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Labor & Employment Law Special Briefing

2015 review—2016 forecast: Federal agencies on the move

Highlights

- ✔ Unclear how much will change on the EEOC conciliation front
- ✔ Strategies for employers in the aftermath of "quickie election" rule
- ✔ "White-collar" proposal could shake up wage-hour landscape
- ✔ "Persuader rule" may pose attorney-client privilege problem

Inside

By Pamela Wolf, J.D.

There was no shortage of federal agency activity in 2015, with what some saw as continued efforts to expand agencies' reach fueled by the Obama Administration's pro-worker agenda. Those efforts were curbed at times by federal courts. In this second of a three-part series, Wolters Kluwer *Employment Law Daily* shares insights from a team of experts who weighed in on the most important agency developments and union activity in 2015, and what we can expect in 2016.

Mixed results at the EEOC

"2015 was a wild roller coaster ride for the EEOC," according to Sherman & Howard attorney John Doran. "While celebrating its 50th anniversary, the agency won big in the U.S. Supreme Court in the *Abercrombie & Fitch* case and indirectly in the *United Parcel Service* case. But the EEOC took a significant hit in the *Mach Mining* Supreme Court decision, and suffered a series of massive setbacks in terms of adverse attorneys' fees awards and even adverse sanctions awards."

In the High Court

Indeed, in *EEOC v. Abercrombie & Fitch Stores, Inc.*, the High Court favored the EEOC's position on June 1, holding that to prove disparate treatment discrimination, a rejected job applicant who wore a religious headscarf was not required to show that the manager who chose not to hire her "actually knew" she wore the scarf for religious reasons and needed accommodation. It was enough to show that her need for the employer to accommodate her religious practice was a motivating factor in the hiring decision.

On April 29, in *Mach Mining v. EEOC*, "the Supreme Court ruled that courts did have a role in making sure the EEOC conciliates before it litigates," as Jackson Lewis attorney Paul Patten put it. "However, the Supreme Court ruled that the court's scrutiny has to be narrow and that the remedy for the EEOC failing to conciliate is not dismissal, but a re-opening of conciliation."

In *Young v. United Parcel Service, Inc.*, decided on March 25, the Court rejected the EEOC's recently issued pregnancy discrimination guidance that employers must treat women affected by pregnancy, childbirth, or related medical conditions in the same manner as it accommodates other employees who are not so affected but who are similar in their ability or inability to work. The Court declined to hold that Title VII requires pregnant women to be treated at least as favorably as other employees with similar restrictions.

However, as Sherman & Howard attorney William Wright pointed out, the Court nonetheless indicated that "a pregnant employee might still prevail

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on a disparate treatment claim, based on the theory that the employer failed to accommodate her pregnancy, if the facts showed there was no legitimate reason not to accommodate pregnant employees."

Conciliation in the wake of *Mach Mining*

After *Mach Mining*, lower courts have signaled their willingness to extend the ruling's deference to the EEOC's *conciliation* process and opted not to heavily scrutinize the depth of EEOC *investigations*, according to Patten. The real question is how the EEOC will respond in the wake of the ruling. "On the one hand, the EEOC might be more willing to be open and provide information in conciliation, knowing that conciliation disclosures will not be used against the EEOC to dismiss an EEOC lawsuit," the Jackson Lewis attorney explained. "On the other hand, the EEOC might be emboldened by *Mach Mining* and provide even less insight about facts and theories, knowing that the ultimate penalty for not conciliating is merely a stay in the lawsuit."

Agency investigations. Patten suggested that employers might have hope that the EEOC will fully investigate before filing a lawsuit. "There is a large downside risk to the EEOC that a cursory investigation will result in a meritless lawsuit and fees assessed against the EEOC," he said. "But employers should not rely on the EEOC being motivated solely by its interest in filing strong lawsuits. EEOC staffing challenges and a desire to move on to the next big case give the EEOC a countervailing incentive to conduct truncated investigations."

Implications for employers? The bottom line, according to Patten, is that employers should be prepared for the EEOC to provide less insight during its investigations and to be less transparent. "This does not necessarily mean that the investigation process should become more adversarial," Patten clarified. "Rather, employers should become more proactive during the EEOC administrative process—a 'wait and see' approach during an EEOC investigation risks a cause finding of much greater scope than was signaled by the investigation."

Patten suggested that continuing to ask the agency what it is doing and why it is asking for information "can provide employers with a better roadmap of where the EEOC might end up at the end of the investigation."

Systemic litigation

Sherman & Howard's Doran pointed to the EEOC's use of systemic litigation as the first of what he saw as four major developments at the agency in 2015. "The EEOC continued on its ill-conceived path of litigating small one- or two-plaintiff cases as though they were massive, systemic or class cases." According to the Doran, "the EEOC does this to overwhelm defendant employers with expensive discovery and unimaginable litigation costs intended to force employers into big-ticket settlements."

The EEOC has said that "a strong nationwide systemic program is critical to fulfilling its mission of eradicating discrimination in the workplace." Accordingly, the Commission has made the systemic program a top priority of the agency. "The identification, investigation, and litigation of systemic discrimination cases, along with efforts to educate employers and encourage prevention, are integral to the mission of the EEOC," the Commission said.

Maybe not working so well …But the tactic has not worked very well for the agency, according to Doran, who said the end result has been "a substantial rise in the number of attorneys' fees and sanctions awards issued by courts against the EEOC." He observed that more and more judges are persuaded that the EEOC, like many other federal agencies, tends to push the limits of its authority and jurisdiction. "By taking insupportable positions and engaging in scorched earth litigation that is sometimes completely baseless, the EEOC has severely diminished its credibility with many jurists," he said. "The great hope is that, as a result of these awards, the EEOC will moderate its behavior and its litigation tactics going forward."

High-profile attorneys' fee case. Doran noted that the Supreme Court is poised to put a finer point on this issue in the pending *CRST Van Expedited* case. The question the Justices will resolve is: "Whether the dismissal of a Title VII case, based on the EEOC's total failure to satisfy its pre-suit investigation, reasonable cause, and conciliation obligations can form the basis of an attorneys' fee award to the defendant under 42 U.S.C. 2000e-5(k)." CRST Van Expedited is determined to recoup at least some of the costs of the hard-fought sexual harassment litigation brought against it by the EEOC that it has been defending since September 2007. The company is asking the Supreme Court to undo the *Eighth Circuit's reversal* of a $4.69 million award of attorneys' fees and costs entered by a federal court in the Northern District of Iowa.

Tip for employers. Doran offered this suggestion: Any employer engaged in an EEOC dispute at the pre-litigation stage "is wise to vigorously push the EEOC on the specifics of its case and carefully and meticulously

document all communications with the EEOC during the conciliation process," he said. "Likewise, once litigation ensues, an employer should carefully document its attempts to settle the litigation and to stage its settlement attempts in a manner depicting the employer's reasonable position in distinction to the EEOC's unreasonable settlement demands."

Remedies for vulnerable workers

Doran also found 2015 noteworthy for the EEOC's continued pursuit of remedies for vulnerable workers. In the EEOC's eyes, vulnerable workers include immigrant and migrant workers, as well as workers who are victims of illegal trafficking, he noted, all of whom may not know their rights under Title VII or who may be afraid to exercise those rights. "To that end, the EEOC sued or settled with a number of farm and agricultural businesses in 2015, making clear that such businesses loom large on the EEOC's radar," Doran said. "The EEOC also views individuals with cognitive disabilities to be vulnerable and aggressively litigated on behalf of those individuals in 2015."

Employers take heed. "It is important for employers who rely on what the EEOC describes as 'vulnerable workers' to remember at all times that they are directly in the center of the EEOC's crosshairs and must go above and beyond the dictates of Title VII to ward off EEOC litigation."

LGBT rights

A third major development at the EEOC in 2015, according to Doran, was the agency's aggressive advocacy for lesbian, gay, bisexual, and transgender rights. In a case involving a federal employee, the Commission ruled that employment discrimination based on sexual orientation constitutes unlawful discrimination based on gender under Title VII. "While it was no secret that the EEOC enforcement strategy included advocating this position with respect to charges and litigation, the ruling from the Commission signaled a strong commitment to this position," Doran explained. "The EEOC also issued FAQs in 2015 stating unequivocally that the Commission views discrimination based on sexual orientation, gender identity, or transgender status to be actionable under Title VII."

Attorney Chris Bourgeacq, The Chris Bourgeacq Law Firm, PC, a member of the *Employment Law Daily* Editorial Advisory Board, similarly pointed to the EEOC's determination to protect LGBT employees and applicants. He too cited the EEOC's announcement in a July decision that in the future, it would treat sexual orientation as "sex discrimination" and therefore covered by Title VII. "Though the EEOC announced its decision in the context of a claim against the federal government, there is no reason to believe the agency will feel constrained to limit this interpretation to the public sector," Bourgeacq said. "The impetus for this action is likely due to a combination of the current lack of congressional desire to broaden Title VII to include sexual orientation, coupled with the Supreme Court's *Obergefell* decision supporting same-sex marriage and emboldening LGBT stakeholders."

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Trister, Ross, Schadler & Gold attorney David Wachtel, also a member of the *Employment Law Daily* Editorial Advisory Board, echoed the same 2015 development, underscoring the "EEOC's focus on broadening Title VII to cover sex orientation and gender identity is a trend that continues to build momentum." He noted that the agency had recently filed a few briefs on this issue. "The trend could be shut down or stalled by Court of Appeals decisions," Wachtel said, "because sex orientation discrimination has been rejected under Title VII many times." He thought perhaps the EEOC expects the issue could end up in the Supreme Court.

New sexual orientation discrimination suits. Indeed, these predictions proved to be accurate. While this briefing was still in progress, on March 1, the EEOC filed its first two complaints of discrimination based on sexual orientation: one in Western District of Pennsylvania against *Scott Medical Health Center*; another in the District of Maryland, Baltimore Division, against *Pallet Companies, dba IFCO Systems NA.*

Employers beware. Underscoring the agency's announced perspective, Doran offered a best practice for employers. "At the very least, employers must regularly remind their supervisors and workers that LGBT employees must be treated the same as everyone else in the workplace," he said. Policies and handbooks should also be modified to recognize and demand equal respect for LGBT employees. "While the EEOC's position on Title VII coverage of LGBT workers may or may not survive Supreme Court scrutiny in the future, employers are wise to assume it does, particularly given the expansion of LGBT rights at the state and local level throughout much of the United States," Doran advised.

Similarly, Bourgeacq suggested, "Going forward, employers and their attorneys will need to consider that even though Title VII and many state laws do not expressly recognize sexual orientation as a protected class, it is quite likely that courts may slowly start finding ways to fit that class under the reach of sex discrimination if the legislatures refuse to act."

Separation agreements

As a fourth important development in 2015, Doran turned to what he called the EEOC's "continued frontal assault" on otherwise innocuous employer-generated documents such as employee separation agreements. "The EEOC maintains that standard boilerplate provisions in most separation agreements, such as right-to-sue waivers and confidentiality covenants, deter protected charge-filing activity by ex-employees," he explained. "As a result, the EEOC has aggressively challenged employers' use of separation agreements with provisions such as these."

What Doran dubbed the EEOC's "most infamous challenge," the *EEOC v. CVS Pharmacy* case, hit a "substantial speed bump" in December. The Seventh Circuit held that the EEOC lacked the statutory authority to challenge CVS' separation agreements because the agency made no attempt to conciliate with CVS before filing suit. "Noteworthy in the *CVS* decision," Doran pointed out, "is dicta in a footnote where the court states that the EEOC could not win even if it had conciliated because CVS separation agreement specifically states that it is not intended to prevent individuals from engaging in charge-filing activities."

Review separation agreements. According to Doran, the EEOC is not likely to let the decision lie—it could end up in the Supreme Court. In the meantime, though, he recommended that employers carefully review their separation agreements to ensure that they "contain the sorts of caveats the Seventh Circuit called out in the CVS case, making clear that provisions covering the release of legal claims and confidentiality covenants specifically carve out the right to engage in statutorily protected rights, while waiving the right to recover that which are attendant to such rights."

New regulations and guidance

The EEOC issued long-awaited proposed rules on the intersection between employer-sponsored wellness programs and the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act. Many employers had been particularly confused about what types of incentives could be offered in conjunction with wellness programs without running afoul of these two federal antidiscrimination statutes. The EEOC also issued updated guidance on pregnancy discrimination under Title VII in light of the High Court's ruling in *Young v. United Parcel Service, Inc.*

Wellness programs and the ADA. On April 20, the EEOC published its proposed rule on how Title I of the ADA applies to employer wellness programs that are part of group health plans. The EEOC's regulatory agenda indicates it will issue its final rule in early 2016, Jackson Lewis attorneys Francis Alvarez, Joseph Lazzarotti and Kathryn Russo noted.

"However, recent cases addressing the safe harbor and wellness programs may give the EEOC pause in issuing the final regulation as it considers the impact of these cases on the proposed rule," the attorneys said, citing *EEOC v. Flambeau, Inc.* (finding the requirement that employees participate in a wellness program, including a health risk assessment and "biometric screening," was a term of the employer's health benefits plan covered by the "safe harbor" provision for the terms of a bona fide benefits plan under the ADA) and *EEOC v. Orion Energy Systems, Inc.,* E.D. Wis., No. 1:14-cv-1019-WCG (litigating whether the employer violated the ADA's prohibition against involuntary medical inquiries and examinations by imposing impermissible penalties on employees who chose not to participate in its wellness initiative.)

"The EEOC acknowledged that guidance was needed on how wellness programs offered as part of an employer's group health plan can comply with the ADA consistent with provisions governing such programs in the Health Insurance Portability and Accountability Act, as amended by the Affordable Care Act," explained the Jackson Lewis attorneys. Under the proposed rule, when an employee health program seeks information about employee health or medical examinations, the program must be reasonably likely to promote health or prevent disease. In the agency's view, "employees may

not be required to participate in a wellness program, and they may not be denied health coverage or disciplined if they refuse to participate," noted Alvarez, Lazzarotti and Russo. Further, medical information collected as a part of a wellness program may be disclosed to employers only in aggregate form that does not reveal the employee's identity, and that information must be kept confidential in accordance with ADA requirements.

What about incentives? The proposed rule also explains that under the ADA, companies may offer incentives of up to 30 percent of the total cost of employee-only coverage in connection with wellness programs, the Jackson Lewis attorneys pointed out. Individuals with disabilities must be provided reasonable accommodations that permit them to participate in wellness programs and earn whatever incentive an employer offers.

GINA and HRAs. Alvarez, Lazzarotti, and Russo also noted that on October 30, the EEOC issued a proposed rule clarifying that the GINA does not prohibit employers from offering limited incentives to employees when their covered spouses provide information about their current and past health status in a health risk assessment (HRA). "The HRA must be offered as part of a voluntary wellness program that is part of a group health plan," they explained.

"The proposed rule reflects a change from the agency's position that such incentives could violate GINA based on the statute's broad definition of 'genetic information,'" according to Alvarez, Lazzarotti, and Russo. That definition includes information about a family member's (including a spouse's) current or past health status. "The proposed rule would clarify that GINA does not prohibit employers from offering limited inducements for the provision by spouses (covered by the employer's group health plan) of information about their current or past health status as part of a HRA, as long as certain requirements are met," the Jackson Lewis attorneys explained. "However, no incentives may be offered in exchange for a spouse providing his or her own genetic information (as compared to the spouse's current or past health status), including for the results of genetic tests, the current or past health status of the employee's children, or genetic information regarding the employee's child."

Incentive cap. How much of an incentive is permissible under GINA? "The total incentive for participation in a wellness program may not exceed 30 percent of the total annual cost of the health insurance plan in which the employee and any dependents are enrolled, including any other incentives permitted under the ADA," according to Alvarez, Lazzarotti, and Russo. "The proposed rule also would add a requirement for incentives to be apportioned between employees and spouses in connection with programs that provide inducements to employees' spouses to provide information about the spouses' own current or past health status."

Confidentiality and data security. While much of the attention on the proposed ADA and GINA rules concerned how they would affect the incentives that employers have implemented to motivate employees and their spouses to engage in healthier behaviors, both sets of proposed regulations also address the confidentiality and security of the data generated by those programs, observed Lazzarotti and his Jackson Lewis colleagues Amy Worley and Jason Gavejian. "Perhaps more importantly, the proposed rules may influence changes to existing practices for safeguarding employees' medical records (those not covered by HIPAA) beyond merely separating medical files from personnel files and limiting disclosures of such information."

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Specifically, the EEOC's interpretive guidance in the ADA proposed regulations "begins to flesh out data security measures that the agency would expect to be in place to serve as security referencing steps that would be required by law and certain best practices," according to Lazzarotti, Worley, and Gavejian. Those practices include:

- Proper employee training regarding safeguarding sensitive health data.

Quickie elections

The so-called "quickie election" final rule, implemented in April, has continued to draw congressional ire, including efforts to roll back what lawmakers see as unfavorable provisions. Sherman & Howard attorney W. V. Bernie Siebert sketched out the highlights of the new election rules:

- A petition may be filed electronically by the union and simultaneously serve the employer.
- The employer has mandatory posting requirements of a Notice of Petition for Election and other NLRB publications.
- If the employer desires a pre-election hearing, it must file with the Board and the union a "statement of position" setting forth all issues the employer has with the petition (unit, supervisors, etc.), and failure to raise an issue will preclude the employer from later raising the issue.
- The hearing is limited to whether there is a question concerning representation.
- Within two days following the approval of a stipulation for election or a ruling by the regional director following a hearing the employer must electronically file with the Board a list of voters by name, address, cell phone and home number, personal e-mail, work location, shift and job classification.
- Elections can be held in as few as 13 days from the filing of a petition.

- Clear privacy policies and procedures concerning the collection, storage, and disclosure of medical information.
- On-line systems and other technology to guard against unauthorized access, such as through encryption.
- Data breach response planning.

Employer homework. Lazzarotti, Worley, and Gavejian made this suggestion in light of the confidentiality and data security aspects of the EEOC's regulatory proposals: "Employers will need to review the final regulations, whether or not they sponsor wellness programs, because the EEOC's view of safeguarding medical information expressed in those regulations may affect what employers are currently doing to safeguard the confidentiality of employee medical information subject to ADA and GINA protections."

Updated pregnancy discrimination guidance. Although considered sub-regulatory, it's also notable that on June 25, the EEOC issued its updated Enforcement Guidance on Pregnancy Discrimination and Related Issues in light of the Supreme Court's *Young v. United Parcel Service, Inc.* ruling in March 2015. The updated guidance reflected the High Court's conclusion that women may be able to prove unlawful pregnancy discrimination when an employer has accommodated some workers but refused to accommodate pregnant women. The agency also updated a companion question and answer document.

In *Young*, the Court explained that employer policies which are not intended to discriminate on the basis of pregnancy may still violate the Pregnancy Discrimination Act if the policy imposes significant burdens on pregnant employees without a sufficiently strong justification. The EEOC updated only those pages of the enforcement guidance, originally issued in July 2014, that were affected by the *Young* decision. All other aspects of the guidance remained the same, including the sections related to the ADA and the FMLA.

That busy Labor Board

It was an active year at the National Labor Relations Board, as Howard & Sherman lawyer W.V. Bernie Siebert sees it. He pointed to football players as "employees" and new joint employer standards as areas of change that were considered by the Labor Board in 2016. The NLRB also "continued its march to make virtually every employee handbook provision a violation of the NLRA," according to Siebert.

Jackson Lewis attorney Howard Bloom, echoing some of the same developments, identified these as the most important developments at the Labor Board in 2015:

- Implementation of the new final representation case rule on April 14.
- Issuance of its *Browning-Ferris Industries*, *Banner Estrella Medical Center*, *Piedmont Gardens, Lincoln-Lutheran of Racine*, and *Northwestern University* decisions, as well as multiple decisions dealing with the legality under the NLRA of class action waivers.
- The General Counsel's Report Concerning Employer Rules and his Guidance Memorandum on Electronic Signatures to Support a Showing of Interest.

Controversial "quickie election" rule

Continuing to fuel a controversy with no apparent end in sight, the Board's controversial final representation case rule—the so-called "quickie election" rule—went into effect on April 14. "The rules on their face significantly altered the balance between employers and unions throughout the various stages of the NLRB election process," according to

Bourgeacq, who dubbed them "part of the not-so subtle pro-labor agenda of this Board." He quickly added that the anecdotal evidence so far suggests that the rules have not yet drastically changed elections, suggesting that employers may have prudently used the "run-up" to the new rules to prepare for the changes. Bourgeacq also predicted that we have not yet seen the last of challenges to the rules.

"Sea change" in election procedures. Bloom said that the new representation case rule has "effected a sea change" in the way representation cases are handled at the NLRB, by:

- Drastically shortening the amount of time between the date the union files a petition and the date of the election (almost by half), consequently also shortening the time an employer has to communicate with its employees about the union prior to the election.
- Minimizing pre-election litigation, potentially leaving unresolved until after the election important issues such as the supervisory status of an employee, for example, leaving open until after the election the question whether the employer may lawfully utilize that employee to communicate the employer's position to employees.
- Giving unions greater (home addresses, cellphone and home phone numbers, and personal email addresses vs. only home addresses) and earlier (within two days after election arrangements are made vs. seven days) access to employee contact information.
- Placing significant new administrative burdens on employers immediately after the petition is filed.

What's behind the new rule? The Labor Board says the impetus for the rule is to "simplify representation-case procedures, codify best practices, and make them more transparent and uniform across [NLRB] regions," Bloom observed. "However, conventional wisdom among management observers is the rule is intended to make it easier for unions to win NLRB-conducted representation elections, and therefore, increase the number of unionized employees in the private sector," he said, noting also that at the end of 2014, only 6.6 percent of employees working in the private sector were represented by unions.

"Union organizing efforts, which have languished for years, are expected to receive a boost from the Board's action and result in a greater percentage of private sector employees becoming unionized," according to Bloom. However, like Bourgeacq, Bloom noted that it appears the new rule did not have that effect during 2015, citing an article authored by a Jackson Lewis colleague. "The rule did have one desired impact—speeding up the holding of elections," he said, noting that that the median number of days from the filing of a representation petition to the election had dropped from 37 days to 23 days.

Practice tip. What should employers do now that the new election rule is in effect? Siebert suggested that "to mitigate the effects of the quickie election rules, employers will need to engage in a regular and continuous campaign enlightening employees of their rights and the reasons why employees don't need a union."

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Bourgeacq said that "employers will likely be more successful in chipping away at certain aspects of the rules in future cases, rather than full-scale attacks on all the rules, based on actual instead of hypothetical examples of harm and unreasonableness."

Bloom offered these best practices for employers in light of the final rule:

- ***Develop a strategic, company-wide labor relations plan.*** Key executives and general counsel should review the organization's options so company officials can make strategic decisions in light of the rule and other recent NLRB actions.
- ***Train managers and supervisors as soon as possible.*** Topics for training should include the revised NLRB election procedures, their impact on employers, the employer's position on unionization, the significance of authorization cards, early warning signs of union activity, and what and when an employer may communicate lawfully with employees regarding union drives and signing union cards. Every individual who meets the definition of a "supervisor" under the NLRA should be trained.

- ***Eliminate issues immediately.*** Conduct a legal/human resource vulnerability assessment to identify, address, and eliminate legitimate workplace issues now.
- ***Conduct critical bargaining unit and supervisory analyses.*** In its attempt to minimize pre-election litigation, the Board's rule fosters uncertainty as to the bargaining unit, voter eligibility, and the supervisory status of individuals who may communicate lawfully on an employer's behalf. Clarification is essential, so employers should do two things:
  - Conduct a bargaining unit analysis to establish the best units from an employer perspective in light of recent NLRB decisions.
  - Assess the status of potential supervisors. Supervisors are not eligible to vote and, as agents of the employer, the employer is responsible under the NLRA for their statements and actions. The employer also may use or need these individuals to communicate on its behalf (*e.g.*, while off-shift, or in languages other than English). Consider adjustments based upon practical and legal considerations.
- ***Develop a representation case litigation plan.*** An employer is required to file a position statement concerning unit issues and other matters within days of the filing of the NLRB petition. Organizations must think strategically now and prepare information in advance.
- ***Communicate with employees:***
  - About the new representation case rule and its effect.
  - About their employer's labor relations philosophy in new hire orientation and an employee handbook.
  - Consider regular messaging consistent with the organization's labor relations approach.
- ***Prepare a "break the glass kit."*** Have a company-specific "don't sign the card" letter and other communications and handouts drafted so they are ready to be finalized quickly in the event of union activity.
- ***Identify and train a rapid response team.*** Consider having a designated team that is prepared and ready to act in the event of union activity. These core members of management should have in-depth knowledge about what the employer can and cannot say or do. The team can communicate quickly and effectively with employees on key issues.

Expanding joint-employer standard

In another controversy likely to have a long life, on August 27 the Board issued its long-awaited decision, in *Browning-Ferris Industries of California*, on the standard for determining "joint employer" status. "Pursuant to long-standing Board law, joint employer status could only be established if the joint employer possessed the authority to control the terms and conditions of employment of the employees and the joint employer actually exercised that control directly," Siebert explained. "Under the guise of 'changing economic conditions,' the Board substantially modified the joint-employer standard to encompass nearly every situation where there are two employers."

Calling the NLRB an agency that "continues to disrupt the traditional labor landscape," Bourgeacq observed that the *Browning-Ferris* decision "sent shockwaves to companies coast to coast," once again reversing decades of precedent. "The NLRB placed employers on notice that using contract labor (a ubiquitous practice in virtually every industry) may result in a joint-employer relationship between the hiring company and the contract labor company," he said.

Broad and liberal definition. Under the new standard, joint employer status will be found where the employers share and codetermine terms and conditions of employment of the employees. According to Siebert, the phrase "terms and conditions of employment" has "an expanded meaning beyond hiring, firing, discipline, and supervision"—the phrase in this context will also apply to scheduling, seniority, overtime, work assignments and work performance.

"In a nutshell, the Board went from a test of direct control to a test of indirect control," as Siebert put it. "It will be extremely difficult for two employers to avoid being found to be joint employers under the Board's broad and liberal definition." He cautioned that "employers must carefully examine their relationships with temporary agencies, franchisees, and other third parties who provide or have employees."

Instead of requiring an employer to *actually* exercise control over the contracted labor to support a joint-employer finding, the board now requires only the contractual *right* to control, regardless of whether it is exercised, Bourgeacq stressed. The net result, he said, is a larger pool of potentially unionized employees.

What was the impetus for the modification? According to the NLRB, the revised joint-employer standard is designed "to better effectuate the purposes of the Act in the current economic landscape." The Board noted that more than 2.87 million of the workers in the United States were employed through temporary agencies in August 2014, and that its previous joint-employer standard had failed to keep pace with changes in the workplace and economic circumstances. "At bottom, the new standard seeks to

place responsibility for employees and employer actions on all of the organizations with whom the employee has a workplace connection," according to Bloom.

Critical impact. The *Browning-Ferris* decision "could have a critical impact on businesses that rely on non-traditional workforces (i.e., employees of independent staffing services, subcontractors, distributors, and franchisees), making those businesses joint employers of those nontraditional employees," Bloom explained. "As joint employers, they now will be exposed to unfair labor practice liability, collective bargaining obligations, and economic protest activity, including strikes, boycotts, and picketing involving those employees."

What steps can employers take? According to Bourgeacq, employers facing a post-*Browning-Ferris* era presently have little guidance on which to rely to avoid a joint-employer finding. "And because *Browning-Ferris* was a representation case rather than an unfair labor practice case, it could take years before a court of appeals provides any additional, bright-line guidance on this issue," he predicted. "Savvy employers therefore would be wise to comb through the facts and examples discussed in *Browning-Ferris*, and dust off the common law tests for joint employment, to take precautions to avoid actions that could support such a finding."

"Businesses will have to determine whether to attempt to structure their relationships with contractors and franchisees, etc., to try to avoid joint-employer liability or to accept that a joint-employer finding is inevitable given the Board's liberal new standard," Bloom suggested. "In doing so, employers should closely scrutinize their contracts and other indicia of their relationships with these contractors and franchisees to determine areas of joint-employer vulnerability. Where the decision is to accept joint-employer liability, employers should impose even tighter controls on their contractors and franchisees in an attempt to ensure they do not run afoul of the National Labor Relations Act."

Confidentiality of internal investigations

Bloom pointed to the Board's June 26 *Banner Estrella Medical Center* decision as an important development. There the Board concluded that an "Interview of Complainant" form used by the employer in conducting workplace investigations violated employees' Section 7 rights under the NLRA because it requested that interviewees not discuss the investigation with coworkers while the investigation was ongoing. But the Board considered its decision nothing new, saying it was consistent with established precedent in other, similar cases, most notably *Hyundai America Shipping Agency* (357 NLRB No. 80 (2011)), Bloom noted.

Is there a danger of corruption *here*? In *Hyundai*, the Board held that before an employer may require an employee to keep a workplace investigation confidential, "it must 'first determine whether, in any given investigation witnesses, need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up,'" Bloom explained. "Only if the [employer] determines that such a corruption of its investigation would likely occur without confidentiality is the [employer] then free to prohibit its employees from discussing these matters among themselves.'" The Board also reasoned that the *Hyundai* standard "fully and fairly accommodates the competing interests at stake, and it provides the Board—and employers—with structured guidance to deal with the wide variety of investigative situations that arise in today's workplaces."

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Best practices. As a result of *Banner Estrella Medical Center*, Bloom suggested that employers "will have to find ways other than requiring employees to preserve confidentiality to maintain the integrity of their workplace investigations and will have to modify existing policies, procedures, and forms used for internal investigations to ensure such agreements or policies do not interfere with employees' rights to engage in concerted activity under Section 7 of the NLRA."

Bloom outlined these best practices for employers:

- Consider and document the existence of the factors cited by the Board justifying a requirement for confidentiality, including the basis for confidentiality, in connection with each workplace investigation.
- Use caution when investigating and do not issue a confidentiality instruction unless the circumstances warrant.
- Review any written policies regarding investigations or confidentiality to assess whether they contain a blanket confidentiality requirement that the NLRB may conclude violates *Banner Estrella*.
- Continue advising witnesses who are supervisors and executives and not covered by the NLRA that they should treat the investigation and matter being investigated as confidential.
- Consider whether a modified direction to witnesses is warranted, or whether an acknowledgement form should be presented that advises witnesses about confidentiality and the reasons for it but also includes a "disclaimer" informing the witness that he is not precluded from discussing terms and conditions of employment with others. Memorialize points discussed with witnesses, including confidentiality, privilege, and non-retaliation.
- Consider training those employees charged with conducting internal investigations as to the circumstances in which a confidentiality instruction is appropriate, how to narrowly tailor the instruction in light of Board law, and how to plan investigations that do not warrant such an instruction.

Witness statements in union setting

Where the workplace is unionized, witness statements may be subject to disclosure at the request of a union representative. Bloom stressed the significance of the NLRB's June 26 decision in *American Baptist Homes of the West dba Piedmont Gardens:* "The Board overruled 37 years of Board precedent and decided that witness statements obtained by a unionized employer during an investigation of employee misconduct and requested by a union representative no longer will enjoy special protection from disclosure," he observed. "Instead, the Board will apply a balancing test to determine whether the employer's interest in maintaining a statement's confidentiality outweighs the union's right to the statement."

Why the about-face? Bloom explained the Board's reasoning: Unions should have access to witness statements in their representative capacity, and the Board applies a balancing test in all other cases involving assertions that requested information is confidential and should do so with respect to witness statements. "The Board wrote that witness statements are neither unique nor fundamentally different from other types of information employers are expected to provide to unions," Bloom noted. "The Board also wrote that providing witness statements would assist unions in deciding whether or not to pursue a grievance at all, and therefore help unions conserve their 'limited resources.'"

The decision's impact. According to Bloom, one impact of the *Piedmont Gardens* decision is that employees who report misconduct may be reluctant to provide witness statements for fear of disclosure and possible retaliation from a union or coworkers. "Indeed, the potential for disclosure could cause an employee who witnesses misconduct to decline to report it out of concern that any statement he gives may have to be given to the union," Bloom stressed.

What can employers do? In light of the change rendered by *Piedmont Gardens*, Bloom suggested that employers increase the likelihood that they can protect witness statements from disclosure when the balancing test is applied by:

- Providing assurances of confidentiality to witnesses prior to asking them to provide statements.
- Documenting specific concerns about the employer's inability to obtain witness statements in the future if disclosure takes place.
- Documenting any actual or threatened harassment or intimidation of witnesses.
- Demonstrating a reasonable concern for confidentiality, harassment, or coercion.
- Raising confidentiality concerns in a timely manner with the union.

Bloom said that employers should also prepare for the possibility that, without the protective promise of confidentiality, employees may be more hesitant to cooperate with employer investigations in the first place. Accordingly, employers may be hampered in their ability to conduct complete and thorough investigations. To convince employees to cooperate, employers should make clear that company policy prohibits retaliation against employees who participate in investigations.

Dues checkoff obligation

In another decision that ushered in a substantial change, the Board on August 27 held in *Lincoln Lutheran of Racine* that an employer's obligation to check off union dues pursuant to a dues deduction provision in a CBA survives the expiration of the bargaining agreement. Bloom said that in doing so, the Board overruled 53

years of precedent. The Board reasoned that terms and conditions of employment survive the expiration of the CBA, and dues checkoff is a term and condition of employment, he explained. Unilateral changes to dues checkoff undermine collective bargaining the same way other unilateral changes do, according to the Board.

What does the change mean for employers? Bloom pointed to these potential impacts of *Lincoln Lutheran of Racine* on employers: (1) it reduces leverage for employers—an employer's halting of dues deduction when an existing contract expires places pressure on a union to come to agreement so that dues deduction would be reinstated; (2) in first contract bargaining, it could harden an employer's position against either accepting a dues deduction provision at all or against accepting dues deduction without explicit wording making the dues deduction expire when the contract expires; and (3) it could result in an employer bargaining hard for a provision in an existing agreement explicitly having the dues deduction provision expire when the agreement expires.

Bloom suggested that "employers negotiating first contracts should consider refusing to agree to dues deduction provisions or to agree to such provisions only if they include wording explicitly making the clause survive the expiration of the contract. Employers negotiating successor contracts should consider proposing a 'survives-the-expiration-of-the-contract provision.'"

Are college scholarship athletes "employees"?

At least for now, the Board has decided not to expand. Siebert pointed to *Northwestern University*, where the College Athletes Players Association—a labor organization—filed a petition with the NLRB to represent a unit of grant-in-aid football players at Northwestern University. A regional director found the grant-in-aid student athletes were "employees" within the meaning of the NLRA and ordered that an election be conducted. However, without deciding whether grant-in-aid football players *are* employees, the Board ruled that "it would not promote stability in labor relations to assert jurisdiction in this case." Thus, "the Board punted on deciding the real issue in the case," according to Siebert.

Most Board-watchers expected the NLRB to uphold the decision of the regional director, according to Bloom, who said that no one predicted the Board would decline jurisdiction. "Many Board watchers believe the Board simply decided it did not want to interject itself into this very controversial area," he said. The Board also appeared to base its decision on its view that improvements had been made in scholarship players' treatment.

In the meantime … Bloom said that private colleges and universities can breathe a big sigh of relief over the Board's decision not to assert jurisdiction. "Although the Board left the door open to revisit the issue if it is not satisfied with the treatment of private college athletes in the future, the decision likely means that private college and university scholarship athlete unionization is dead for now," he said. But he also suggested that private colleges and universities should heed the NLRB warning about treatment of their scholarship athletes.

How did unions fare in 2015?

Sherman & Howard attorney W.V. Bernie Siebert noted that unions were expected to make large gains in 2015 due to an increasingly favorable environment at the NLRB and, particularly, the Board's expedited election rules. "Many unions were rumored to have petitions 'in the queue' awaiting the implementation of the new rules," he said. "Additionally, the NLRB's new approach minimizing pre-election litigation of issues promised a rapid path to elections in voting units determined largely by unions. The NLRB's 'presumption' under *Specialty Healthcare* that any petitioned-for unit would be appropriate for an election nearly ensured that employers would not be able to challenge unit composition." The Board also initiated widely publicized prosecutions against purported "joint employers," which promised to increase the pressure on larger corporations to encourage their franchisees and subsidiaries to voluntarily recognize unions, according to Siebert.

But none of these favorable conditions moved the needle on union representation in the U.S. "After an initial flurry of petitions for representation, the number of petitions in 2015 was nearly the same for a comparable period in 2014," Siebert explained. "Moreover, the NLRB reported a slight *decline* in the 'win rate' for unions in NLRB elections." While the median time frame from petition to election has been reduced by about 14 days, there is no indication that the reduced time frame is producing different results. "These developments suggest that declining labor density will not be reversed by the NLRB's regulatory agenda," Siebert said.

Never-ending handbook scrutiny

As Siebert put it, in 2015 "the Board continued its relentless crusade to find violations of Section 7 in nearly every possible provision of any employee handbook." He said "the cases are legion" demonstrating the Board's actions.

Siebert pointed in particular to the Board's December 28 ruling in *Whole Foods Market, Inc.*, finding unlawful a handbook provision prohibiting the recording of company meetings. The Sherman & Howard attorney noted that its purpose was to encourage free and open communications. As applied to termination meetings, where the discharged employee can appeal to a five-member panel of his or her peers, recording of any meeting might have a detrimental effect on panel deliberations. The Board found the rule infringed on and chilled employees' exercise of their Section 7 rights.

Is there anything employers can do? Employers constantly struggle with the question of how handbook provisions can be constructed without running afoul of labor laws. "Unfortunately, there is virtually no way that an employer can totally insulate itself from having a handbook provision that violates Section 7 without placing a disclaimer in every provision that such provision is not meant to restrict employees in the exercise of their Section 7 rights," according to Siebert.

Class action waiver decisions

Bloom also found significant the Board's "dozens of decisions issued in 2015" that found requiring employees to sign agreements not to bring class or collective actions against their employers violated the NLRA. "The Board views agreements requiring an employee to waive his rights to join with other employees to file suit against their employer as an unlawful restriction on an employee's right to engage in protected concerted activity," he explained.

Labor attorneys believe the legality of these waivers will eventually reach the Supreme Court and that the Court will determine they do not violate the NLRA. "Coupled with the fact that, thus far, U.S. Courts of Appeals that have been presented with the issue unanimously have refused to enforce Board decisions finding these waivers unlawful, the Board's decisions on this issue are unlikely to have much impact on employers, who will continue to use waivers," Bloom predicted.

Keep waiving. While the waiver issue is working its way to the Supreme Court, should employers refrain from using class action waivers? "Employers who wish to use these waivers should continue to do so, with the understanding that if challenged, they likely will be found by the NLRB to violate the NLRA," Bloom suggested. "Where practicable, employers should consider including opt-out provisions and language excluding actions under the NLRA in the waivers."

Data breaches in a unionized workplace

Lazzarotti, Worley, and Gavejian singled out an area increasingly of concern to employers—data breaches. The Jackson Lewis attorneys underscored a Board action in 2015 that they say may spur more unions to seek an additional benefit for their members: credit monitoring and data breach remediation services. "These unions also may demand that employers share the specifics of their data security and breach response plans as they relate to the safeguarding of employment data," the attorneys predicted. "Perhaps more troubling, employers facing the difficult and unsettling task of responding to data breaches, may find unions more likely to insert themselves into the response process and demand a say in the actions being taken with respect to employees."

Unions react. The Board action came after the U.S. Postal Service reported a data breach potentially affecting hundreds of thousands of employees, Lazzarotti, Worley, and Gavejian explained. The American Postal Workers Union filed an unfair labor practice complaint alleging that the Postal Service should have bargained with the union over the impact and response to the security breach. That led to a complaint filed by the NLRB Regional Director for Region 5 in Baltimore, claiming that the Postal Service was wrong for not bargaining with the union.

"Increasingly, unions are reacting when the personal information of their employees is breached," the Jackson Lewis attorneys observed. "When the personal information of millions of Office of Personnel Management employees was breached, the largest federal workers union, American Federation of Government Employees, filed a class action lawsuit against OPM."

Employer dilemma. The attorneys explained that businesses with employees represented by unions now face an additional challenge in figuring out how to respond to a data breach: Is it better to risk (1) a claim for undue delay in breach notification and mitigation by an employee or federal or state enforcement agency as a result of union negotiations, or (2) a union charge that the company did not bargain about the response?

A way out … "Businesses may want to consider including data breach response and related benefits as part of their overall labor relations strategies," according to Lazzarotti, Worley, and Gavejian. "Where possible, reach some agreement ahead of time with the union on

how the company will respond to a breach in the event one occurs, and incorporate that agreement into the company's data breach response planning." This will help put the company in a position to respond timely under the applicable breach notification law(s), and hopefully, avoid confrontation with the union.

Board guidance

In 2015, the Board issued two guidance documents that Bloom highlighted.

Report Concerning Employer Rules: After a number of recent NLRB decisions focusing on the lawfulness of employer rules and policies, Bloom noted, the Office of the General Counsel on March 18 released Memorandum GC 15-04 to assist employers with personnel policies and employee handbook rules to ensure compliance with the NLRA.

The NLRB has issued many decisions analyzing the legality of various employer personnel policies and rules—even experienced practitioners and Board personnel have found many of the decisions difficult to reconcile, according to Bloom. "The Report is an attempt to provide a window into the thinking of the General Counsel (who decides which unfair labor practice cases to bring to the Board, including those involving the legality of policies/rules) about what makes certain common rules, such as those dealing with confidentiality, lawful or unlawful."

But was it really that helpful? The guidance is intended to assist employers in drafting new or revised rules that comply with the NLRA, Bloom said. "However, in numerous instances, the General Counsel noted that the rule in question was deemed lawful because of its 'context,' making the Report significantly less helpful with respect to those rules because the analysis of many of the rules cited in the Report was dependent on other rules contained in the same handbook/policy section, or other words contained in the same rule/policy."

Review at least annually. Bloom expects the Board to continue to issue several decisions a year analyzing the legality of handbook rules and personnel policies. "As a result, employers should have their personnel policies and handbooks reviewed by labor counsel once a year at a minimum," he suggested.

Guidance Memorandum on Electronic Signatures to Support a Showing of Interest: On September 1, in Memorandum GC 15-08 (revised on October 26), NLRB General Counsel Richard Griffin announced that the Board would accept employees' electronic signatures from unions in support of the union's showing of interest to support an election petition.

According to the Memorandum, in connection with implementation of the new representation case rulemaking, the Board solicited comments as to whether the proposed regulations should expressly permit or proscribe the use of electronic signatures to support a showing of interest and then determined that its regulations permitted the use of electronic signatures for that purpose. "The Board also decided that Congress wanted federal agencies, including the Board, to accept and use electronic forms and signatures, when practicable," Bloom noted. The General Counsel said that the Board gave him the responsibility to "determine whether, when, and how electronic signatures can practicably be accepted" and to "issue guidance on the matter."

> *"And, quite frankly, it's been decades since the salary test amounts have been adjusted, so it really comes as no surprise that some upward movement is due."*
>
> – Attorney Chris Bourgeacq

How does it impact employers? The decision to let unions use electronic signatures to support a showing of interest is expected to lead to an increase in NLRB election petition filings. "Employees may now 'sign up' for the union without speaking with a union organizer or pro-union coworker," Bloom explained. "Instead of relying on an organizer or employee to 'make the case' verbally and possibly stumble in that pursuit, unions can use impressive written materials and websites to lure employees into 'signing' electronically."

Since this will make it easier for unions to obtain a sufficient showing of interest to support an election petition, Bloom suggested that employers should implement the strategies he recommended for dealing with the new representation case regulations. "Employers also should consider educating employees and new hires about unions and union authorization cards and the potential they may be solicited to show support for the union electronically," he added.

DOL active on many fronts

The Labor Department was active on many fronts in 2015: Among other developments, the Wage and Hour Division issued a controversial proposed rule that would dramatically lift the floor below which certain employees are exempt from Fair Labor Standards Act minimum wage and overtime requirements, and the Employee Benefits Security Administration issued an equally controversial proposal that would modify the definition of "fiduciary" under the Employee Retirement Income and Security Act.

WHD shaking up the rules

The WHD's two "biggies" were the FLSA proposal and a guidance memo from the Wage & Hour Administrator on independent contractors, according to Bourgeacq. The division also issued regulations expanding the definition of "spouse" under the Family and Medical Leave Act.

White collar exemptions. Sherman & Howard attorney Andrew Volin saw the WHD's proposed FLSA white-collar exemption rule as the most significant development. Issued on July 6, it "would dramatically increase the amount of salary required to establish any of the so-called 'white collar' exemptions from overtime pay," he explained. The proposed rule seeks to double the current minimum of $455 per week to an amount yet to be determined, but over $900, for workers classified as exempt under the executive, administrative, professional, and highly compensated employee exemptions. The new salary requirements would also be adjusted every year going forward. Volin noted that WHD expects to publish the final regulation during the second half of 2016, although no specific date has been announced.

Why are the rules being revised? Jackson Lewis attorney Paul DeCamp pointed to the President's March 2014 memorandum directing the Secretary of Labor to update the regulations to expand the protections of the overtime laws. Bourgeacq noted that some commenters have estimated the increase in the exemption threshold could expand FLSA overtime coverage to more than six million employees. He sees the impetus for the proposal, in large part, as a push to drive more overtime pay and consequently more tax revenue. "And, quite frankly, it's been decades since the salary test amounts have been adjusted," he said, "so it really comes as no surprise that some upward movement is due."

Duties test could change. The proposed rule did not alter the "duties" tests that partly define the administrative, executive, and professional exemptions—at least for now. Still, the WHD is eliciting public input on the current rules, both as to whether it should implement a bright-line "primary duty" test, such as the 50-percent standard used in California for what percentage of nonexempt work could be performed by exempt workers, and the particular substantive duties that should be considered part of an administrative, professional, or executive employee under the FLSA.

Bourgeacq saw this aspect of the proposal as more onerous and problematic. "The DOL could require that employees perform exempt duties more than 50 percent of their work time, which in some cases could significantly reduce the number of employees an employer can exempt from overtime, depending on the nature and extent of their duties," he explained. "That issue could become the biggest sleeper surprise for employers later this year and result in more misclassification litigation than from the increase in salary thresholds."

How could the proposed rule affect employers? "If this proposal becomes final—and we don't really have any reason to believe it won't—expect many employers to either reduce full-time staff to part-time, rigorously enforce no overtime for their employees paid under the

Active DOL

As Sherman & Howard attorney Andrew Volin noted, the Labor Department was active on multiple fronts in 2015. He pointed to these developments:

- Wage and Hour Division's proposed rule under the Fair Labor Standards Act to dramatically increase the salary required to establish any of the so-called "white collar" exemptions from overtime pay.
- WHD'S guidance reinforcing restrictions on characterizing workers as independent contractors as opposed to employees.
- WHD's notice implementing an executive order requiring that federal contractors be paid a new $10.15 minimum hourly wage (effective in 2016).
- WHD's final rule defining "spouse" under the FMLA to include partners in same-sex marriages.
- OSHA's new injury and illness reporting requirements (effective in 2015).
- Employee Benefits Security Administration's proposed rule on the fiduciary requirements for ERISA plan advisors.

threshold salary, or engage in significant (and costly) reclassification of employees to fit into the framework of the new rules," Bourgeacq noted. "Also look for more off-the-clock wage/hour litigation."

DeCamp said that in his firm's experience, "this type of reclassification normally results in an employee working fewer hours and receiving lower overall pay, and the employees almost always see this type of change as a demotion."

What should employers do? DeCamp suggested that employers take a close look at their exempt population, determine the universe of employees who earn less than the proposed new salary minimum, and develop a plan for what to do with those employees if and when the WHD issues a final rule. "For employees who are already close to the new minimum, it may make sense to increase their salary to maintain exempt status," he explained. "Where keeping an employee exempt does not make sense, it is important to figure out how to pay these people, which requires knowing roughly how many hours per week they will be working after reclassification in order to be able to determine a pay rate that yields an appropriate overall level of compensation that takes into consideration any anticipated overtime."

Guidance on independent contractors. Volin pointed out that almost immediately after publishing its proposed overtime rules, DOL Administrator Dr. David Weil on July 15 released his Administrator's Interpretation reinforcing the restrictions on characterizing workers as independent contractors, as opposed to employees.

Weil announced in this second important development that "most workers are employees under the FLSA's broad definitions," Bourgeacq explained. As he sees it, much of this guidance is based on "antiquated caselaw" that supports Weil's conclusions from his book, "The Fissured Workplace," to reduce or eliminate subcontracting and franchising, while also "unreasonably inflating wages."

What does it mean? Bourgeacq said that employers should expect more rigorous enforcement from the Labor Department on independent contractor issues.

Volin added that "employers who were considering reacting to new overtime pay requirements by moving workers to independent contractor status should consider themselves forewarned."

Expanded definition of "spouse." Turning to employee benefits, Jackson Lewis attorneys Francis Alvarez, Joseph Lazzarotti, and Kathryn Russo noted that the WHD on February 25 issued new regulations expanding the definition of "spouse" under the FMLA "so as to entitle eligible employees in legal same-sex marriages to take FMLA leave to care for their spouse or covered family member, regardless of where they live." The rules, which were effective 30 days later on March 27, provide that "establishing a spousal relationship for FMLA purposes 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 under the old FMLA regulations," the attorneys explained.

Impact on employers. "For employers with multi-state operations, the new regulations create greater uniformity in administering FMLA leave for same-sex spouses," Alvarez, Lazzarotti, and Russo observed. "If employers generally seek documentation confirming covered family relationships, they may want to consider requiring documentation to confirm same-sex spousal relationships. Employers also will need to know or research the same-sex marriage laws, including the standards for common law marriage, of specific states or countries when employees request FMLA leave to care for a spouse, child, or parent and the basis of the family relationship is a same-sex marriage. Employers similarly will need to understand whether an employee or parent is in a same-sex marriage or a civil union. Civil unions are not considered marriages under the FMLA."

> *"Employers who were considering reacting to new overtime pay requirements by moving workers to independent contractor status should consider themselves forewarned."*
>
> – Sherman & Howard attorney Andrew Volin

What should employers do? "Employers should review and revise their FMLA policies and forms to ensure the definition of 'spouse' reflects the new regulatory definition and should identify 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," the Jackson Lewis attorneys recommended.

OSHA's enforcement tune-up

In 2015 there were numerous developments at OSHA that will have a lasting impact on employers, according to Sherman & Howard attorneys Patrick Miller and Rodney Smith, including important changes to fines and penalties that may be imposed for health and safety violations, new safety standards, and new reporting requirements.

Penalties boosted to keep pace with inflation. At the top of the OSHA list was what the Sherman & Howard attorneys called "a little-noticed addition" to the federal budget signed by President Obama in November. "Titled the 'Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015,' this provision removes the exemption in the prior law that prohibited OSHA from increasing its penalties to keep pace with inflation," Miller and Smith explained. "OSHA may now increase its penalties in line with inflation and, what is more, catch up with the past 25 years' worth of inflation in setting its new penalty structure."

What do employers need to know? Fines employers might face will increase by up to 80 percent, Miller and Smith said. Effective August 1, 2016, the maximum penalty for a "serious" violation will jump from $7,000 to almost $12,500, and the top penalty for a "willful" or "repeat" violation will leap from $70,000 to nearly $125,000. "Increased penalties have been a priority for OSHA for many years, and we fully expect the agency to take advantage of them in punishing employers who violate workplace safety and health standards," the Sherman & Howard attorneys warned. "Employers faced with increased penalties will be served by contesting the merits of citations they receive, especially in situations where there is a dispute as to their legitimacy."

DOL and DOJ team up. The two attorneys also pointed to a plan announced on December 17 by the Departments of Labor and Justice to increase the frequency and effectiveness of criminal prosecutions of safety and environmental violations affecting workers, called the "Worker Endangerment Initiative." A new "Memorandum of Understanding" between the DOL and the DOJ explains how OSHA, the Mine Safety and Health Administration, the WHD, and the DOJ will cooperate more closely to investigate and where appropriate, refer employers for criminal prosecution. Criminal penalties under the OSH Act are available for any willful violation that results in the death of an employee.

Multi-employer citations. Miller and Smith also noted that in 2015, OSHA continued to use its "multi-employer citation policy," which they said permits the agency "to issue citations to 'controlling' employers on a worksite whose own employees are not even exposed to the alleged hazard." In these efforts, OSHA is buoyed by the recent NLRB decision in *Browning-Ferris* that revised and expanded the current "joint-employer" standard used by the Board.

Employer tip. The Sherman & Howard attorneys said they expect OSHA to use these and similar legal theories in expanding liability to as many employers as possible on any given worksite. "Employers are encouraged to ensure that temporary and contract workers receive the proper training with respect to safety and health matters, as the agency is just as likely to issue citations based upon alleged exposure to these workers as it is with respect to exposure to direct employees," they said.

On the regulatory front. OSHA was also active on the regulatory front. Miller and Smith named the May 4 publication and subsequent rollout of the new confined spaces construction standard as the main regulatory development. This standard, which took effect August 23, regulates the process by which construction employers must handle worker entries into confined spaces. "This development is important because previously there were only very negligible requirements with respect to confined spaces in construction," the attorneys explained. "Employers who engage in construction must now familiarize themselves with this set of very detailed, and often confusing, standards."

Volin also noted that OSHA's new injury and illness reporting requirements went into effect on January 1. Employers are now required to notify OSHA when an employee is killed on the job or suffers a work-related hospitalization, amputation, or loss of an eye under the final rule, which was announced by the agency September 2014.

New rules for federal contractors

The Department of Labor took two actions in 2015 that Sherman & Howard attorneys Brooke Colaizzi and Glenn Schlabs found particularly important to federal contractors: final pay transparency regulations and proposed guidance on fair pay and safe workplaces, both implementing executive orders issued by President Obama.

Fair pay and safe workplaces. On May 28, the DOL issued its proposed guidance on the implementation Executive Order 13673, entitled "Fair Pay and Safe Workplaces." As Colaizzi and Schlabs noted, E.O. 13673 generally requires contractors or subcontractors with contracts exceeding $500,000 to self-report their own labor law violations and those of its subcontractors.

"E.O. 13673 was spurred by a desire to 'increase efficiency and cost savings' in federal contract work by promoting compliance with labor laws," the two attorneys explained. "Contractors are required to report administrative merit determinations, civil judgments, and arbitral awards or decisions related to 14 federal labor laws or executive orders and similar state laws in the three-year period preceding the contractor's bid or proposal. Contractors are required to include in their reports corrective steps and mitigating information related to each alleged violation." And the reporting requirement does not stop at final determinations but also includes decisions that are not final and/or are subject to appeal.

Best practices. Colaizzi and Schlabs suggested a few best practices related to the final rule. "Contractors must be prepared to face the risk of losing contracts, or at very least having to vigorously defend their employment practices, as a result of decisions such as EEOC reasonable cause determinations and similar non-final, appealable, or debatable accusations. Contractors could be at a disadvantage in providing mitigating information in the context of these types of determinations."

Moreover, the executive order and guidance provides an additional incentive for federal contractors and subcontractors to increase and maintain diligence in their compliance with federal and state labor laws, the attorneys said. "Contractors also must carefully consider their strategy in responding to an EEOC Charge of Discrimination, threatened lawsuits, and other suggestions of wrongdoing, and consider early resolution to avoid a reportable determination."

Pay transparency. On September 11, the DOL's Office of Federal Contract Compliance Programs published its final rule on pay transparency for government contractors. The rules, which were effective January 11, 2016, amend the implementing regulations for Executive Order 11246. "The rules were prompted by a concern, born out of the Lilly Ledbetter case, that women and people of color are unable to determine if they are receiving equal pay for equal work," Colaizzi and Schlabs explained.

The regulations apply to any federal contractor or subcontractor with a contract exceeding $10,000, the attorneys noted. "They require that the equal opportunity clause in federal contracts and subcontracts include that federal contractors and subcontractors cannot discharge or otherwise discriminate against employees or applicants—including managers and supervisors—who discuss or ask about their compensation or the compensation of other employees or applicants." The regulations define compensation broadly to extend beyond just salary or hourly wages to fringe benefits, stock options, retirement plans, and others forms of compensation.

Colaizzi and Schlabs observed that the rules, however, do not protect disclosure of other employees' pay information obtained through an employee's performance of his or her essential job functions, *unless* the disclosure is in furtherance of an investigation, proceeding, or hearing; in response to a formal complaint or charge; or consistent with the contractor's legal duty to furnish the information. Contractors also are required to disseminate a nondiscrimination provision prepared by the Director of the OFCCP by means of their handbooks or employee manuals and by posting it in conspicuous places.

> *"The rules were prompted by a concern, born out of the Lilly Ledbetter case, that women and people of color are unable to determine if they are receiving equal pay for equal work."*
>
> – Sherman & Howard attorneys Brooke Colaizzi and Glenn Schlabs

A little suggestion … What do the new pay transparency rules mean for employers? "Employers who are federal contractors or subcontractors should take this opportunity to review their pay practices for evidence of unequal pay among employees performing equal work," Colaizzi and Schlabs suggested. "Contractors should also revise their handbooks and manuals to include the required language and ensure that their other nondiscrimination policies encompass the principles set forth in the regulations."

At the Department of Homeland Security

Pivoting to the immigration landscape, Jackson Lewis attorneys Michael Neifach, Amy Peck, Jessica Feinstein, Cynthia Liao, and David Jones identified two 2015 regulatory

Justice Department crackdown

Jackson Lewis attorneys Richard Cino, Joseph Toris, and David Jimenez emphasized that in November 2015, the Department of Justice announced the hiring of an attorney to serve as a full-time Foreign Corrupt Practices Act compliance expert. "While corporate compliance programs have been an integral part of corporate governance practices for years, this is the first time the DOJ has hired a federal prosecutor with significant experience managing corporate compliance programs," the attorneys explained. The new compliance expert's responsibilities will include:

- Providing guidance concerning the effectiveness of corporate compliance programs to Fraud Section prosecutors as they consider whether to prosecute business entities.
- Helping prosecutors develop appropriate benchmarks for evaluating corporate compliance programs.
- Assisting in evaluating the effectiveness of a company's compliance and remediation measures.

"The hiring of a full-time compliance expert is a clear signal that compliance programs should be a high priority for employers in 2016 as the DOJ will likely be giving greater and closer scrutiny of compliance programs in future actions," according to the Jackson Lewis attorneys.

actions at the Department of Homeland Security's U.S. Citizenship and Immigration Services that were significant. Both stem from immigration-related actions that President Obama announced in November 2014 to address various ongoing problems with the national immigration system.

H-4 work authorization. In February, USCIS announced that as of May 26, 2015, it would begin accepting applications for employment authorization from qualified H-4 dependents. Dependent spouses of certain H-1B visa holders may now apply for work authorization in the U.S. The move was important because prior to this rule, dependent spouses in H-4 visa status were not allowed to work in the U.S., according to the Jackson Lewis attorneys.

Under the rule, eligible H-4 dependent spouses may file Form I-765, Application for Employment Authorization, with supporting evidence and the required fee in order to obtain employment authorization and receive a Form I-766, Employment Authorization Document.

The change will "help U.S. employers keep their highly skilled workers by increasing the chances these workers will choose to stay in this country through authorizing the dependent spouse to work," according to Neifach, Peck, Feinstein, Liao, and Jones. "It also provides more economic stability and better quality of life for the affected families."

L-1B guidance. In March 2015, USCIS issued additional guidance for the L-1B specialized knowledge visa category to simplify and streamline adjudications of the L-1B visa. The guidance defines the differences between "special" and "advanced" knowledge to provide USCIS examiners with better rules for evaluating and adjudicating L-1B petitions and better ensure consistency of decisions by USCIS, the Jackson Lewis attorneys said.

"Attorneys will use this guidance as the primary resource when deciding specialized knowledge cases involving L-1B, intra-company transfer of personnel," explained Neifach, Peck, Feinstein, Liao, and Jones. "Attorneys should also note that USCIS adjudicators still retain broad authority to request additional information. It remains to be seen how effective this guidance is to establishing clear and workable standards for employers and practitioners."

2016 agency outlook

What can we expect from federal agencies this year? Chris Bourgeacq offered this forecast: "Operationally, employers in 2016 face a year requiring greater caution dealing with outsourcing labor (due to *Browning-Ferris* and the DOL's independent contractor guidance); addressing new overtime exemption rules; and just keeping current with the continual weight of workplace regulation." Since Congress was unable to rein in federal agencies, either financially or through oversight, he said that mid- to large-size employers will likely experience more frequent and more burdensome investigations from the DOL and the EEOC on each agency's hot-button issues.

Turning to the NLRB, Bourgeacq predicted that "the *McDonald's* cases and *Browning-Ferris* will certainly spawn significant activities relating to franchisees, independent contractors, and subcontracted workforces in the areas of joint employment." At the DOL, employers should "expect more rigorous enforcement actions in many of the same areas and some of the same issues as the NLRB." Within the DOL, "OSHA appears to be flexing its regulatory muscles as well," Bourgeacq said, "both expanding its authority in new safety rules and also seeking more authority in its whistleblowing responsibilities."

EEOC forging ahead

What's on the horizon at the EEOC? "With 2016 an election year, we can expect the EEOC's individual lawsuits to highlight differences between the two political parties," Jackson Lewis attorney Paul Patten predicted. "So we will likely see the EEOC continue to advocate creatively for pregnant women, the LGBT community, on issues of gender pay equity, and immigrant rights, including religious accommodations."

Systemic litigation. As to the systemic discrimination front, Patten said that the EEOC will likely "continue to push disparate impact issues to the forefront." He also observed that "after notable disparate impact losses the last several years, the EEOC obtained significant monetary relief in disparate impact matters in 2015."

Sherman & Howard attorney John Doran echoed these sentiments, saying: "We can fully expect that the EEOC will continue its aggressive and expansive litigation strategies, using their systemic initiative to grossly expand otherwise small cases. Recent statistics suggest an ongoing increase in 'cause' determinations in EEOC systemic investigations, and those 'cause' determinations in systemic cases all but guarantee EEOC litigation unless resolved through the conciliation process."

Vulnerable and LGBT workers. Doran also predicted that the EEOC will continue its vigorous protection of vulnerable and LGBT workers. "Nothing has changed with respect to the EEOC's enforcement priorities for these groups," he said. In January 2015, EEOC Chair Jenny Yang reiterated the Commission's national strategic priority to take on victims of trafficking, pointing to a December 2015 settlement with two labor camps that agreed to pay $5 million to illegally trafficked workers who were subjected to discrimination and retaliation, Doran noted. The Chair also called out its $240 million jury verdict in the *Henry's Turkey* case, involving 32 intellectually disabled individuals, as further proof of the Commission's commitment to protect vulnerable workers.

"And, with its own Commission decision now supporting its protection of LGBT workers, the Commission is likely to double-down on this issue over and over in 2016," Doran predicted.

Separation agreements still in play. The Sherman & Howard attorney also pointed to "the EEOC's seeming obsession with separation agreements as in the *CVS* case," saying that until the Supreme Court reaches the issue, there is no reason to believe the agency will back off its current enforcement strategy. "The EEOC has taken this issue on as a key obstacle to the exercise of Title VII rights and the Commission's enforcement power," Doran explained.

Just a bump in the road. "The *CVS* decision notwithstanding, the EEOC cannot possibly back down from its position at this point," Doran said. "Remember, too, that CVS' separation agreement contained language that tracked earlier EEOC guidance with respect to preserving statutory rights, and appeared to be the most Title VII-friendly language imaginable for a separation agreement. While the *CVS* case allows the EEOC to frame its position with respect to the most reasonable separation agreement conceivable from an employer's perspective, there are, no doubt, countless separation agreements that do not go as far to honor Title VII, and that is likely where we can expect the next round of skirmishes."

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>
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Muslim and Middle Eastern workers. Doran also suggested that the EEOC will be focusing in 2016 on relatively new areas. "First, in the aftermath of the Paris and San Bernardino terrorist massacres, look for the EEOC to prioritize protections of workers who are, or who are perceived to be, Muslim or Middle Eastern," he said. In December 2015, the EEOC's Chair issued a statement encouraging employers to re-issue policies preventing harassment, retaliation, and other forms of discrimination in the workplace in the context of discussing protections of Muslim and Middle Eastern employees. The statement included links to two new EEOC Q&A publications raising and answering questions on this type of discrimination from both the employer's and the employee's perspective.

"In the aftermath of 9/11, we saw a significant uptick in the EEOC's enforcement of Muslim and Middle Eastern employee rights," Duran observed. "In light of the current state of the world and global terrorism, in the context of discrimination and retaliation against

Muslim and Middle Eastern workers, we can be assured that the EEOC will ramp up its enforcement well beyond 9/11 levels in the coming year."

Religious discrimination. Following closely on the heels of Muslim and Middle Eastern employee discrimination and retaliation enforcement will be religious discrimination and accommodation cases challenging employee time for prayer, among other religious practices, Doran predicted. "The EEOC has initiated some very large cases involving Muslim religious expression, and more are sure to come."

Practice tip. Doran offered these tips: "Employers should seriously consider revising their policies to take into account these unique challenges and to vigorously train and re-train to prevent unlawful discrimination in this realm. Employers should also map out a strategy in advance to address requests for religious accommodation with respect to prayer in the workplace."

No high hopes on the conciliation front. With the Supreme Court's *Mach Mining* decision looming large over the EEOC conciliation process, and with the recent Court's decision to take up the *CRST Van Expedited case*, might we expect the EEOC to take a more informative, conciliatory approach to its duty to conciliate prior to bringing suit?, Doran queried. Answering his own question, he said, "Not likely. At least not in the short term." The *Mach Mining* decision "did much to confirm the EEOC's duty to engage in meaningful conciliation, but it simply did not create a carrot or stick substantial enough to incentivize the EEOC to engage in fair, meaningful conciliations, and it remains a substantial challenge for employers to prove that the EEOC did, in fact, fail to conciliate in good faith after *Mach Mining*," he explained.

But maybe ...While we can expect business as usual on the conciliation front for now, Doran observed that the now-pending *CRST Van Expedited* case could very well change this dramatically. "If the Supreme Court reverses the Eighth Circuit's decision and affirms the $4.7 million attorneys' fees award against the EEOC for its complete failure to conciliate, we might very well see a different and potentially more productive approach to conciliation from the Commission."

Employer wellness programs. The Sherman &Howard attorney also pointed to heightened EEOC enforcement of the ADA and GINA, particularly as to employer wellness programs. "It is no secret that the EEOC has been taking on employer wellness programs under the ADA and GINA," he explained. "Remember that the EEOC has filed more ADA cases in the past few years than almost any other form of discrimination," Doran said. "We can expect this to continue, with GINA claims often going hand-in-hand with ADA claims. And we can expect the EEOC to continue to prioritize cases involving voluntary wellness programs that the EEOC deems to be involuntary."

Final regulations. Jackson Lewis attorneys Francis Alvarez and Joseph Lazzarotti also reiterated the EEOC's plan to issue final ADA and GINA wellness regulations during 2016. "We suspect this timeframe might be impacted given the number of comments that were submitted as well as the recent court ruling [*EEOC v. Flambeau, Inc.*], which may be followed soon by other rulings, rejecting the EEOC's position on the application of the ADA's safe harbor to wellness programs."

Pregnancy discrimination. Doran predicted that in light of the Supreme Court's decision in *Young v. United Parcel Service, Inc.*, the EEOC "is very likely to push the envelope with respect to pregnancy discrimination." He said that the Commission "has already called out this issue with respect to both ADA and disparate impact liability, and it will be emboldened by the *UPS* case going forward."

Charge processing slow as molasses. On the administrative front, we can expect even more of what Doran called "the brutally slow processing of charges we have experienced in recent years from the EEOC." He noted that the agency's charge backlog continues to grow. "Depending on the region, some charges can take years to process at this point," he noted. "The EEOC appears to be unable or unwilling to improve the speed of its charge processing, so 2016 will be yet another 'hurry up and wait' year, with the EEOC ordering employers to hurry up and provide information to the Commission, and then expecting employers to wait for inordinate amounts of time to obtain a decision."

Inherently discriminatory barriers. As a final forecast, Doran anticipates that the EEOC will continue to file lawsuits challenging what it perceives to be "inherently discriminatory" barriers to employment. "The EEOC will continue to pursue employers that have blanket rules excluding candidates with criminal backgrounds, extended periods of unemployment, or poor credit history," he said. "The EEOC will most definitely continue its pursuit of employers who require pre-employment medical screenings or post-offer screenings that exceed the limits of the ADA."

Active Labor Board

"We can expect continued activism in favor of union and employee rights" at the Labor Board in 2016, according to Jackson Lewis's Howard Bloom.

Joint-employer remake. Sherman & Howard attorney W. V. Bernie Siebert said that the most important issue facing the NLRB in 2016 is McDonald's Corporation's testing of the Board's newly announced standard for determining joint-employer status. "The case could have a substantial impact on the universe of franchisor-franchisee relationships," he noted. Another closely watched case will be *Miller & Anderson, Inc*. There, the Board will re-examine its long-standing rule that requires employer consent before a union election can be conducted among both workers solely employed by the company and workers supplied by a third party. "This case will give the Board the opportunity to further extend its joint-employer ruling," Seibert suggested.

He also pointed to a challenge to the Board's "quickie election" rules pending in the Fifth Circuit following a ruling by a federal court in Texas upholding the regulations. "Most observers hold out little hope for a reversal of the district court's ruling," he said.

Policies that chill employee rights. "The Board continues to make rulings concerning what it views as the chilling effect certain employer policies have on protected concerted activity rights under the National Labor Relations Act," observed Lazzarotti, Worley, and Gavejian, who noted that one of the policies in the agency's crosshairs is the proscription against recording in the workplace. "The ubiquity of smart devices with high quality audio and video recording capabilities has promoted more employers to consider whether and to what extent they should permit employees to record communications and activities in the workplace," they explained. "Knowing one's conversation is being recorded may make one less inclined to be candid and open. Federal and state wiretap and other monitoring protection also are at risk of being violated."

But another risk employers need to consider, according to the Jackson Lewis attorneys, is the information captured in the recordings, particularly in certain regulated industries such as healthcare and financial services. "Information that can easily be captured on an employee's personal device can be subject to specific protections and is no longer secure in that environment, posing a significant risk to the company. Employers will have to carefully consider how to balance these competing interests as neither shows signs of letting up."

Labor Department to go big

The Labor Department is expected to unveil big changes on the regulatory front in 2016. Indeed, Bourgeacq said that the most consequential rulemakings on his radar this year will be at the DOL.

WHD's OT rules. There is widespread anticipation and a great deal of angst about the white collar exemption rules. "Once they are released—and don't expect too many pro-employer changes from the proposed rules—expect a mad compliance scramble in the workplace, and listen for collective action wage and hour attorneys to start sharpening their knives," Bourgeacq said.

Paul DeCamp agreed that in 2016, the main area of focus will be the final rule setting the new salary level, and possibly a new duties standard. The Solicitor has said that the rule should be effective by late 2016, and the Secretary suggests that the rule may come out in the spring. "Depending on the content of the rule, expect to see litigation over its validity," DeCamp said.

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>
> – Attorney Chris Bourgeacq

Persuader rule changes. Bourgeacq pointed in addition to changes to the so-called "Persuader Rule" that the Office of Labor-Management Standards released in early 2016. The long-awaited "persuader rule" would require certain disclosures related to third-party consultants (including attorneys) used by employers in crafting and delivering anti-union messages to workers. The final rule is effective April 25; the proposed changes will be applicable to arrangements, agreements, and payments made on or after July 1, 2016. And, as Bourgeacq suspected, the final rule could be problematic, not just for employers, but also for attorneys.

Open to interpretation. According to Bourgeacq, the final rule is "problematic on several fronts and will likely be pared down through inevitable court challenges." For starters, he suggested that the term "persuader activities" leaves too much open to interpretation. "Although the

rule clearly is directed primarily to organizing activities, the DOL repeatedly notes the rule encompasses 'collective bargaining' too," he observed. "Under the NLRA, collective bargaining encompasses substantially more than just organizing and contract negotiation and includes myriad activities dealing with the union after a CBA is in place—*e.g.*, side agreements, grievances, information requests. Will attorneys have to report activities related to collective bargaining in those contexts?"

Attorney client privilege problem. "The DOL pays lip service to observing and protecting attorney-client privilege, but the new rule presents a clear and substantial threat to the privilege," Bourgeacq continued. "The DOL explains, for example, that if an attorney engages in providing mixed legal advice and 'persuader' activities, the entire agreement between the attorney and client would have to be reported and included in a filing. No attorney or client wants detailed attorney-client billing records subject to request and review by the union, or to see that information posted on social media with misleading comments from union organizers."

Indirect persuader activities. In addition, Bourgeacq suggested that the Labor Department "has enlarged the scope of 'indirect' persuader activities well beyond any previous meanings." He queried whether drafting an employee handbook with the following provisions, all of which could indirectly implicate organizing and collective bargaining, requires reporting under LM-10 and LM-20: solicitation/distribution; Internet usage; discipline policies; business codes of conduct; dress codes; and confidentiality provisions.

"All of these topics, and certainly others as well, are serious matters with even more serious consequences," Bourgeacq said. "The vague and ambiguous contours of the new rule unfortunately leave too many activities open to debate as to whether they are covered or not covered, reportable or nonreportable."

Hobson's Choice. Noncompliance with reporting obligations under the LMDRA carries potential civil and criminal penalties, including fines and imprisonment. "The many ambiguities in the new rule could leave employers, their attorneys, and labor consultants guessing at their peril. Err on the side of not reporting, and you may break the law. Err on the side of reporting, and you could violate attorney-client privilege. In its 'solution' in search of a problem, the DOL thus has created a Hobson's Choice for employers and even more so for attorneys representing management in labor relations," concluded Bourgeacq.

New OSHA rules. Miller and Smith underscored a few developments on the regulatory horizon at OSHA:

- A final rule on the new crystalline silica standard was released on March 23. The standard will lower permissible exposure limits to crystalline silica and also will add new requirements such as medical surveillance and training.
- A final rule on the new walking working surfaces standard for general industry is expected this spring.
- A final rule on a proposed recordkeeping rule is expected this spring, which would require certain employers to submit injury and illness information to OSHA and would allow such records to be accessed by the public via on online database.
- Promulgation of a "clarification" to existing recordkeeping rules that would increase the statute of limitations on recordkeeping violations from six months to five years. This "clarification" is in response to a court case in which the D.C. Circuit held that OSHA cannot issue citations for discrete recordkeeping violations past the statutory six-month limitations period for issuing citations. If promulgated, the new rule will face significant legal challenge.

Federal contractors. Colaizzi and Schlabs outlined two developments that federal contractors should expect this year. In late 2016, the attorneys anticipate regulations implementing an executive order mandating that employees of federal contractors earn one hour of paid sick leave for every 30 hours worked, up to a maximum of seven days (56 hours per year). President Obama signed the executive order in September. "The permissible use of the sick leave extends beyond family members to anyone 'related by blood or affinity whose close association with the employee is the equivalent of a family relationship,'" the Howard & Sherman attorneys noted. "Employers cannot forfeit unused sick leave at the end of the year and must reinstate unused sick leave for employees rehired within 12 months of leaving employment. The executive order does not require that employers pay out unused sick leave at the end of employment, but state laws may require such payment."

Turning to the OFCCP, Colaizzi and Schlabs observed that practitioners anticipate pay discrimination and "pay gaps," particularly those based on race and sex, will be focal points of the OFCCP's 2016 enforcement strategy. "Given the agency's activities in 2014 and 2015, we also can expect an emphasis on identifying and remedying individual and systemic discrimination, particularly discrimination based on gender, race, and sexual orientation, and a focus on enforcement of Section 503 and VEVRAA regulations."

H-2B nonagricultural temporary workers. Neifach, Peck, Feinstein, Liao, and Jones noted that a major development in 2016 will be the DOL's "complete

revamp" of the H-2B nonagricultural temporary worker via the 2016 Department of Labor Appropriations Act, enacted on December 18, 2015. The new program closely follows the current H-2A agricultural worker regulations. The new regulations require pre-registration, submission of labor certifications before advertisements are completed, and direct applicants to apply through the state workforce agency. The 3/4ths guarantee was eliminated as well as other miscellaneous attestations. Newly added provisions relate to private wage surveys in prevailing wage determinations. The labor certifications must be submitted to the DOL between 60 and 75 days before the date of need, which previously was not a requirement. There were also changes to the procedure for workers in the seafood industry.

DHS proposal for high-skill workers

On the immigration front at the DHS, Neifach, Peck, Feinstein, Liao, and Jones pointed to proposed new regulations to benefit the movement and retention of high-skill workers, mostly in the United States in H-1B, O-1, TN, or L status. "As drafted, most of these proposals codify current practice and may have limited effect," they observed. Key changes are: DHS employment authorization documents will be available for certain individuals who have an approved immigration petition, no available visa number, and "compelling circumstances" for needing the work authorization; ability to keep all benefits of an immigrant worker petition even if withdrawn by the petitioning company; providing "grace periods" of authorized stay for certain nonimmigrants; allowing work authorization documents to remain valid for up to 180 days beyond the expiration if the extension was timely filed; and elimination of the 90-day processing timeframe for DHS to adjudicate work authorization documents.

The Jackson Lewis attorneys said that the DHS views these changes as codifying current practices. "Consequently, despite initially being announced in 2015 as a significant change allowing broad categories of individuals with approved I-140 petitions to obtain work authorization while awaiting a current visa, as written the proposed changes appear to be much more limited in effect."

About the Author

Pamela Wolf is an attorney and legal analyst who tracks and analyzes labor and employment law issues, court decisions, legislation and trends for *Employment Law Daily.* As a practicing attorney for 12 years, Wolf 's experience includes litigation of employment and civil rights matters.