any private cause of action by an aggrieved individual.

The legislation appears to reflect an expressed concern regarding the prevalence of hiring efforts that may exclude the unemployed, particularly at a time when the nation has been facing a difficult economy over the past years. Earlier this year, the Equal Employment Opportunity Commission examined the treatment of unemployed job seekers. Witnesses and experts suggested a growing trend of discrimination against the jobless. The panelists raised concerns over the disparate impact facially neutral advertisements could have on African Americans, Hispanics and older workers – all of whom are federally protected groups whose jobless rates are well above the United States average. Accordingly, the EEOC is concerned that advertisements excluding the unemployed will result in harsher treatment of African Americans and Hispanics, of which 15.7% and 11.9%, respectively, are currently unemployed. This issue bears watching in the months ahead.

*Jackson Lewis, 5/11/2011*

## OFCCP Looks to Overhaul Audit Procedures Through Revisions to Scheduling Letter and Itemized Listing

In an obscure Notice published in the May 12, 2011, *Federal Register*,<sup>1</sup> the Office of Federal Contract Compliance Programs (OFCCP) announced an intention to alter the forms it uses to collect information in connection with compliance reviews. These changes, if implemented, will substantially impact federal contractors in their record retention practices and in their responses to audit scheduling letters.

OFCCP commences its audits by first sending a "Scheduling Letter" to the selected government contractor advising it of the audit and requiring the contractor to provide certain information. The Scheduling Letter is always accompanied by a standard form known as the "Itemized Listing," which sets forth the information and documentation that the contractor is required to produce.

The May 12 Federal Register Notice indicates that OFCCP intends to change the text of the Scheduling Letter and alter the Itemized Listing. In a supporting statement prepared by OFCCP in connection with these proposed changes – but not published in the *Federal Register* – OFCCP states that its revisions to the body of the Scheduling Letter are simply made for clarity.<sup>2</sup> However, the agency acknowledges that its proposed changes to the itemized listing are substantive and, as discussed below, some of the proposed changes would be very significant.

First, OFCCP seeks to revise the Itemized Listing<sup>3</sup> to require contractors, as part of their initial submission of documentation in connection with an audit, to include

employment policies covering the Family and Medical Leave Act, pregnancy leave and accommodations for religious observances and practices. OFCCP states that:

Receipt of these policies would assist OFCCP in better determining the existence of sex or religious discrimination indicators within contractor organizations. Additionally, the policy requirements would enhance OFCCP's broad authority under Executive Order 11246 to prohibit sex and religious discrimination in employment and its share[d] enforcement responsibilities with the EEOC under Title VII.

OFCCP also seeks to change what used to be Item 10 of the old Itemized Listing to require more specific demographic information related to applicants, hires, promotions, and terminations.

For example, with regard to applicants and hires, Item 10 currently requires employers to report the "total number of applicants and the total number of hires, as well as the number of minority and the number of female applicants and hires" by job group OR job title. The current reporting requirements with regard to promotions and terminations similarly require reporting of minorities and females and give contractors the option of reporting by job group OR by job title.

Again using applicants and hires as an example, under OFCCP's proposed revision to Item 10 (which would also be renumbered and become a new Item 11), contractors would instead be required to specifically provide:

the total number of applicants

and the total number of hires, as well as the number of African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaskan Native, White, and the number of female and male applicants and hires. For each job group and job title, applicants for whom race and/or sex is not known, should be included in the data submitted.

The same requirement would also apply with regard to promotions and terminations.

With regard to this new requirement, OFCCP apparently intends to continue using racial and ethnic categories that differ from those used by the U.S. Census Bureau and those used in connection with the EEO-1 form. In addition, based on these proposed revisions, OFCCP does not appear interested in data regarding individuals who report themselves as being of two or more races.

Adding to the burden on employers, the revised Itemized Listing would no longer allow contractors to provide this data by job group OR job title. Instead, contractors under the proposed change would be required to provide the data by job group AND job title.

Significantly, OFCCP also proposes to change current Itemized Listing Number 11 that relates to compensation data. Under OFCCP's proposal, Item 11 would be renumbered, becoming Item 12 and would require employers to produce the following:

Employee-level compensation data for all

employees (including but not limited to full-time, part-time, contract, per diem or day labor, temporary) as of February 1 (i.e., the data as it existed on the most recent February 1 date). Provide gender and race/ethnicity information and hire date for each employee by job title, EEO-1 category and job group in a single file. Provide all requested data electronically in Excel format, if available.

- a. For all employees, compensation includes base salary, wage rate and hours worked. Other compensation or adjustments to salaries such as bonuses, incentives, commissions, merit increases, locality pay or overtime should be identified separately for each employee.
- b. You may provide any additional data on factors used to determine employee compensation, such as education, past experience, duty location, performance ratings, department or function, and salary-level/band/range/grade.
- c. Documentation and policies related to compensation practices of the contractor should also be included in the submission, particularly those that explain the factors and reasoning used to determine compensation.

There are a number of ways in which this proposal would substantially change contractors' burdens:

- Requiring data as of February 1 means that audited employers will likely have to run special data reports separate from the snapshots normally used in preparing their affirmative action plans or conducting self-

audits of compensation.

- The proposed request broadens the categories of individuals for whom data must be provided. Government contractors typically do not consider independent contractors to be covered under their affirmative action programs. Similarly, temporary employees are also often not included in affirmative action plan data.
- Old Item 11 permitted employers to report compensation information by "salary range, rate, grade, or level." Proposed Item 12 would mandate reporting by job title AND EEO-1 Category AND job group.

Finally, OFCCP also proposes adding a new Item 13 to the Itemized Listing that would require the employer to provide a copy of the contractor's Vets-100 or Vets-100A report for the last three years.

**Compliance Checks**

As part of its May 12 Notice, OFCCP has also sought approval from the Office of Management and Budget of a revised letter to be used to schedule Compliance Checks.

Compliance Checks involve a limited purpose evaluation of a contractor's establishment to determine whether the contractor has maintained records consistent with OFCCP's regulations – a type of limited compliance evaluation that has not been utilized by the Obama Administration OFCCP. Although OFCCP is seeking to revise the form of the letter from what was approved in the past, it still does not appear to have any plans to begin conducting Compliance Checks, at least for the time being. The Supporting Statement prepared by OFCCP in support of this change, states that "OFCCP has not scheduled any Compliance Checks for FY 2011."

**Conclusion**

OFCCP's proposed changes to the Itemized Listing are a clear indication

of the agency's intention to scrutinize contractors' employment data more aggressively.

The proposals, if implemented, will significantly add to contractors' compliance burdens. Moreover, there appear to be aspects of the proposed revisions that involve the imposition of burdens that appear either unnecessary or unjustified given the potential enforcement benefit. As OFCCP will be accepting comments on the proposed changes through July 11, 2011, contractors are encouraged to examine the proposed revisions and either provide comments directly to OFCCP regarding concerns or share such concerns with their employment counsel. Littler will expect to be commenting as well.

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<sup>1</sup> 76 Fed. Reg. 27,670 (May 12, 2011).

<sup>2</sup> The Supporting Statement is available at <http://www.regulations.gov/#!documentDetail;D=OFCCP-2011-0003-0002>.

<sup>3</sup> The proposed new Itemized listing is available at <http://www.regulations.gov/#!documentDetail;D=OFCCP-2011-0003-0003>.

*David Goldstein, Littler Mendelson's Minneapolis office, May 2011*

## New York Clarifies Scope of Covenant Against Business Seller's Solicitation of Former Clients

New York's highest court has ruled that a business seller may solicit and regain former clients for his new employer without incurring liability for improperly soliciting business under certain circumstances. *Bessemer Trust Co., N.A. v. Branin*, No. 63, 2011 NY Slip Op. 3307, 2011 N.Y. LEXIS 602 (Apr. 28, 2011).

The ruling came in response to a question certified from the U.S. Court of Appeals for the Second Circuit. The decision underscores the importance of utilizing post-employment competition and solicitation agreements to protect the value of a business purchase. In addressing the standards of liability that apply when a business purchaser fails to utilize such agreements, however, the State Court of Appeals declined to articulate any bright-line rules, instead, adopting a case-by-case evaluation of certain factors, including those relevant to the particular industry.

**Background** Under a covenant implied by New York courts, the seller of the good will of a business cannot actively solicit former clients, thus depriving the buyer of the value of the bargain. The seller, however, may still compete with the buyer in the same business and even accept his former clients' business if he is not otherwise bound by any express restrictive covenants.

The defendant, Francis Branin, Jr., sold his wealth management and investment advisory firm's assets, including its client accounts and related good will, to the plaintiff, Bessemer Trust Company, N.A. He later joined a competitor, Stein Roe Investment Counsel LLC. There, he devised a focused strategy to recapture his former clients' business, participated in at least two in-person meetings with one major client, and responded to his former clients' inquiries.

After a bench trial, the federal district court found Branin liable for improper solicitation of one major client in violation of the common law

"*Mohawk* doctrine." That doctrine prohibits, in perpetuity, a voluntary seller of a client's good will from improperly soliciting business from that client after the client's business, including its good will, is transferred to the purchaser. However, the seller may accept the business of his former clients if they choose to follow him to a new employer. . . .

**Scope of Active Improper Solicitation** The Court of Appeals declined to provide any bright-line rules on when a seller violates the implied covenant not to solicit his former clients. Instead, it declared that the trier of fact must consider the principles underlying the *Mohawk* doctrine and the relevant factors within the industry involved. However, the Court established the following guideposts:

1. **Direct Communications.** The seller may not take affirmative steps to communicate directly with his former clients. If the seller initiates contact with them, he impairs the good will he sold to the buyer.

2. **Advertising and Contacts.** The seller may advertise to the public, if his advertisements are general in nature. However, he may not send targeted mailings or make individualized phone calls to his former clients informing them of his new venture.

3. **Providing Information to Clients.** The seller may answer a former client's factual inquiries about his new venture. For example, he may provide information about his new employer's products or strategies for servicing the client's needs and he may describe the resources, personnel, and fee structure at his new employer. But the seller may not go beyond the scope of the specific information sought or freely tout his new business venture.

4. **Disparagement.** The seller may not disparage the buyer of his business, even if prompted by his former clients.

5. **Comparisons.** The seller may not explain why he believes the products or services of his new venture are superior to those offered by the buyer of his business.

6. **Providing Client Information to New Employers.** The seller may convey information about his former clients to his new employer (*e.g.*, clients' preferences and goals) if this is appropriate in the context of the industry. However, the seller may not supply the buyer's proprietary information to his new employer.

7. **Role in Sales Pitches.** The seller may aid his new employer in preparing for a sales pitch meeting requested by his former clients and be present at the meeting. But his role in the meeting must be limited to providing responses on factual matters.

Whether the seller has embarked on a solo venture or joined a direct competitor, he may compete with the buyer of his business and accept his former clients' business if he avoids contacting former clients directly, merely responds to his former clients' factual inquiries, and plays a largely passive role at any sales-pitch meetings requested by his former clients.

The case will now return to the Second Circuit for application of these principles and factors to the case. The Second Circuit also will revisit whether the district court properly calculated Bessemer's damages under a "return of capital" theory, instead of assessing Bessemer's lost profits.

### Lessons Learned

Where possible, a purchaser of a business should require the seller to sign a post-sale or a post-employment non-compete agreement to guard against the possibility that the seller will work for a short time only to leave and have the business follow him, as happened here. While restrictions implied by law in the context of the sale of a business provide some measure of protection, most purchasers likely would find the limited protection afforded to be insufficient, particularly since the high court has ruled that merely attending a sales-pitch meeting does not violate the implied covenant.

*Jackson Lewis, 5/5/2011*

## SSA Resumes sending No Match Letters to Employers

The Social Security Administration (SSA) has announced that after a four year halt, it will resume sending Social Security “no-match” letters to employers. (SSA has continued to send letters to employees’ home addresses if the name and/or social security number on an employer’s W-2 form does not match the information on SSA’s database.)

This new round of no-match letters, formally referred to as “Decentralized Correspondence” (DECOR), informs employers that the information on an employee’s 2010 W-2 wage and tax statement does not match the name and/or Social Security number on file with the SSA, or lacks a SSN entirely. According to the SSA, the purpose of these letters is to obtain corrected information to help the SSA identify the worker to whom the earnings belong and to post the corrected amounts to the employee’s earnings record. SSA will not be sending out no-match letters to employers for the 2007 through 2009 tax years.

SSA’s new no-match letters addressed to employers list only one Social Security number per letter. (The old no-match letters that SSA issued through 005 contained a potentially lengthy list of social security numbers.) The letter advises employers that SSA may share information that it receives with IRS for tax administration purposes, or with the Department of Justice for investigating possible violations of the Social Security Act. The new no-match letters (like the old ones) caution that there can be many reasons for a no-match, such as typographical errors, name changes, and incomplete information. The letter expressly cautions employers that the fact that the employer received a no-match letter “is not a

basis, in and of itself, for you to take any adverse action against the employee, such as laying off, suspending, firing, or discriminating against the individual.”

SSA stopped sending no-match letters to employers in 2007 (for 2006 tax year) because of litigation over the proposed safe harbor regulations, which ICE (Immigration and Customs Enforcement) eventually rescinded in 2009. That proposed guidance would have created safe harbor for employers from a charge that they had constructive knowledge that an employee was not authorized to work in the U.S. if the employer responded to a no-match letter following the prescribed steps and within the prescribed timelines. Actual or constructive knowledge that an employee is not authorized to work can result in civil, and in extreme cases, criminal liability for the employer under the Immigration Reform and Control Act of 1986.

What is an employer to do? Receipt of a no-match letter still puts an employer on notice of possible discrepancies that it must look into. SSA advises employers to begin by checking their records to see if the information on the no-match letter is the same as the company’s records, and to ask the employee to check his/her records to ensure that the employee reported his/her name and social security number to the employer accurately. If that does not resolve the problem, SSA expects the employer to instruct the employee to contact the local SSA office, and to give the employee an unspecified but “reasonable” length of time to correct the problem. What is “reasonable” for this purpose has not yet been defined in any federal law, regulation, or court decision.

The Office of Special Counsel for Immigration-Related Unfair

Employment Practices (OSC) has provided [general guidance](#) for employers to follow in setting up a response plan for no-match letters. The OSC’s recommended steps are:

1. Recognize that name/SSN no-matches can result because of simple administrative errors.
2. Check the reported no-match information against the employer’s personnel records.
3. Inform the employee of the no-match notice.
4. Ask the employee to confirm his/her name/SSN reflected in the employer’s personnel records.
5. Advise the employee to contact SSA to correct and/or update his or her SSA records.
6. Give the employee a reasonable period of time to address a reported no-match with the local SSA office.
7. Follow the same procedures for all employees regardless of citizenship status or national origin.
8. Periodically meet with or otherwise contact the employee to learn and document the status of the employee’s efforts to address and resolve the no-match.
9. Review any document the employee chooses to offer showing resolution of the no-match.
10. Submit any employer or employee corrections to the SSA.

OSC suggests that 120 days may be a “reasonable” length of time to allow for resolution of a Social Security no-match situation, drawing an analogy to the federal government’s E-Verify program,

*Contd on p. 40*

*Contd from p. 39*

which also allows for up to 120 days to resolve social security number discrepancies. Because no federal statutes or regulations define a “reasonable period of time” in connection with the resolution of a no-match notice, as a practical matter, a “reasonable period of time” will depend on the totality of the circumstances.

OSC also offers employers a list of don’ts in response to no-match letters, including:

1. Don’t assume the no-match letter conveys information regarding the employee’s immigration status or actual work authority.
2. Don’t use the receipt of a no-match notice alone as a basis to terminate, suspend or take other adverse action against the employee.
3. Don’t attempt to immediately reverify the employee’s employment eligibility by requesting the completion of a new Form I-9 based solely on the no-match letter.
4. Don’t follow different procedures for different classes of employees based on their national origin or citizenship status (or any other protected class).
5. Don’t require the employee to produce specific I-9 documents to address the no-match letter.
6. Don’t require the employee to provide a written report of SSA verification (because OSC recognizes such a report from SSA may not always be obtainable).

*Employment Law Update, Littler Mendelson PC., 4/14/2011*

## USCIS Launches I-9 Central on USCIS.gov

*New Online Resource Provides Enhanced, Easy-to-Access Guidance for Employers and Employees*

U.S. Citizenship and Immigration Services (USCIS) today launched I-9 Central (<http://www.uscis.gov/I-9central>), a new online resource center dedicated to the most frequently accessed form on USCIS.gov: Form I-9, Employee Eligibility Verification. This free, easy-to-use website builds on recent employment-related enhancements by providing employers and employees simple one-click access to resources, tips and guidance to properly complete Form I-9 and better understand the Form I-9 process.

“I-9 Central is the latest in our ongoing efforts to better serve the 7.5 million employers who use Form I-9 every time they hire an employee,” said USCIS Director Alejandro Mayorkas. “It provides critical information for all employers – whether they hire a single employee or hundreds – in an accessible, intuitive and comprehensive online format.”

The launch of I-9 Central follows the introduction of other important USCIS employment-related resources. These resources include E-Verify Self Check, [Not yet available for New York or New Jersey] a service launched in March that allows workers and job seekers in the United States to check their own employment eligibility status online, and an updated “Handbook for Employers: Instructions for Completing Form I-9 (M-274)” (<http://www.uscis.gov/files/form/m-274.pdf>) published earlier this year.

I-9 Central includes sections about employer and employee rights and responsibilities, step-by-step instructions for completing the form, and information on acceptable documents for establishing identity and employment authorization. I-9 Central also includes a discussion of common mistakes to avoid when completing the form, guidance on how to correct errors, and answers to employers’ recent questions about the Form I-9 process.

I-9 Central complements existing Form I-9 resources including the current Form I-9 Web page, the form instructions, and the above-referenced “Handbook for Employers.” USCIS also offers free webinars on completing Form I-9.

By law, U.S. employers must verify the identity and employment authorization for every worker they hire after Nov. 6, 1986, regardless of the employee’s immigration status. To comply with the law, employers must complete Form I-9.

Visit or link to I-9 Central at [www.uscis.gov/I-9central](http://www.uscis.gov/I-9central).

For more information on USCIS and its programs, please visit [www.uscis.gov](http://www.uscis.gov) or follow us on Twitter (@uscis), YouTube (/uscis) and the USCIS blog The Beacon.

USCIS, 05/13/2011

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# IMA UPDATE

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## U.S. Supreme Court Decision in Patent Case has Implications for Employee Invention Assignment Agreements

**O**n June 6, 2011, the U.S. Supreme Court issued its decision in the case of *Stanford Univ. v. Roche Molecular Sys., Inc.*, No. 09-1159. While the primary issue in the case involved patent rights for inventions developed by federal funding, the decision, written by Chief Justice John G. Roberts, sends a message to employers who want to make sure they have rights in the inventions created by their employees.

The case involved a researcher, Dr. Mark Holodniy, who joined Stanford University in 1988 and signed an agreement stating that he agreed to assign to the university his rights, title and interest in any inventions resulting from his employment with the school. Stanford collaborated with a small California research company called Cetus to develop methods for quantifying blood-borne levels of HIV. In connection with his employment at Stanford, Holodniy conducted research with Cetus and, as a condition to gain access to the company, signed an agreement with it stating that he “will assign and do[es] hereby assign” to Cetus his right, title

and interest in the inventions made as a consequence of his access.

Working with Cetus employees, Holodniy devised a procedure for measuring the amount of HIV in a patient’s blood. At Stanford, he and other university employees tested the procedure. Stanford obtained three patents based on the procedure. Thereafter, Roche Molecular Systems acquired Cetus and commercialized Holodniy’s procedure, which is used today in HIV test kits worldwide. Stanford filed suit against Roche, claiming that Roche’s HIV test kits infringed Stanford’s patents.

The U.S. Court of Appeals for the Federal Circuit held that Holodniy’s duty to assign rights to Stanford did not prevent him from actually assigning rights to Cetus, and, therefore, Roche held the patents. Based on the language of his agreement with Stanford, Holodniy agreed to assign all right, title and interest in and to inventions to Stanford. Based on the language in his contract with Cetus, he actually did assign all such right, title and interest. On appeal to the U.S. Supreme Court, Stanford argued that the contractual rights did not matter, because it had a

statutory right to the invention under the federal Bayh-Dole Act, which allocates rights in federally funded inventions. The Supreme Court disagreed and upheld the decision of the Federal Circuit.

While much of the high court’s discussion addresses the application of the Bayh- Dole Act, the opinion itself highlights the importance of employers carefully wording assignment language in employment agreements with their employees. The court emphasized the well-settled precedent that rights in an invention belong to the inventor. Thus, unless there is an agreement to the contrary, an employer does not have rights in an invention created by its employee. However, employees can contract away their rights to inventions.

In this case, the language in Stanford’s contract with Holodniy had him agreeing to assign his patent rights at a later date, rather than assigning any patent rights in inventions – past, present or future – at the time he executed the agreement. Had the contract included the latter

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*Update from the President*

**Your EEO-1 Report is due September 30, 2011 and your VETS-100/100A report which is normally due September 30, 2011 has been delayed due to technical problems.** “The Department will not initiate enforcement actions against contractors who submit the VETS-100/VETS-100A from October 1, 2011 through November 30, 2011.”

The EEO-1 (<http://www.eeoc.gov/employers/eeo1survey/>) report must be filed by employers: 1) with federal government contracts of \$50,000 or more and 50 or more employees and 2) who do not have a federal government contract but have 100 or more employees. The report must use employment numbers from any pay period in July through September of the reporting year.

The 2011 Vets-100 Form will be posted at <http://www.dol.gov/vets/programs/fcp/main.htm/>. Any entity or subcontractor who received a contract(s) from the Federal Government in the amount of \$25,000 or more prior to December 1, 2003, must file a VETS-100 Report on an annual basis. The reporting threshold was increased to \$100,000 to become effective December 1, 2003 for contracts awarded on or after this date. Contractors with contracts in both categories above will be required to file both the existing VETS-100 report for pre-December 2003 contracts and the new VETS-100A Report for contracts after December 2003.

Employers may request an extension of time from the administering agencies to submit the EEO-1 report or VETS-100/100A reports.

We encourage you to contact us with any questions, needs or suggestions you may have.

Thank you for your membership.

Larry Donnelly

**National Position Evaluation Plan**

*A Measure of Value*

**NPEP** is a Point Factor Evaluation System. It evaluates each position according to 11 established criteria that can be applied to any position in any organization. As a result, your salary structure is Objective, Equitable, and Non-discriminatory. It will help you to use your salary dollars more efficiently, organize your Wage & Salary system, improve employee morale and have a system that is defensible against discrimination claims.

**Affirmative Action Plan Preparation**

Are your AAP's up to date and ready in the event of an audit?

Do you know that a well written plan may exclude you from an in-house audit?

Changes have been made to the regulations that give an OFCCP investigator options on how to proceed with a contractor. As a result, fewer companies are having full audits and many more companies are being audited. Being prepared, will reduce the chances of your organization going through a complete audit.

**Contact IMA for information on the above services**

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## New York State's Marriage Equality Act: Top 10 Questions (and Answers) Regarding Impact on Employer-Sponsored Health & Welfare Plans

New York State's Marriage Equality Act, ("Act"), became effective last week on July 24, 2011. The Act had been signed into law one month earlier, on June 24, 2011 by New York governor Andrew Cuomo. The Act amends New York's Domestic Relations Law to provide that same-sex couples may obtain a marriage license in New York, and to require that a same-sex marriage be treated the same as an opposite-sex marriage "in all respects under [New York] law."<sup>1</sup> New York is the sixth state to adopt such a law, in addition to the District of Columbia.

The Act's impact on employer sponsored health and welfare benefit plans has generated many questions from clients. This article sets forth the top 10 questions we have received on this topic from employers with employees who live in New York State and provides our views on the answers, based on information available to date.

**1. Is an employer who sponsors a group health plan that is self funded and subject to ERISA now required to offer group health coverage to an employee's same-sex spouse in New York State?**

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<sup>1</sup>The Act specifically provides, "[n]o government treatment or legal status, effect, right, benefit, privilege, protection or responsibility related to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law." Act § 3 (adding new § 10 ja(2) to New York's Domestic Relations Law).

No. ERISA does not contain a definition of "spouse," and the employer therefore has flexibility concerning how to define "spouse" in the written plan document. ERISA preempts all state laws "insofar as they . . . relate to any employee benefit plan." ERISA § 514(a). Thus, self-funded group health plans that are subject to ERISA are not required to comply with state law to the extent that preemption applies. Although an exception to this rule, referred to as the "savings clause," applies to any law of any state which regulates insurance, banking or securities, ERISA prohibits a state from "deeming" a self-funded health plan to be an insurance company, bank, trust company or investment company for purposes of state law. ERISA § 514(b)(2)(A); (B).

Therefore, with respect to a self-funded group health plan that is subject to ERISA, the employer continues to have the ability to define "spouse" in the written plan document. The employer should not be required to define "spouse" to include an individual of the same-sex because the Act should be preempted under ERISA's general preemption provision. ERISA § 514(a). However, self-funded group health plans are also not precluded from voluntarily extending benefits under their plans to an employee's same-sex spouse.

**2. Is it necessary for an employer to make any changes with respect to the definition of "spouse" in its written self-funded ERISA group health plan because of the Act?**

Possibly. If an employer has not explicitly defined spouse in its group health plan, or has defined spouse by reference to state law, it should consider amending the definition of spouse to clearly specify how spouse is defined, particularly if the employer

intends to exclude a same-sex individual from the definition of spouse. If a plan grants the plan administrator discretion to interpret the terms of the plan, a court considering this issue would likely apply a deferential standard of review rather than a de novo standard of review and uphold a plan's determination of who constitutes a spouse. See *Firestone Tire & Rubber Co. v. Bruch*, 489, U.S. 101 (1989). However, if the employer does not explicitly clarify the term "spouse" in the plan, a court could consider the definition of spouse under the Act to be controlling and conclude that spouse includes a same sex spouse. If this is not intended, the better approach would be for the employer to resolve the ambiguity in advance of a claim for eligibility or benefits by supplying a clear definition of the term spouse through a formal amendment to the plan document. This is also an issue that employers should consider with respect to retirement plans.

**3. Is an employer who sponsors a group health plan that is insured by a policy issued in New York State and subject to ERISA now required to offer group health coverage to an employee's same-sex spouse in New York State?**

Yes. As noted in Q&A #1 above, the Act should not be preempted as to insured arrangements because of ERISA's "savings clause." Therefore, a fully insured group health plan insured by a policy issued in New York should be required to comply with the Act and treat any individual who is married under New York State law as a spouse for all purposes under the policy. In addition, the insurer should also be required to offer state-mandated continuation coverage to a same-sex spouse just as it would for an opposite-sex spouse. Employers who

sponsor a fully insured group health plan should review their underlying insurance policies to determine whether their policy states that it will comply with New York law.

**4. If an employee requests to add his/her same sex spouse to group health plan coverage following marriage in New York, can the employer allow the employee to change his/her cafeteria plan election to add the spouse?**

Probably. The Code § 125 cafeteria plan mid-year change in election regulations generally restrict the circumstances under which an employer is permitted to allow an individual to make a change in his or her salary reduction election under a cafeteria plan. Treas. Reg. § 1.125-4. However, changes are permitted in certain specified circumstances identified in the regulations. These circumstances include a "change in status" event, as well as a "change in cost or coverage" under the plan. Treas. Reg. § 1.125-4(c); (f). The change in status events do consider a "marriage" to be a change in status event, but the issue is complicated by the fact that federal tax law needs to be interpreted in a manner that is consistent with the federal "Defense of Marriage Act," which provides that the term "marriage" shall be construed for purposes of federal law as constituting a legal union between a man and woman.<sup>2</sup> Therefore, the marriage of a same sex couple may not be considered a change in status event under the federal cafeteria plan

regulations. Nevertheless, if coverage under a group health plan first becomes available to a same sex spouse after the start of the plan year, the employer may be able to take the position that the change is allowable because it is an addition of a new coverage option for the same-sex spouse (assuming the written cafeteria plan incorporates this rule as a permissible mid-year change in election event). Treas. Reg. § 1.125-4(f)(3)(iii). Alternatively, an employer may be able to take the position that because the coverage is paid for on an after-tax basis for federal tax purposes, the mid-year change in election regulations, which generally restrict changes to an employee's *pre-tax* salary reduction election, do not apply.

**5. For federal tax purposes, is an employer required to add to an employee's wages the value of employer provided health coverage for the same-sex spouse?**

Yes. Because of the federal Defense of Marriage Act, the fair market value of the coverage provided to an employee's same sex spouse must be imputed into the employee's income as wages for federal tax purposes. Fair market value is determined based on facts and circumstances, but the IRS has informally stated in the past that the single rate charged to an individual under the plan for COBRA continuation coverage could be used.

**6. For New York State tax purposes, is an employer required to add to an employee's wages the value of employer-provided health coverage for the same-sex spouse?**

No. On July 21, 2011, the New York State Department of Taxation and Finance posted guidance for employers on its website indicating that employers should not withhold New York tax on certain benefits provided to a same-sex married employee. Specifically, the guidance states that employers do not need to withhold tax for New York State, New

York City, or Yonkers income tax purposes on the value of certain benefits (e.g. domestic partner health benefit), even though that benefit is subject to federal withholding. The guidance states that this applies if the employee's federal taxable wages subject to withholding include the value of the benefits, and the value of these benefits wouldn't be included in taxable wages if provided to a different-sex married spouse.

The guidance is available at: [http://www.tax.ny.gov/pit/withholding\\_mea.htm](http://www.tax.ny.gov/pit/withholding_mea.htm). This guidance is very helpful since the definition of "adjusted gross income" under the New York Tax Law is defined as "federal adjusted gross income as defined in the laws of the United States for the taxable year, with modifications specified in this section." McKinney's Tax Law § 612(a). Absent guidance to the contrary (such as described above), it would be difficult to reconcile the straightforward definition of adjusted gross income in the New York State Tax Law with the requirements of the Act.

**7. Does the Act affect an individual's state tax filing status and estate tax in New York State?**

Yes. On July 29, 2011, the New York State Department of Taxation and Finance, Taxpayer Guidance Division, issued a Technical Memorandum explaining that, as of July 24, 2011, same-sex married couples must file New York personal income tax returns as married, even though their marital status is not recognized for federal tax purposes. This first applies to 2011 tax returns, and is based on a couple's marital status on December 31, 2011. This guidance is very helpful since Section 607(b) of the New York State Tax Law specifically provides that an individual's marital status for state tax law is the same as the individual's marital status for federal rate-setting purposes, and under the federal

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<sup>2</sup>The Defense of Marriage Act specifically provides, "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. sec. 7.

Defense of Marriage Act, the IRS does not recognize same-sex marriage for federal income tax purposes, including for purposes of filing a joint return. In addition, the Technical Memorandum provides that, with respect to an individual who dies on or after July 24, 2011, the New York taxable estate of an individual in a marriage with a same-sex spouse must be computed in the same manner as if the deceased individual were married for federal estate tax purposes. While the difference in federal- state filing status adds complexity, it likely will result in lower New York taxes for same-sex couples.

**8. Does an employer need to make any changes with respect to non- ERISA benefits for New York State employees who have same-sex spouses?**

Possibly. Now that a spouse for purposes of New York law includes a same-sex spouse, employers should review all non- ERISA benefits that may be extended to a spouse including leave policies (e.g., leave to care for a spouse, or bereavement leave), relocation policies, and employee discount programs to determine whether changes need to be made to comply with New York state and local laws that prohibit discrimination on the basis of marital status and sexual orientation. A benefit may be "non-ERISA" because it is not identified in ERISA §§ 3(1) or 3(2), because it is within a safe harbor described in Department of Labor regulations or guidance, or because the plan is not subject to ERISA (e.g., government plan, or church plan).

**9. What are the other six jurisdictions that recognize same-sex marriage and how is an individual who is married in one of those jurisdictions treated under New York state law?**

New York is the sixth state to adopt a same-sex marriage law. The other states which have adopted

similar laws are: Connecticut, Iowa, Massachusetts, New Hampshire, Vermont. The District of Columbia has also adopted a similar law. The Act is similar to the laws of New Hampshire, Vermont and the District of Columbia, which have also amended their domestic relations statutes to provide for same-sex marriages. Similarly, Connecticut has codified same-sex marriages in its general construction of statutes by allowing the terms such as "husband," "wife," "groom," "bride," etc. to include individuals of the same-sex. Although Iowa and Massachusetts also recognize same-sex marriages, it has yet to be codified in their statutes. Rather, each state's respective State Supreme Court has ruled that laws limiting marriage to opposite-sex couples are unconstitutional. New York State law previously required same-sex spouses validly married in other jurisdictions that recognize same-sex marriage to be treated the same as opposite-sex spouses. This requirement was put into place through a directive issued by former Governor Paterson in 2008. The Act does not alter this requirement, nor does the Act impose any additional requirements.

**10. What steps should employers take with respect to health and welfare plans now that the Act is effective?**

Employers with employees in New York State should review their health and welfare plan documents, SPDs, participant communications materials, and open enrollment forms to determine the rights of same-sex spouses under the Act and consider whether they would like to make any changes. If an employer sponsoring a self-funded plan does not wish to cover same-sex spouses, the definition of "spouse" in the plan documents should make this exclusion clear. In addition, employers should speak with their insurance providers and third-party administrators regarding the Act's requirements, and work with their payroll department to address any

New York State taxation issues. Finally, employers should make sure to communicate the rights of same-sex spouses under the Act, including any changes, to participants.

*Groom Law Group 8/2/2011*

*Contd from p. 41  
Supreme Court*

language, the outcome may have been different.

Employers should consider drafting invention assignment language in their employment agreements to include an automatic assignment that occurs constructively at the moment of invention rather than a promise by the employee to assign his rights at a later date. In the event the employee claims rights in patents created as part of his or her employment, the former clause gives the employer the right to claim ownership of the patent, while the latter may only give the employer a breach of contract claim.

*Employment Law Update,  
Nexsen/Pruet, August 2011*

## NLRB Signals Retreat on Cases Involving Employee Comments in Social Media

In three recent cases, the National Labor Relations Board (NLRB) has indicated that employee comments about their employment on social media web sites like Facebook may not be protected under federal labor law. These cases signal a retreat from the NLRB's trend in late 2010 and early 2011 to issue complaints involving employer discipline of employees who posted complaints about their employment online.

Section 7 of the National Labor Relations Act (NLRA) protects employees who engage in "concerted activity" for their "mutual aid and protection." The NLRB had long held that an employer could restrict public statements by its employees, provided that the purpose of the employer's policy was to maintain a "civil and decent work place" and did not explicitly restrict employees' rights to engage in protected, concerted activity, such as supporting an organizing campaign.

However, with the widespread popularity of social media web sites like Facebook, the NLRB issued several complaints against employers that enforced social media policies and disciplined employees—both union and non-union—who posted online comments about their employment. In February 2011, the NLRB settled a complaint that had challenged an employer's policy prohibiting employees from depicting the employer "in any way" on social media sites and prohibited disparaging comments about co-workers or superiors. In May 2011, the NLRB issued a complaint involving the discharge of an

employee who made a hostile Facebook posting about a sales event that he believed could impact the earnings of car sales employees. Similarly, in late June 2011, the NLRB alleged that a nonprofit organization had illegally fired five employees for posting on an employee's Facebook page negative comments about working conditions and staffing. These cases strongly suggested that the NLRB would treat as protected activity virtually any social media posts by employees.

However, in three recent cases, the NLRB's Division of Advice declined to issue complaints involving employer discipline of employees for their social networking activity, even where their online comments were job-related. In each instance, the NLRB explained that the employee comments did not constitute protected concerted activity, but instead were more appropriately considered personal gripes outside the protection of the NLRA:

- In *JT's Porch Saloon & Eatery, Ltd.*, an employee's online conversation with a relative, stating that he had gone five years without a raise and commenting negatively about his employer's customers, was not protected concerted activity. The NLRB held that the online complaints were never discussed with other employees nor did other employees respond to the posting.
- In *Martin House*, an employee commented during an online conversation on Facebook with non-employees about her work for a mental health service provider, stating that it was "spooky" working at night in a "mental institution." The NLRB found no

basis to issue a complaint, finding that the online postings did not mention any terms or conditions of employment, were not discussed with other employees, and received no comments or responses from other employees.

- In *Wal-Mart*, a customer service representative posted disparaging comments about his manager and Wal-Mart on his Facebook page. Although two co-workers responded to his posting, the NLRB concluded that the comments merely expressed the employees' "individual gripes" and did not constitute an effort to induce Wal-Mart employees to engage in group action.

These cases suggest that the NLRB is retreating from its recent overly expansive definition of "protected concerted activity" in the social media context, and that employee social networking activity is not without reasonable limits. These cases serve to reassure employers that while the NLRB has taken an aggressive approach toward overly broad or restrictive social media policies, simple online personal attacks posted outside the workplace are not guaranteed protection under federal labor law.

*Jennifer A. Dunn and Doug A. Hass,  
Franczek Radelet P.C., August 3, 2011*

## FEDERAL CONTRACTORS: OFCCP wants to know "What's in Your Wallet"?

Federal contractors, subject to Executive Order 11246, have been required by the Office of Federal Contract Compliance Programs (OFCCP) since 2000 to proactively conduct in-depth analyses of their compensation systems to ensure that those systems were not discriminatory. And since that same year the OFCCP has struggled to gain greater access to contractors' employee compensation data to enforce that aspect of contractors' obligations under the Executive Order regulations.

Contractors that have long been subject to EO 11246 or that have been involved in an OFCCP compliance review know that a well-prepared, correct and thoughtful "Item 11" response is critical because it can mean the difference between ending a compliance review (provided all else is in order) or the OFCCP seeking individualized compensation data on all of the contractor's employees in a particular establishment. But it has become next to impossible for contractors to survive the Item 11 review without further information requests by the OFCCP. For the past year or so, OFCCP has been using a 2 percent or \$2,000 "tipping point" method (2 percent or \$2,000 difference in pay between protected and non-protected class whether data provided by job title, job group, etc.) to determine whether it will seek individualized compensation data from contractors as part of the desk audit phase of a compliance review. Few, if any, contractors pass this analysis, and as a result, OFCCP has been using this process to obtain contractor compensation data to send to its statisticians in Washington, D.C.

Fast forward to August 10, 2011 – the OFCCP has now issued an Advance Notice of Proposed Rulemaking (ANPRM) inviting the public to provide input on the development and implementation of a compensation data collection tool. See <http://www.gpo.gov/fdsys/pkg/FR-2011-08-10/pdf/2011-20299.pdf>; 76 Fed. Reg. 49398 (advance notice proposed Aug. 10, 2011). OFCCP notes that the tool may be "used to identify contractors for compensation focused reviews as well as full compliance reviews." Thus, it appears that the proposed compensation data collection tool would be a separate reporting requirement apart from the Itemized Listing (noted above) that is included with the notification letter announcing a compliance review.

Consequently, contractors should be deeply concerned both about the implementation of such a data tool as well as the "scope, content and format" of the tool. As such, OFCCP has suggested fifteen specific areas for comment regarding the proposed tool. The questions OFCCP would like to have contractors address range from how various elements of compensation should be reported to how employees should be grouped for the compensation data reporting. In addition, OFCCP asks for comments on the format contractors should be expected to produce the compensation information. Further, OFCCP seeks comments on what type of compensation data would be useful for identifying specific industries for industry focused reviews and even multi-establishment national compensation reviews of a contractor's business. For a complete list of all fifteen questions, please go to the ANPRM (above).

### ***What Can You Do Now?***

OFCCP is seeking comments from contractors on this ANPRM for 60 days from August 10, 2011, meaning all comments must be received on or before October 11, 2011. All comments must be identified by RIN number 1250-AA03 and submitted by any of the following methods:

Federal eRulemaking Portal: [www.regulations.gov](http://www.regulations.gov) (follow instructions).

Mail: Debra A. Carr, Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

As always, Baker Donelson's Labor and Employment attorneys stand ready to assist contractors in understanding this Advance Notice of Proposed Rulemaking as well as any issues that may arise in the federal contracting arena.

*Baker Donelson's, August 11, 2011*

## Do's and Don'ts of Hardship Distributions

Given the current economic climate, a greater number of participants may be requesting hardship distributions from their retirement plans. To avoid jeopardizing the qualified status of the plan, employers and plan administrators must follow both the plan document and legal requirements before making hardship distributions.

Some retirement plans, such as 401(k) and 403(b) plans, may allow participants to withdraw from their retirement accounts because of a financial hardship, but these withdrawals must follow IRS guidelines. A plan may only make a hardship distribution:

1. If permitted by the plan;
2. Because of an immediate and heavy financial need of the employee and, in certain cases, of the employee's spouse, dependent or beneficiary; and
3. In an amount necessary to meet the financial need.

### Before making hardship distributions:

1. Review the terms of the plan, including:
  - a. whether the plan allows hardship distributions;
  - b. the procedures the employee must follow to request a hardship distribution;
  - c. the plan's definition of a hardship; and
  - d. any limits on the amount and type of funds that can be distributed for a hardship from an employee's accounts.
2. Obtain a statement or verification of the employee's hardship as required by the plan's terms.
3. Determine that the exact nature of the employee's hardship qualifies for a distribution under the plan's definition of a hardship.
4. Document, as may be required by the plan, that the employee has exhausted any loans or distributions, other than hardship distributions, that are available from the plan or any other plan of the employer in which the employee participates.
5. If the plan's terms state that a hardship distribution is not considered necessary if the employee has other resources available, such as spousal and minor children's assets, document the employee's lack of other resources.
6. Check that the amount of the hardship distribution does not exceed the amount necessary to satisfy the employee's financial need. However, amounts necessary to pay any taxes or penalties because of the hardship distribution may be included.
7. Ensure that the amount of the hardship distribution does not exceed any limits under the plan and consists only of eligible amounts. For example, a plan could limit hardship distributions to a specific dollar amount and require that they be made only from salary reduction contributions.
8. If the plan's terms require that the employee is suspended from contributing to the plan and all other employer plans for at least 6 months after receiving a hardship distribution, inform the employee and enforce this provision.
9. If a plan does not properly make hardship distributions, it may be able to correct this mistake through the [Employee Plans Compliance Resolution System](#) (EPCRS).

IRS.gov August 8, 2011

## Salary Budgets Lag Behind U.S. Rate of Inflation

For the first time since 1980, the U.S. rate of inflation is higher than the average total salary budget increase. During the 12-month period ending April 2011, inflation, as measured by the U.S. Consumer Price Index (CPI), was 3.2 percent. That compared to a total salary budget increase of 2.8 percent for the same period, according to the WorldatWork 2011-2010 Salary Budget Survey.

Why haven't pay increases kept up with the rate of inflation? A number of factors—particularly high unemployment—are combining to keep salary increase budgets low, suggests the study, which includes data from more than 2,400 participants, representing nearly 15 million U.S. employees. The data, collected in April 2011, represents a wide variety of U.S. companies and industries, distributed across all 50 states.

"Salary budget planning does not happen in a bubble," explained Don Lindner, senior compensation practice leader for WorldatWork, an association of total rewards professionals. "Labor costs, productivity, unemployment and other economic factors are important considerations for compensation professionals when making budget recommendations." . . .

"Time will tell if salary budget increases will return to pre-recessionary levels, but hikes may only occur if the weight shifts between the supply and demand for labor," added Alison Avalos, research manager for WorldatWork. "Mining, quarrying [and] oil and gas companies are currently experiencing a shortage of skilled labor, so their 2012 planned salary budgets are above average, at 4.1 percent." U.S. employees in other industries, on the other hand, can expect average pay increases of 2.9 percent in 2012, according to WorldatWork's research.'

Stephen Miller, CEBS, SHRM. 8/3/2011