EMPLOYMENT, LABOR, BENEFITS AND IMMIGRATION LAW FOR EMPLOYERS

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New Government Regulations Keep Compliance Busy

In the first quarter of 2015, employers saw the U.S. economy continue to rebound, the unemployment rate drop to 5.5 percent, and Congressional gridlock persist. For many businesses and their counsel, attention is focused on compliance with new and existing government regulations and on agency enforcement activities. Meanwhile, President Barack Obama continues to issue executive orders affecting the employment policies and practices of covered government contractors and subcontractors.

Many of these developments and their impact are discussed and analyzed at www.jacksonlewis.com, in Webinars & Special Reports and at live seminars and conferences conducted by Jackson Lewis attorneys and featured speakers around the country. A brief summary of some of these developments follows.

Updated FMLA Regulations Cover Same-Sex and Common Law Spouses

DOL The U.S. Department of Labor has issued new regulations expanding the definition of "spouse" under the Family and Medical Leave Act of 1993. The DOL's action follows the U.S. Supreme Court's 2013 decision in United States v. Windsor, which held that Section 3 of the Defense of Marriage Act (defining "spouse" as only a person of the opposite sex who is a husband or a wife) was unconstitutional. As a result of that ruling, eligible employees in legal same-sex marriages may take FMLA leave to care for their spouse or covered family member regardless of where they live.

The new regulations, effective March 27, 2015, have two major features. First, establishing a spousal relationship for FMLA purposes now depends on the law of the place in which the marriage was entered into ("place of celebration"), as opposed to the law of the state in which the employee resides ("place of residence"). The new "place of celebration" rule allows all legally married couples, whether opposite-sex, same-sex, or married under common law, to have consistent federal family leave rights

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The new DOL regulations create greater uniformity in administering FMLA leave for same-sex spouses.

regardless of where they live. The "place of celebration" rule is consistent with the interpretation adopted by other federal agencies, such as the Department of the Defense and the Internal Revenue Service.

Second, the new regulations' definition of "spouse" expressly includes individuals in lawfully recognized same-sex and common law marriages and all marriages that were validly entered into outside of the United States if they could have been entered into lawfully in at least one U.S. state. This change in the definition of "spouse" means that eligible employees, regardless of where they live, may take FMLA leave:

1) *to care for their lawfully married same-sex spouse with a serious health condition;*
2) *for qualifying exigencies due to their lawfully married same-sex spouse's covered military service;*
3) *as military caregiver for their lawfully married same-sex spouse;*
4) *to care for a stepchild (child of the employee's same-sex spouse), regardless of whether the employees provide day-to-day care or financial support for the child; and*
5) *to care for a stepparent who is a same-sex spouse of the employee's parent.*

For employers with multi-state operations, the new regulations create greater uniformity in administering FMLA leave for same-sex spouses. In light of the new regulations, employers should consider the following:

- *Reviewing and revising their FMLA policies to ensure the definition of "spouse" reflects the new regulatory definition;*
- *Revising or developing template forms to confirm family relationships consistent with the new regulatory definition; and*
- *Identifying resources that may assist them in finding same-sex marriage laws, including the standards for common law marriage, in other states and countries when such situations arise.*

Civil unions are not covered by the new FMLA regulations.

The Jackson Lewis **Disability, Leave and Health Management** Practice has developed a **Quick Reference Guide** for the new FMLA regulations, available at **www.jacksonlewis.com**.

Injury and Illness Reporting and Recordkeeping Requirements Expanded

OSHA The Occupational Safety and Health Administration released its **final rule** for Occupational Injury and Illness Recording and Reporting Requirements, revising the requirements for reporting work-related hospitalizations and requiring the reporting of all amputations and eye losses. The rule became effective on January 1, 2015, for employers under federal OSHA jurisdiction. Effective dates for employers under jurisdiction of **State-run OSHA plans** may differ.

A change in the way OSHA rates industries for hazard risks, now using the North American Industries Classification System, has resulted in certain industries now being required to keep OSHA injury and illness records for the first time. The new rule maintains the exemption for any employer with 10 or fewer employees from the requirement routinely to keep records of worker injuries and illnesses. *See,* ***Updates to OSHA's Recordkeeping Rule***.

The new rule expands the list of severe injuries that all OSHA-covered industries, regardless of size or partial exemption status, *must* report to OSHA. Under the new rule, a fatality (occurring within 30 days of the work-related incident) must be reported within eight hours of the death. However, employers now will have a 24-hour window in which to report to OSHA all work-related inpatient hospitalizations that require care and treatment of even a single employee, all amputations, and all losses of an eye that occur within 24 hours of the incident. *See,* ***"Reporting Fatalities and Severe Injuries/Illnesses."***

The methods of reporting also have been expanded. In addition to calling OSHA's confidential number (1-800-321-OSHA) or contacting the local OSHA Area Office, employers will be able to go OSHA's (not-yet-available) web portal and make a report electronically. Though not all reported incidents will lead to an inspection, OSHA

noted in its announcement that hospitalization and partial body loss indicate serious hazards are likely to be present at a workplace and that an intervention is likely warranted to protect other workers at the establishment. OSHA recently issued further guidance on reporting and agency responses. *See,* ***Updates to OSHA's Recordkeeping Rule***.

Most significant and troubling is that OSHA will publicize an employer's report of all fatalities, hospitalizations, amputations, or eye losses on the agency's website to incentivize employers to ensure a safe workplace for their employees. Of similar concern is a proposal for mandatory electronic submission of injury and illness reports to be posted online with detailed, site-specific information, excluding employee identifying information. A final rule is projected for August, 2015.

For more information on **OSHA's reporting and recordkeeping requirements**, see OSHA Internal Memo Outlines Triage Process for Reported Fatalities, Injuries , and www.osha.gov.

"Quickie Election" Rule Faces U.S. Senate Challenge

NLRB As expected, the National Labor Relations Board reissued its much-debated "quickie election" rule on December 12, 2014. The new rule on the Board's procedures in representation cases is being challenged in two lawsuits and under the Congressional Review Act of 1996, which allows Congress to pass a "resolution of disapproval" for "major" rules issued by federal agencies. The Senate voted on March 4 in favor of such a resolution (S.J.Res.8). The resolution also must receive a vote of approval in the House of Representatives. However, even if it passes in the House, the resolution is expected to be vetoed by President Obama, and it is unlikely that Congress would be able to muster the two-thirds vote necessary to override. *See,* ***Congress Reviews NLRB Quickie Election Rule***.

Given better chances to succeed are the lawsuits that have been filed by employer business and trade associations. On January 5, 2015, the U.S. Chamber of Commerce and certain employer associations in Washington, D.C., filed a complaint against the NLRB in the U.S. District Court for the District of Columbia seeking a declaratory judgment and injunction against enforcement of the new election rule. The Chamber's suit alleges the rule violates the National Labor Relations Act, the Administrative Procedures Act, or both, as well as employers' free speech and due process constitutional rights, among other things. *U.S. Chamber of Commerce v. NLRB*, No. 1:15-cv-9.

A similar challenge was filed on January 13, 2015, by the Associated Builders and Contractors of Texas, Inc., Associated Builders and Contractors, Inc., Central Texas Chapter, and National Federation of Independent Business/Texas in the U.S. District Court for the Western District of Texas. The suit asserts the new rule violates the NLRA, the APA, or both. *Associated Builders and Contractors of Texas, Inc. v. NLRB*, No. 1:15-cv-00026. *See,* ***Chapter Two: Lawsuits Filed Challenging NLRB's New Election Rules***.

It is unclear whether a federal district court decision against the rule would impel the Board to suspend it nationwide. For now, employers must prepare for the new rule and develop a strategic, company-wide labor relations plan. Employers are urged to review their organization's options to make strategic decisions in light of the new rule and other recent NLRB decisions. Training managers and supervisors before the rule is implemented on April 14 is critical.

The Jackson Lewis **Labor and Preventive Practices** Group is following the progress of the challenges, has reported extensively on the effects the new rule would have for employers facing union representation requests, and has developed a webinar for employers concerned about how to prepare for its implementation.

See, **Here Comes the "Quickie" Election Rule Again** and **Preparing for Labor Board's Quickie Election Rule**, at **www.jacksonlewis.com**. Visit our blog for the latest reports: **Unions and Organizing | Labor & Collective Bargaining**.

The NLRB's rule on representation procedures is being challenged on several fronts prior to its April 14 effective date.

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EO 13673 prohibits certain government contractors from using mandatory arbitration agreements for Title VII and other harassment-related disputes.

Federal Contractors' Feet Held to Fire by Executive Order

OFCCP In one of a series of recent Executive Orders creating significant additional burdens for federal contractors, President Obama issued **Executive Order 13673 "Fair Pay and Safe Workplaces"** in July 2014 (regulations to be issued). EO 13673 is misleadingly named in that it primarily covers topics other than fair pay and safe workplaces. Under the new requirements, federal agencies must take into account violations of 14 federal statutes (and equivalent state laws) when considering contract awards. Contractors and subcontractors must report violations of these laws, including, among others:

- *Fair Labor Standards Act*
- *Occupational Safety and Health Act*
- *National Labor Relations Act*
- *Family and Medical Leave Act*
- *Davis Bacon*
- *Service Contract Act*
- *Title VII of the Civil Rights Act*
- *Americans with Disability Act*
- *Age Discrimination in Employment Act*
- *Executive Order 11246*
- *Vietnam Veterans Readjustment Assistance Act*
- *Section 503 of the Rehabilitation Act*
- *Executive Order 13658 (federal contractor minimum wage)*

In addition, EO 13673 requires contractors to provide employees with information that allows them to "verify the accuracy of their paycheck." It prohibits contractors with contracts in excess of $1 million from using pre-dispute mandatory arbitration agreements for disputes arising out of Title VII and

Top 15 for 2015 on Data Privacy

The Jackson Lewis **Privacy, e-Communication and Data Security** Practice says businesses have an obligation to learn about data privacy and security and take steps to protect the information they maintain. The list of **"Top 15 for 2015 on Data Privacy"** is by no means exhaustive, but it points out hot topics to consider in 2015.

1. Inside Threats for Healthcare Providers and Business Associates. Many organizations, including healthcare providers and business associates, face significant and immediate risks from their workforce members. These organizations can **take steps to reduce their risk for a data breach**, reputational harm, investigation by federal and state agencies, and litigation.

2. The Telephone Consumer Protection Act (TCPA). TCPA suits have increased notably in the past year, many filed as class actions, not just aimed at large companies, but also small businesses. Statutory damages range from $500 to $1,500 per violation (e.g., per fax/text sent or call made) with potential damages in the millions. Understanding the **FAQs for the TCPA** is a great first step to reduce risk.

3. Location-Based Tracking. GPS-enabled devices are becoming more prevalent as workplace tools for tracking employees who are absent from work, traveling for business, making questionable representations as to their location. The case law in this area is evolving rapidly, making it a priority item on the watch list.

4. Technology Budgets. Technology initiatives often are focused on increasing employee productivity or company profits, but appropriately funding a company's IT and data security functions should not be overlooked when implementing technology initiatives (e.g., moving company information to the cloud or making it available to employees remotely). Budgetary constraints will not justify poor technology support or data security.

5. HIPAA Litigation. Although the Health Insurance Portability and Accountability Act does not provide for a private cause of action, cases using the HIPAA rules as an element in common law tort claims are surfacing (e.g., the **Connecticut Supreme Court held that HIPAA did not preempt a negligence claim** where the healthcare provider's disclosure of patient information in response to a subpoena). The potential direction of these types of actions is unclear and is worth monitoring closely.

6. Bring Your Own Device (BYOD). The risks of allowing employees to bring their own electronic devices to the workplace for work use have businesses considering Bring Your Own Device programs. The interrelated

from torts related to sexual assault or harassment. The Executive Order tasks the General Services Administration with developing a website for contractors to streamline the burden of meeting their reporting requirements.

Federal agencies now are required to take into account violations of anti-discrimination law when considering government contract awards.

The requirements of EO 13673 will be implemented in 2016 following issuance of implementing regulations by the Federal Acquisition Regulation Council and guidance by the U.S. Department of Labor.

The Jackson Lewis **Affirmative Action and OFCCP Defence** Practice has published a **a comprehensive analysis, "President Obama Signs Executive Order on Federal Contractor Blacklisting,"** noting that it implements previous "blacklisting" principles and sets the stage for common violations of federal and state labor and employment laws to result in ineligibility to hold federal contracts. With the disclosure requirements looming, contractors should review their violation records and assess their current compliance programs to determine whether more robust programs are needed to help ensure the ability to win and keep federal government contracts.

The FAR Council, DOL, and other key enforcement and contracting agencies will be holding informal "listening sessions" with stakeholders in connection with issuing rules and guidance implementing the Executive Order. Government contractors should consider participating in these sessions to voice their concerns with how the Executive Order will be implemented. The White House also published a **fact sheet** on the new obligations contained in the EO.

For a summary of recently issued Executive Orders for covered government contractors, see **A (Running) List of Presidential Actions Affecting Federal Contractors**.

issues arising from BYOD programs are discussed in **our comprehensive BYOD issues outline**.

7. User-Generated Health Data. The collection of health information in electronic format increasingly includes health data, which an individual voluntarily provides to track or chart his or her own health or fitness. While the popularity of such tracking and charting devices is without doubt, the privacy and security of this information is debatable.

8. Risk Assessment. Many businesses are unaware of how much personal and confidential information they maintain, who has access to it, how it is used and disclosed, and how it is safeguarded. **Getting a handle on a business's critical information assets must be the first step**, and is perhaps the most important step, to reducing risk of inadvertent disclosure and misuse.

9. Written Information Security Program (WISP). Even if **adopting a WISP** to protect personal information is not a legal business requirement in your state (some states, including Connecticut, Maryland, Massachusetts, and Texas, have such a mandate), having one is critical to limiting information risk. Not only will a WISP help a company in defending claims related to a data breach, but it will aid in managing and safeguarding critical company information. It may even help avoid employee whistleblower claims.

10. Dealing with Vendors. Company data may be used or accessed by vendors during the course of the vendor's services. Companies should be aware of the legal requirements on company-owned data accessible by vendors, as well as how to negotiate confidentiality and security provisions in service agreements.

11. Plan for Breach Notification. All state and federal data breach notification requirements currently in effect mandate that notice be provided as soon as possible. Failing to respond appropriately could **result in significant liability, even when the number of individuals affected is relatively small**. Developing a **breach notification and response** plan is not only prudent, but also may be required under federal or state law.

12. Federal Trade Commission (FTC) and Federal Communications Commission (FCC) Enforcement. Last year, the **FCC issued its first fines** against a telecommunications carrier for alleged failure to reasonably secure customers' personal information in violation of the Communications Act. Additional **FTC and FCC action**, as well as legal challenges to any enforcement by either agency, is likely in 2015.

13. Investigating Social Media. Social media use continues to grow and the content available from a user's profile or account can be sought in connection with litigation. In fact, **failure to preserve relevant information in social media may have dire consequences** in a lawsuit. Further, while publicly available content generally may be utilized without issue, improperly accessing content available only privately can have **serious repercussions**.

14. Watch for New Legislation. Managing data and ensuring its privacy, security, and integrity is critical for businesses and individuals, and is increasingly the subject of complex regulation. As yet, the United States has no national law requiring protection of personal information, although **President Barack Obama has stated that data security is one of the top issues** for legislation in 2015. In the interim, companies are left to navigate a growing web of state legislation. They must be vigilant to remain compliant and competitive.

15. Jackson Lewis Webinar Series. Given the numerous developments in the world of data privacy and security, Jackson Lewis will be hosting **a comprehensive webinar series** in 2015 to address these issues and how they may impact the workplace. Also, see the **Workplace Privacy, Data Management, & Security Report** for updates on developments, strategies and tips.

After 50 years, Executive Order 11246 is getting an update to reflect changes in workplace demographics and laws pertaining to sex discrimination, sexual orientation, and gender identity.

Gender Identity, Sex Discrimination Are Focus of New Regulations for Government Contractors

Final regulations implementing **Presidential Executive Order 13672** prohibiting federal contractors and subcontractors from discriminating against lesbian, gay, bisexual, and transgender (LGBT) employees and applicants become effective April 9, 2015. The rule will apply to federal contracts entered into or modified on or after this date.

Executive Order 13672 is the first federal action ensuring workplace equality for LGBT employees in the private sector, according to the U.S. Department of Labor. The rule prohibits covered employers from discriminating on the basis of sexual orientation or gender identity and requires that they take affirmative action to ensure that applicants and employees are treated without regard to their sexual orientation or gender identity. The regulations modify the 50-year-old Executive Order 11246 (which generally provides for affirmative action on the basis of race or sex) by substituting the phrase "sex, sexual orientation, gender identity, or national origin" for "sex or national origin."

In response to requests following publication of the final regulations, OFCCP has published a directory of resources to assist federal contractors "around issues relating to creating an inclusive workplace of lesbian, gay, bisexual, and transgender employees." The directory includes information from both public and private sectors, and OFCCP indicates it will be updated periodically.

For more details on the new regulations, see **"Understanding What OFCCP Has, and Has Not, Done,"** at **Affirmative Action & OFCCP Law Advisor**.

The Labor Department also has proposed a clarification of federal contractors' requirements under **Executive Order 11246** to prohibit sex discrimination. The recommended changes would revise the OFCCP guidelines to align with laws, court decisions, and societal changes since the regulations were originally issued in 1970.

The proposed rule would reflect demographic developments, such as the increased presence of women in the workplace, as well as legal developments, including a Supreme Court ruling recognizing that a sexually hostile work environment is a form of sex discrimination, and the Pregnancy Discrimination Act, which strengthened workplace protections for pregnant women.

More information, including the text of the NPRM, is available at **www.dol.gov/ofccp/SDNPRM/**.

The new rule does not require federal contractors and subcontractors to set placement goals on the bases of sexual orientation or gender identity, nor does it require them to collect or analyze any data with respect to the sexual orientation or gender identity of their applicants or employees. As part of compliance efforts, attorneys in the Jackson Lewis **Affirmative Action and OFCCP Defense** Practice suggest that covered employers consider:

1. *Incorporating the new language into the equal opportunity clauses used for all new and modified subcontracts and purchase orders;*
2. *Revising, as necessary, the equal opportunity language used in job solicitations and posting notices;*
3. *Updating affirmative action plans and policies to include all prohibited bases of discrimination; and*
4. *Modifying equal opportunity training programs.*

The Jackson Lewis **Affirmative Action and OFCCP Defense** Practice actively blogs about developments affecting government contractors. Check out all the **Jackson Lewis blogs** in this and other practice areas.

Jackson Lewis Announces Newest Class of Shareholders for 2015

"All of our newly elevated Shareholders have been outstanding additions to our firm, and their elevation reflects Jackson Lewis' on-going commitment to advancing attorneys who are devoted to the firm's client-centric focus," said Firm Chairman Vincent A. Cino. *"Their commitment to the firm and to their clients has helped us increase the depth and breadth of our service to employers throughout the country, and we celebrate their elevation."*

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Biographies of each of the Shareholders are at **Jackson Lewis P.C. | People**.

Weldon Latham Is Selected as '2015 Most Influential Black Lawyer'

Jackson Lewis Shareholder WELDON LATHAM recently was honored by *Savoy Magazine* as one of the **"2015 Most Influential Black Lawyers"** for his advocacy in corporate diversity counseling and representation. As Chair of the Corporate Diversity Counseling Group at Jackson Lewis, Mr. Latham has continued his long and successful career helping major corporate clients turn diversity into a competitive business advantage. Calling his affiliation with Jackson Lewis "a perfect alignment of goals," Mr. Latham has continued to help clients "avoid problems by better managing diversity and inclusion issues before they become crises."

Congratulations to Weldon for a job "well done!"

More about **WELDON LATHAM** and the **Corporate Diversity Counseling** Practice is at **www.jacksonlewis.com**.

Susan Corcoran Is Honored as Outstanding Pro Bono Volunteer

Jackson Lewis Shareholder SUSAN CORCORAN received special recognition by the **New York State Bar Association** for her extraordinary *pro bono* contributions in 2014 at its Fourteenth Annual Justice for All Luncheon in January. Ms. Corcoran was nominated for the award by the **Pro Bono Partnership** that connects non-profit organizations with legal counsel on a *pro bono* basis.

Ms. Corcoran was one of the Pro Bono Partnership's first attorney volunteers in 1997, and she has remained dedicated and active during her tenure as a Partnership *pro bono* counsel. Her many contributions include working on 44 different legal matters for clients; speaking at Partnership workshops on employment law issues, including two "Boot Camps" which she helped organize; and answering numerous employment-resource calls from the non-profit community.

Please join Jackson Lewis and the Pro Bono Partnership in congratulating Susan on her award and her invaluable service to the non-profit community!