
As the battle between Congress and the Obama Administration played out during 2014, federal agencies were very much at the center of the controversy, having taken actions that at least appeared to support an agenda that has failed to gain traction among lawmakers. Republican legislators who viewed several agency developments as aggressive, overreaching, and even unauthorized, have responded by, among other things, introducing proposed legislation to curb such activity.

In this second of a three-part Special Briefing on the year that has passed and the year ahead, Employment Law Daily focuses on the three federal agencies that most impact the labor and employment law scene: the Equal Employment Opportunity Commission, the National Labor Relations Board, and the Department of Labor—the “Big Three.” We’ve reached out to a panel of labor and employment management-side experts to get their take on the most important federal agency developments in 2014, the impact of those developments, the best practices they give rise to, and what we can expect in 2015.

Bold action at EEOC

The theme that has emerged from our panel of experts casts the EEOC as an agency that last year was both bold and determined to make inroads in federal courts—although not always very successfully. “In 2014, the EEOC took a fairly aggressive stance on emerging and developing issues, including pregnancy discrimination, religious accommodation, ADA claims, and LGBT issues,” observed Kelly Robinson, Member, Sherman & Howard, who specializes in labor and employment law, family law, and litigation, trials, and appeals, in the firm’s Denver office.

“The EEOC did not fare well in its litigation efforts in 2014, especially in its background check litigation,” Robinson continued. “For example, in EEOC v. Kaplan, the EEOC challenged the employer’s reliance on credit history as part of the hiring process and alleged the practice had an unlawful discriminatory impact on African-Americans. The Sixth Circuit upheld the district court’s decision to grant summary judgment to the employer in an opinion highly critical of the EEOC’s reliance on unreliable expert testimony.”

Robinson predicted that the words of the Sixth Circuit “will undoubtedly be quoted in many pleadings filed on behalf of employers for years to come: ‘The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself. The district court did not abuse its discretion in excluding [the expert’s] testimony.’”
On the sub-regulatory guidance front, in July 2014 the EEOC published comprehensive, updated guidance on pregnancy discrimination and related issues, including the intersections between pregnancy and the Americans with Disabilities Act, the Family and Medical Leave Act, and a section on the Patient Protection and Affordable Care Act’s requirement that employers provide “reasonable break time” for nursing mothers. Some experts saw the guidance, which had not been updated since 1983, as aggressive and very far-reaching.

In conjunction with its Enforcement Guidance on Pregnancy Discrimination and Related Issues, the EEOC released a Q&A document about the guidance, and a Fact Sheet for Small Businesses. According to the agency, much of the analysis in the enforcement guidance is “an update of longstanding EEOC policy.” But the guidance is also consistent with the agency’s current Strategic Enforcement Plan, which places national priority on certain emerging and developing issues, including accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act and the Pregnancy Discrimination Act.

Duty to accommodate? Patricia Pryor and Katharine Weber, both Shareholders in the Cincinnati, Ohio, office of Jackson Lewis P.C., noted that two commissioners dissented from what has become a controversial move by the commission. “With the adoption of the new guidance, the EEOC has arguably stepped dangerously close to treating pregnancy as a per se disability under the ADAAA without Congress having to amend the law and without the EEOC having to go through the process of public rule making,” the Jackson Lewis attorneys said.

The new guidance is an attempt to expand the reach of the PDA to a variety of circumstances that employers face, including “the looming issue of whether pregnant employees need to be accommodated,” according to Pryor and Weber. “Although the guidance recognized the tenet that pregnancy alone is not a disability, it concluded that many impairments that accompany pregnancy are disabilities and that, even without an accompanying impairment, pregnant employees must be treated the same as all other employees, including disabled employees or employees who are being accommodated because they are receiving worker’s compensation,” the attorneys explained. “Therefore, if an employer accommodates a disabled employee, the employer will need to similarly accommodate a pregnant employee who is similar in her ability or inability to work.”

Robinson pointed to the timing of the EEOC’s updated guidance—just two weeks after Supreme Court granted cert in Young v. UPS. There, the plaintiff brought suit because she was denied a “light duty” assignment during her pregnancy. Robinson explained, noting also that the Fourth Circuit upheld summary judgment in favor of the employer. “The EEOC issued updated guidance addressing an employer’s obligation to provide light duty to a pregnant worker, flatly rejecting the Fourth Circuit’s decision.”

Best practices. Pryor and Weber offered a few best practices in light of the EEOC’s updated pregnancy discrimination guidance: “As a result of this Guidance, employers should review and revise their policies. At the very least pregnancy and breast feeding/lactation should be added to EEO and harassment policies. Employers may also need to revise, or adjust the implementation of, their light duty and accommodation policies to include pregnant employees under certain circumstances, or alternatively suspend or remove those light duty policies until the Supreme Court provides guidance on the issue later this year.”

Wellness programs

In 2014, the EEOC made some moves on the employee wellness program front, but fell short of issuing what is much-needed guidance for employers, as evidenced by the comments of panelists who testified at a hearing before the Senate Health, Education, Labor and Pensions (HELP) Committee on Thursday, January 29.

First lawsuits filed in 2014. Joseph J. Lazzarotti, Shareholder in Jackson Lewis’ Morristown, New Jersey office, noted that in 2014, the EEOC brought its first lawsuits against employers challenging the design and operation of workplace wellness programs under the ADA and GINA. In its first two suits, EEOC v. Orion Energy Systems (E.D. Wis., August 20, 2014) and EEOC v. Flambeau, Inc. (W.D. Wis., October 1, 2014), the EEOC raised similar concerns about the programs—that “employees should not be made to face severe adverse consequence for not participating in certain activities that constitute a medical inquiry,” Lazzarotti explained. “Later in the year, the EEOC challenged a wellness program believed to be more mainstream and sponsored by a well-known employer,” the Jackson Lewis attorney continued. In EEOC v. Honeywell International, Inc. (D. Minn., October 27, 2014), “the EEOC echoed earlier claims and alleged that Honeywell’s program also violated

Pregnancy discrimination guidance
GINA’s proscription against providing inducements to an employee to obtain that employee’s family medical history.”

“None of the cases have been fully resolved (a federal district court denied the EEOC’s motion for a preliminary injunction in *Honeywell*), but in November, the EEOC announced plans to issue proposed regulations (scheduled for February 2015) that would promote “consistency between the ADA and HIPAA, as amended by the ACA,” and clarify that “employers who offer wellness programs are free to adopt a certain type of inducement without violating GINA,” Lazzarotti advised.

**Best practices.** What are the best practices that have emerged thus far for employers grappling with wellness programs in the absence of EEOC guidance? “For many employers, it may be too late to make changes to conform their programs to some of the EEOC’s concerns, but they should watch for the EEOC’s proposed regulations,” Lazzarotti suggested. “Companies that have kept their incentive structures within the limitations of the Affordable Care Act may be at less risk now given the recent EEOC announcement of its intent concerning proposed regulations. Companies with more aggressive structures may want to revisit their programs. In either event, we expect 2015 will provide employers with more insight concerning the legal risks raised by their wellness programs, and how to minimize them.”

**The conciliation question**

Much of the commentary of our experts focused on the EEOC’s litigation activity. And clearly the agency’s obligation to conciliate before filing suit is one of the most important EEOC issues on the minds of labor and employment practitioners. Richard Cohen, Shareholder in Jackson Lewis’ Phoenix office, and Paul Patten, Shareholder in the firm’s Chicago office, suggested that one of the most important developments at the EEOC was the Seventh Circuit’s agreement (in late 2013) with the agency’s argument that its failure to engage in conciliation efforts could not be an affirmative defense against an EEOC lawsuit. “In *EEOC v. Mach Mining, LLC*, the Seventh Circuit became the first appellate court to provide this level of conciliation deference to the EEOC,” they pointed out.

In June 2014, the Supreme Court granted Mach Mining’s *petition for cert.* “If the EEOC prevails, it will receive the same level of deference in all jurisdictions, and the EEOC will have the leeway to ignore the most reasonable requests for information during conciliation and make demands that are not supported by the facts,” according to the Cohen and Patten. “Employers have reason to be concerned that the EEOC is hostile to being accountable for its conciliation efforts.”

Conciliation can be an effective way to reach an early and efficient resolution with the EEOC. Looking at the other side of the equation, the Jackson Lewis attorneys said that employees, too, have reason to be concerned. “To the extent matters are not conciliated because the EEOC does not commit time or share information, matters will be pushed to litigation and relief delayed or never obtained for employees.”

“Employers have reason to be concerned that the EEOC is hostile to being accountable for its conciliation efforts.”

– Jackson Lewis Shareholders Richard Cohen and Paul Patten

**Best practices.** Cohen and Patten shared some best practices related to the conciliation question. “Regardless of the Supreme Court’s ruling, employers need to understand that the EEOC does not see conciliation as the equivalent of mediation.” They suggested that currently, employers should be proactive during the investigation and before the EEOC issues a cause finding:

- Engage the EEOC during the agency’s investigation to obtain as much information and insight from the EEOC as possible.
- Highlight facts that favor the defense and flaws that the EEOC/charging parties face.

“By doing so in conciliation, employers will be in a position to have a better understanding of the true value of the matter, and perhaps the EEOC will be more aware of deficiencies it faces,” Cohen and Patton explained. “Additionally, if the employer knows that the matter is a ‘problem,’ it should consider seeking a pre-determination settlement before the EEOC has a cause finding to stand behind.”
Consent decrees

Cohen and Patten pointed to another important EEOC development that should be on the radar of every labor and employment practitioner. “For the first time in its history, the EEOC was successful in obtaining monetary relief via contempt proceedings based on an alleged violation of a consent decree’s injunctive language,” they said. “Such contempt proceedings give the EEOC and employees the advantage of obtaining relief that would otherwise require the employees to file a charge and wait for the EEOC’s administrative process to run its course.” Employers ought to carefully consider their settlement agreements reached with the EEOC.

Best practices. In light of this development, what should practitioners and employers keep in mind? “Although the EEOC is often resistant, employers should seek to limit injunctive language so that the language has a nexus with the alleged violation,” Cohen and Patton recommended. “Once the agreement is executed, employers need to be diligent about compliance. In the event of non-compliance, employers who quickly seek to remedy the non-compliance are more likely to keep the EEOC from going directly to court.”

Section 707(a) “resistance.” On yet another front, “the EEOC acted boldly and creatively in 2014 with the apparent goal of increasing its already heavy charge volume,” Cohen and Patton observed, pointing to Title VII Section 707(a), which “permits the government to file lawsuits against a person or employer who engages in a pattern or practice of resistance to the rights secured under Title VII.” In the wake of a meaningful Section 707(a) settlement in 2013, the Jackson Lewis attorneys said, the EEOC invoked “this rarely used” Title VII provision again in 2014.

“In one lawsuit, the EEOC claimed that an employer’s typical severance agreement language deterred former employees from filing a charge,” Cohen and Patton explained. “In another lawsuit, despite the lack of explicit language cited by the EEOC, the EEOC claimed an arbitration agreement prohibited employees from filing charges.” The EEOC’s severance agreement challenge was dismissed and the agency has appealed, while the arbitration lawsuit is still pending. “Contrary to the EEOC’s beliefs, these lawsuits will likely have little impact on employees or former employees,” according to Cohen and Patton. “Management attorneys see plenty of charges filed by employees and former employees who have signed similar agreements. The lawsuits are not helpful in clarifying language that would be acceptable. The EEOC has given little guidance on how these agreements should be worded to pass the EEOC’s muster.”

Best practices. Cohen and Patten offered these tips stemming from the EEOC’s position on severance and arbitration agreements. “Employers should review severance and arbitration agreements with counsel while the courts decide whether the EEOC’s novel theories have any merit. Employers should also be aware that the ‘resistance’ language in 707(a) is broad in the EEOC’s eyes and the EEOC may use 707(a) to target other employment practices.”

Systemic focus

Although labor and employment attorneys are well aware of the EEOC’s systemic litigation program, Robinson underscored some of the 2014 program statistics that are cause for concern. The EEOC has continued to expand its focus on systemic discrimination, which includes pattern-or-practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company or geographic location, she noted.

“While the EEOC completed fewer systemic investigations in 2014 than it did in 2013 (260 vs. 300), it issued reasonable cause determinations in 45 percent of the cases,” Robinson pointed out. “This statistic is staggering considering the EEOC historically has issued reasonable cause findings in less than 5 percent of the charges filed. This should be particularly alarming to employers who find themselves facing a systemic discrimination investigation, which can start with an individual charge that the EEOC expands into a systemic investigation.”

Robinson also found it alarming that the agency has “doubled its subpoena actions, which rose from 17 to 34, as many courts endorsed the EEOC’s subpoena power to conduct far-reaching, expansive investigations.”

Backlash from courts

“The biggest development on the EEOC front is the ongoing backlash the agency has received from the courts,” according to Chris Bourgeacq, General Attorney – Labor/HR, for AT&T Services, Inc, and Member of Employment Law Daily’s Editorial Advisory Board. “While the EEOC remains undeterred in pushing and expanding its Strategic Enforcement Plan, the success of its efforts has been less than stellar,” he said, citing for example, the fact that “the EEOC’s attempts to enforce its restrictions on background checks has failed in several courts.”
**On the horizon for 2015**

As to what labor and employment attorneys can expect from the EEOC in 2015, our experts predicted that the agency will continue its push to make strides in the areas of sex discrimination, wellness programs, disparate impact discrimination, and disability discrimination. We can also expect the trend of increasingly aggressive agency investigations to continue.

**Sex discrimination.** For their 2015 prediction, Pryor and Weber had this to say: “The EEOC will continue to battle against the administration’s favorite villain, the ‘war on women.’ We can expect to see additional enforcement efforts by the EEOC in cases where the charging party is pregnant or a caregiver. In many circumstances, the EEOC will expect employers to offer accommodations for caregivers or expectant mothers that allow the employee to take care of family needs and still get paid regardless of how the employer treats other leave takers. This push compliments the DOL’s online #Lead on Leave campaign. Employers can expect to receive an influx of telework and flexible scheduling requests.”

**Wellness programs.** On the wellness program front, Lazzarotti noted that if the “EEOC moves ahead and issues Enforcement Guidance or proposed regulations on wellness programs, it will be big news.” He suggested in addition, that “employers also will have to watch closely for other lawsuits challenging the same or different wellness plan designs that were at issue in the cases filed during 2014.”

**Disparate impact discrimination.** Cohen and Patten observed that “after issuing criminal background guidance in 2012 and filing two lawsuits in 2013, the EEOC did not make headlines with new criminal background challenges in 2014.” The two Jackson Lewis lawyers predicted however, that the agency “will continue to investigate and litigate matters where the EEOC believes an employer’s practices have had a disparate impact against a protected group.”

When the EEOC litigates under a disparate impact theory, it can dispense of the need to prove intent to discriminate, they explained. “Thus, the EEOC will be examining application tests or assessments, bright line hiring criteria, and objective compensation decisions to determine if those practices have a disparate impact. Often, the EEOC does not have to rely on a charging party to bring such practices to its attention because when defending charges, employers often justify their decisions based on such objective rules. Large employers are particularly vulnerable because ‘big numbers are bad numbers.’”

Accordingly, Cohen and Patterson recommended that “employers should periodically review objective rules and criteria to see if those rules are truly job-related and justified by solid business needs, and consider applying criteria in a flexible manner.”

“In many circumstances, the EEOC will expect employers to offer accommodations for caregivers or expectant mothers that allow the employee to take care of family needs and still get paid regardless of how the employer treats other leave takers.”

– Jackson Lewis Shareholders Patricia Pryor and Katharine Weber

**Disability discrimination.** Turning to the ADA, the two Jackson Lewis attorneys noted that unlike Title VII and the ADEA, courts have yet to give clarity to the disability discrimination statute. Until the ADAAA was passed in 2008, many cases were simply disposed based on a plaintiff’s failure to show disability. “The EEOC will continue to exploit this uncertainty and mold the case law in favor of broad coverage for employees,” Cohen and Patterson suggested. “As in the past, the EEOC will scrutinize employers who follow bright line maximum leave policies, deny leave to employees with impairments because the employees are not FMLA eligible, and insist that employees be 100 percent healed before they return to work. There are also signs that the EEOC will be looking at large employers’ treatment of certain classic disabilities, pushing those employers to be more liberal in providing costly assistive devices to applicants and employees.”

**Aggressive investigations.** Cohen and Patterson also forecast continued aggressive EEOC investigations. “This is an agency that believes in its mission and thinks
it can make a difference in the lives of Americans,” they pointed out. “Now, more than ever, the EEOC is opening ADEA and EPA directed investigations which do not require the filing of a charge, securing charges that make ‘class’ allegations, and if the EEOC gets a sniff of something that might be systemic, it will broaden its investigation and require employers to provide nationwide information.”

The two attorneys acknowledged that the EEOC sometimes “runs into a buzz saw and courts refuse to enforce an EEOC subpoena, as the Eleventh Circuit did last year in the EEOC’s lawsuit against Royal Caribbean Cruise Lines, Ltd.” Nonetheless, the agency “seems more than willing to roll the dice with courts who generally defer to the EEOC’s request for information in an investigation,” Cohen and Patten observed.

High-profile, controversial NLRB

As Howard Bloom, Shareholder in the Boston office of Jackson Lewis, noted, “The NLRB was in the news quite often during 2014.” It’s probably fair to say that the NLRB, among the three agencies always on the minds of labor and employment attorneys, was the one that drew the most controversy in 2014. “No federal agency has impacted employers in 2014 as much as the NLRB,” according to Bourgeacq.

Most important developments

Bloom pegged these as the most significant developments in 2014 at the high-profile federal agency:

- Withdrawal of the 2011-2012 final representation case rule after a D.C. District Court ruled it invalid.
- Re-issuance of the final representation case rule (effective in April, 2015).
- Decision not to seek Supreme Court review of two circuit court decisions invalidating the NLRB’s Notice Posting Rule, which would have required most private sector employers to post a notice of employee rights in the workplace.
- The Supreme Court’s Noel Canning decision rendering invalid (temporarily) over 400 Board decisions.
- Triple Play Sports Bar & Grille decision, in which the Board ruled that an employee’s selection of the “Like” option under a former employee’s initial Facebook status update was “an expression of approval” of the update it followed (and therefore part of concerted activity)
- ConAgra Foods Inc. decision, where the NLRB concluded that, for purposes of an employer’s rule regulating employee solicitation in the workplace, union solicitation does not occur unless the employee doing the alleged solicitation has a union card with him/her at the time. The decision also reaffirmed that “union talk” does not constitute “solicitation.”
- Bergdorf Goodman decision, in which the Board held that a petitioned-for “micro” bargaining unit consisting of women’s shoe sales associates working in two areas within a store, which followed no administrative or operational lines set by the store, was inappropriate under Specialty Healthcare, 357 NLRB No. 83 (2011).
- Pacific Lutheran University decision, where the NLRB adopted new standards for determining (1) whether to exercise jurisdiction over self-identified religious colleges and universities under the U.S. Supreme Court’s decision in NLRB v. Catholic Bishop, 440 U.S. 490 (1979), and (2) the managerial status of faculty at any private college or university pursuant to the U.S. Supreme Court’s decision in NLRB v. Yeshiva University, 444 U.S. 672 (1980)
- Purple Communications decision, in which the Board decreed that employers who permit employees to use their email systems must allow employees personal use (including union organizing and other protected-concerted activity) during their non-work time.
- “Activist approach” to the issue of “joint employer,” resulting in several unfair labor practice complaints being issued against McDonald’s USA in cases where the alleged unlawful conduct was committed by a McDonald’s franchisee. There also is a case pending at the Board (Browning-Ferris Industries) in which the Board is expected to “liberalize” the “test” for determination whether two entities are joint employers for purposes of, for example, unfair labor practice liability.
- The NLRB’s continued focus on Section 7 protected-concerted activity on social media sites and in the workplace and in connection with the Board’s review of handbook rules.

Email access. V.W. Bernie Siebert, Member at Howard & Sherman’s Denver office and on Employment Law Daily’s Advisory Board, echoed many of the developments identified by Bloom as those most important at the NLRB. “There was a flurry of decisions issued by the NLRB at the end of the term of Member Schiffer in mid-December 2014,” he observed, pointing to the Purple Communications ruling as the most important.

Fleshing out the details of the case, Siebert explained that “the Board specifically ruled that employees have an absolute right to the use of their employer’s email
system for organizing purposes and held that the earlier decision of the Board in Register Guard...was 'clearly incorrect.'” In Register Guard, the Board ruled that an employer’s rule restricting employee access to its computer and email system for non-business use did not violate the Act so long as the rule was not applied discriminatorily, the Sherman & Howard attorney continued. “The Board reasoned that the property right of the employer in its email system was analogous to telephones, copiers, public address systems, and bulletin boards, all of which the Board had held that employees had no right to use.”

According to Siebert, “Purple Communications turned decades of Board law and most certainly Register Guard on their heads.” In so doing, the “Board majority noted that the decision in Register Guard ‘undervalued employees’ core Section 7 rights,’ failed to perceive the importance of email as a means by which employees engage in protected communications’ and ‘placed more weight on the Board’s equipment decisions than those precedents can bear,” Siebert said. “The Board further ‘qualified’ its decision in a meaningless manner by stating that an employer could rebut the presumption of absolute employee rights to the employer’s email system if it could demonstrate ‘that special circumstances necessary to maintain production or discipline justify restricting its employees’ rights.’”

**Deferral to arbitration.** Pointing to another decision issued at the end of Member Schiffer’s term, Siebert noted that in Babcock & Wilcox Construction Co., Inc., “the Board rewrote the requirements of Spielberg Mfg Co. ...that in order for the Board to defer to the decision of an arbitrator, ‘the party urging deferral shows that (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award.’”

“In so ruling, Siebert continued, “the Board majority elected to ignore the language in Section 10(c) of the Act that states, as do most collective bargaining agreements, that there can be no reinstatement or backpay whenever cause exists for the employees’ suspension or discharge.”

**Faculty at religious institutions.** Like Bloom, Siebert included on his list another of the decisions released at the end of Member Schiffer’s term—Pacific Lutheran University. That decision “modified into non-existence the decision of the Supreme Court in NLRB v. Catholic Bishop of Chicago...when it announced its new test for determining whether to assert jurisdiction over faculty members at a religious college or university,” he explained. “Under the new test, the college or university must first prove that ‘it holds itself out as providing a religious educational environment,’ and second, that the petitioned-for faculty perform a specific role ‘in creating or maintaining the university’s religious educational environment.’”

**What are the impacts of these important NLRB developments?** “At bottom, all of these developments potentially will make it more difficult for employers to operate and to remain union-free,” according to Bloom. As for employees, “All of these decisions (except for Bergdorf Goodman) increase the likelihood that employees who are interested in being represented by a union will be successful, unless their employer has taken preventive steps,” he said—we’ll take a look at those steps in the next section.

Bloom explained the ways in which 2014 developments at the NLRB affect employers:

- The representation case rules, which become effective in April 2015 (if they are not enjoined), because they greatly decrease the amount of time between the filing date of a union petition and the election date and give unions earlier and more detailed access to employee contact information, should make it easier for unions to organize unprepared non-union employers. As a result, we should expect a significant increase in union activity.
- Triple Play Sports Bar & Grille will require employers to be even more vigilant and devote more time and resources to investigating on-line activity before taking action based on that activity.
- ConAgra Foods Inc. will significantly lessen the scope of an employer’s solicitation rule, and therefore will
give employees license to engage in additional union activities at work.

- **Bergdorff Goodman** shows that, although it remains extremely difficult to add job classifications to a bargaining unit, the decision in effect adopts the more liberal definition of joint employer. Employers should familiarize themselves with the General Counsel’s position, which likely will be adopted by the Board, and take steps to minimize the possibility of a joint-employer finding in their organizations.

- **Pacific Lutheran** will impact faculty at all private colleges and universities. The NLRB has made it more difficult for all private colleges and universities to prove their faculty members are “managerial” employees and therefore excluded from coverage by the NLRA. With respect to religious institutions, the NLRB has made it more difficult for those institutions to prove that they are exempt from NLRA coverage.

- **Purple Communications** will result in decreased productivity and easier on-the-job employee organizing. There is no foolproof way for an employer to monitor whether an employee was on non-work time when he or she sent or received a personal email seeking or discussing organizing.

- As to joint employer issues, in his brief to the NLRB in the **Browning-Ferris Industries** case, the NLRB’s General Counsel argued for the Board to adopt a more liberal definition of joint employer. Employers should familiarize themselves with the General Counsel’s position, which likely will be adopted by the Board, and take steps to minimize the possibility of a joint-employer finding in their organizations.

- On the employer handbook front, because new decisions are issued regularly by the Board about handbook rules and policies, employers should have their handbooks reviewed for NLRA issues on a yearly basis at a minimum.

Siebert made this observation on the **Purple Communications** decision: “The impact of this decision is both immediate and far-reaching. Immediate as it invalidates any employer rule restricting employee access to its email system for personal use and far-reaching as it elevates employees’ Section 7 rights above the property rights of the employer. The decision in effect adopts the dissenting opinion in **Register Guard** with a few added employee benefits.”

“The NLRB’s actions in 2014, while favoring unions, don’t automatically translate to favoring employees,” Bourgeacq suggested. “Increased unionization, particularly of smaller businesses, could very well result in some employers closing shop.” He said that employers “can expect to spend more expense dollars on attorneys, rather than on growing their business, as they have to revisit and revise existing social media and email policies, prepare for unreasonably expedited union elections, and deal with micromanagement of their business from an agency in Washington, D.C., that appears disconnected with mom-and-pop shops outside the beltway.”

**Best practices.** What are the best practices for employers based on NLRB developments in 2014? “Prepare, prepare, prepare!” Bloom stressed. “Knowing that the impact of these developments can be a unionized workforce, employers should plan now,” he said, offering a few tips outlined below.

**Quickie elections.** As to the new representation case rule, Bloom had this to say: “Given the distinct probability that implementation of the new rule in April 2015 will result in quicker elections and thus, less time for employers to communicate with their employees about unions once a representation petition is filed by a union at the NLRB, employers should be preparing now for the advent of the rule.” How can they do that? Bloom offered these examples:

- develop a strategic, company-wide labor relations plan;
- train managers/supervisors before the rule is implemented;
- eliminate issues immediately;
- conduct critical bargaining unit and supervisory analyses to establish the best units from an employer perspective in light of recent NLRB decisions;
- prepare a “break the glass kit” to be used in the event of union activity; and
- identify and train a rapid response team.

In addition, Bloom said, employers should develop representation case litigation plans. “The employer will be required to file a position statement concerning unit issues and other matters within days of the NLRB petition being filed,” he explained. “Organizations must think strategically now and prepare information in advance.”

**Email use.** In the wake of **Purple Communications**, Bloom suggested that “employers who allow employees to access email must rewrite their email use policies.” He pointed to the “likelihood that there will be increased use of email systems for union and protected concerted activity,” and added that “employers also must review their email monitoring policies and train their supervisors about the new policies.”

**Religious institutions.** Turning to **Pacific Lutheran University**, Bloom said the case “serves as a road map with respect to two issues—whether an institution is a religious institution that is exempt from the provisions of the NLRA and whether (with respect to any college or institute) a union at the NLRB will impact faculty at all private colleges and universities. The NLRB has made it more difficult for all private colleges and universities to prove their faculty members are “managerial” employees and therefore excluded from coverage by the NLRA. With respect to religious institutions, the NLRB has made it more difficult for those institutions to prove that they are exempt from NLRA coverage.”
university) faculty members are excluded from coverage of the NLRA as so-called ‘managerial employees.’” He offered this tip: “Schools that wish to enhance the possibility that their faculty members will be excluded from unionizing as managerial should review the responsibilities of those faculty members immediately to determine whether they comply with the Pacific Lutheran University guidelines. If faculty members do not, schools should revise those responsibilities in accordance with the teachings of Pacific Lutheran. Similarly, religious institutions should audit whether they would be considered exempt from coverage under the NLRA pursuant to Pacific Lutheran if a union ever attempted to organize their employees. If the answer is no, steps should be taken immediately to position the institution within the guidelines that are detailed in that decision.”

“Like” on social media. As to Triple Play Sports Bar & Grille, Bloom suggested that “before deciding whether to take action against an employee as a result of an on-line post or posts, employers must conduct thorough investigations of employee conduct on social media (including, now, whether one employee has ‘liked’ a work-related complaint of a coworker) and in the workplace to determine whether protected concerted activity is involved.”

In light of ConAgra Foods Inc., Bloom recommended that “employers should train their supervisors about what conduct is and is not covered by their solicitation rules.” He said that in many cases, “employers will have to amend their rules to make sure it is clear what conduct is prohibited.”

Finally, pointing to Bergdorf Goodman, Bloom said “employers should review the decision carefully to determine whether they might be able to structure their workplaces so as to be covered by this decision.”

The NLRB in 2015

What can we expect from the NLRB in calendar year 2015? “We should expect the NLRB to begin widespread public outreach about its new representation case rules with the hope (on the part of the NLRB) that doing so will energize unions and non-union employees to engage in union activity,” according to Bloom.

Long-awaited decisions. “We also should expect issuance (perhaps any day now) of two long-awaited decisions—Northwestern University, involving whether scholarship student-athletes are employees under the NLRA, and Browning-Ferris Industries.” Bloom reiterated the expectation that the Board will issue a decision that makes it easier for it to find joint-employer status.

“That decision will have a particularly negative effect on franchisors and franchisees,” he warned.

Siebert, too, pointed to the highly anticipated decisions in Northwestern University and Browning-Ferris, which he said were generally expected to have been part of the flurry of decisions at the end of Member Schiffer’s term. He noted that the Northwestern case presents the issue of whether student athletes (here, football players) are employees who may vote in a union election, calling the implications of the case “undeniably far-reaching.” He also underscored that Browning-Ferris presents the issue of exactly what is the proper test for determining joint-employer status, as well as the General Counsel’s issuance of unfair labor practice complaints against McDonald’s USA and many of its franchisees, alleging that the fast-food giant is a joint employer in the alleged unfair labor practices of the franchisees.

“Employers should be careful about misclassification and compensation issues in 2015, as DOL officials have publicly stated their intention to focus on these areas in particular.”

– Sherman & Howard Member

Andrew Volin

Finally, Bloom forecasted “regular decisions on protected concerted activity and handbook rules.”

Low-profile at the DOL but still busy

Of the three federal agencies under discussion, the DOL appears to have maintained the lowest profile in 2014. “The DOL largely remained under the radar during 2014, or at least avoided the same degree of press as some of its sister agencies,” Bourgeacq observed. “That doesn’t mean, though, there is nothing going on in Washington.”

Indeed, despite a relatively low profile in 2014, there were a number of developments at the DOL,
some of which already have or will have a substantial impact on the regulated community. Perhaps the most sweeping regulatory changes fall on the shoulders of government contractors.

Sherman & Howard Member Andrew Volin, pointed to a four-part strategic plan announced by the DOL in 2014. Covering 2014-2018, the plan “consists of broad goals involving compensation, workplace safety, high quality work-life environments, and retirement and health benefits,” he noted.

**Wage and Hour Division**

The plan foreshadowed changes at the Wage and Hour Division. “One goal in particular, involving compensation, is likely to impact all types of employers, as the DOL is expected to revise regulations about the so-called white collar exemptions from the overtime requirements of the Fair Labor Standards Act,” Volin said. “FLSA litigation generally continued to be a hot topic for employers, as collective actions were brought challenging off-the-clock work and improper exemption claims. The DOL asserted that many companies misclassify workers as independent contractors rather than employees.”

Paul DeCamp, Shareholder in Jackson Lewis’ Washington, D.C., Region office and national leader of the firm’s Wage and Hour Practice Group, outlined what he saw as the DOL’s three most significant wage and hour accomplishments in 2014:

- Beginning work on revising the Part 541 white-collar overtime exemption regulations in accordance with the president’s March 13, 2014, memorandum to Secretary Perez;
- Issuing regulations implementing the president’s Executive Order raising the minimum wage for government contractors; and
- Removing from the regulatory agenda the so-called “Right to Know” regulation, which would have required employers to conduct an analysis of the status of any workers who do not receive minimum wage or overtime and to provide that analysis to the workers, “a requirement that would have been inordinately expensive for employers to implement,” according to DeCamp.

**Best practices.** In light of wage and hour developments, Volin offer this practice tip: “Employers should be careful about misclassification and compensation issues in 2015, as DOL officials have publicly stated their intention to focus on these areas in particular.”

### Regulatory changes for federal contractors

F. Christopher Chrisbens, Of Counsel in Jackson Lewis’ Denver office and member of the firm’s Affirmative Action Practice Group, underscored the importance of a pair of regulatory revisions. “For federal contractors, the most significant Agency development of 2014 was revision of affirmative action regulations implementing the Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act of 1973 (Section 503),” he said. “The Regulations had not been revised since the 1970s and now include many new obligations and analytics. These include a 7-percent utilization goal for individuals with disabilities (IWD); an annual veteran hiring benchmark; documentation of veteran and IWD outreach assessment; and collection of veteran and IWD applicant/hire data.”

Chrisbens also found significant the OFCCP’s use of a new audit Scheduling Letter in October 2014. “The new letter requests significantly more information and data from contractors at the outset of an OFCCP audit,” he explained. “In addition to data and information required by the revised VEVRAA and Section 503 Regulations, contractors must now provide detailed compensation data for each plan employee. This data includes not only base pay but separately-identified ‘bonuses, incentives, commissions, merit increases, locality pay or overtime.’ Additionally, contractors must now supply employment activity data by sub-minority group, thus allowing the OFCCP to conduct adverse impact analyses for individual minority and non-minority groups.”

**Sweeping impact.** To provide some perspective on the impact of these regulatory changes, Chrisbens said: “It is not an overstatement to say that the revised regulations have required contractors to update nearly every electronic data tracking system, form, and process that relates to affirmative action for protected veterans and IWDs. Contractors will need to continue to adapt as we learn more about how the OFCCP will enforce these regulations in 2015.”

**Best practices.** Chrisbens offered a few best practices stemming from these developments:

- Contractors should pay particular attention to how the OFCCP is interpreting these regulations in current audits.
- More than ever, contractors should be proactively analyzing their data, under privilege, before providing it to the OFCCP.
OSHA

Bourgeaq pointed to the Occupational Safety and Health Administration (OSHA), which he said continues to be burdened with more and more responsibility for administering dozens of new whistleblower laws. “In congressional hearings last year, OSHA officials asked lawmakers for expanded authority in handling whistleblower complaints—e.g., quasi-injunctive power, expanded remedial authority, and changes to statutes of limitations,” he noted. “Don’t expect Congress to accommodate those requests any time soon.”

H-2B temporary foreign workers

Sean Hanagan, Jackson Lewis Shareholder in the firm’s White Plains, N.Y., office, who heads up the firm’s Immigration Practice Group, shed some light on what he considers the most significant developments at the DOL pertaining to employers that apply for DOL approval to petition for H-2B temporary foreign workers.

“The Third Circuit on December 5, 2014, vacated Department of Labor (DOL) regulations at 20 CFR Sec. 655.10(f) and the 2009 H-2B Wage Guidance, which authorized employers to use employer-provided wage surveys for prevailing wage determinations (PWDs) for H-2B workers, on the ground that it was arbitrary and capricious and in violation of the Administrative Procedure Act (APA),” Hanagan noted. “In response to the Third Circuit decision, the DOL announced that, effective December 8, 2014, it will no longer issue H-2B PWDs based on employer-provided wage surveys.”

The DOL also said that pending PWDs seeking to utilize employer-provided surveys will be given the appropriate Occupational Employment Statistics (OES) wage for the requested occupation, Hanagan added. The agency also clarified that “employers whose prevailing wage determination was based an employer-provided wage survey, but whose H-2B Applications for Temporary Employment Certification have not yet resulted in a final determination by the Chicago National Processing Center, will be notified of their new wage obligation along with their certification letters.”

Hanagan also pointed to the Board of Alien Labor Certification Appeals (BALCA) decision in Island Holdings that prohibited the agency from issuing retroactively applicable prevailing wage determinations. The decision is being “reconsidered” by the Secretary of Labor, which he took to mean that the precedent prohibition will likely be reversed.

Pointing to a third significant development, the Jackson Lewis attorney noted that on December 19, Florida Legal Services, representing the plaintiff in Perez v. Perez, sued the agency, asking Northern District of Florida Judge Rogers for injunctive and declaratory relief that the entire 2008 regulatory framework governing the DOL’s issuance of prevailing wage determinations should be enjoined until Judge Rogers’ decision in Bayou Landscaping can be reviewed (and potentially reversed). In Bayou Landscaping, Judge Rogers held that the “DOL doesn’t have the authority to amend the H-2B regulatory framework without DHS authorization,” Hanagan said.

A fourth development on Hanagan’s radar was the DOL’s announcement on December 23 that approved prevailing wage determinations at “private wage survey” wages would be replaced at the labor certification stage with an OES Tier III or Davis-Bacon Act (DBA) wage depending upon whether the employer filed a request for reconsideration.

“The most significant activity from DOL in 2015 should be the issuance of revised Part 541 white-collar overtime exemption regulations.”

– Jackson Lewis Shareholder Paul DeCamp

In the final development noted by Hanagan, the DOL, also on December 23, filed an unopposed motion to consolidate the TRO and preliminary injunction hearing in Perez v. Perez with a full evidentiary hearing on the merits in Judge Rogers’ court, and requested expedited briefing for completion by February 3, 2015.

What’s the bottom line? “All employers that use the H-2B temporary foreign worker process (66,000 visas per year) have a situation where the current state of the law prohibits the DOL from doing what the DOL has now proposed—to replace the approved prevailing wage determination with a OES Tier III (or DBA) wage at the labor certification approval,” according to Hanagan. He anticipates that the Secretary of Labor will change that
law, adding that the same law is being independently challenged in Florida.

What are the impacts of these developments? "Unless the agency is compelled to change course, employers will need to pay the OES Tier III wage (or DBA wage) irrespective of the approved wage determination or advertised wage rate," Hanagan said. The attorney laid out the big picture: "The agency is compelling employers to pay artificially high wages because the agency failed to follow the Administrative Procedures Act in promulgating the 2008 wage rule. In other words, the agency is increasing labor costs associated with temporary foreign employees from 23 to 34 percent in most cases because DOL violated federal law."

Best practices. Hanagan offered this best practice suggestion: "Employers should become political actors—because only by identifying how minor changes, re-writes, and policy reconsideration economically impacts users of the programming provided can the DOL become much more sensitive to the needs of the business community.”

DOL in 2015

We asked our experts what we can expect from the DOL in 2015. Here's what they had to say.

White-collar overtime regs (Paul DeCamp): “The most significant activity from DOL in 2015 should be the issuance of revised Part 541 white-collar overtime exemption regulations. That pending regulatory item is the single most important initiative at DOL from the standpoint of employers. Given the results of the 2014 federal elections, we could be in for a very interesting showdown between Congress and the Executive Branch over these regulations, which could spill over into appropriations bills and other collateral matters.”

OFCCP 'blitz' (F. Christopher Chrisbens): “For 2015, the Agency will continue its run of comprehensive regulatory revision. According to its regulatory agenda, the OFCCP intends to update affirmative action requirements for construction contractors, revise its sex discrimination guidelines, and implement the Equal Pay Report, among other tasks. For federal contractors, the coming year will also be one for learning and adapting to how the OFCCP will use its updated tools: more robust VEVRAA and Section 503 Regulations, a demanding new Scheduling Letter, as well as the president’s Executive Orders. The manner in which the OFCCP and contractors interpret these requirements and resolve audit issues may well set precedent having lasting effects for years to come. Into 2015, we expect the OFCCP to aggressively pursue its analytic agenda in support of Director Shiu’s belief that ‘what gets measured gets done,’ particularly in compensation and compensation-related hiring issues such as ‘steering.’ We foresee the blitz of new obligations may provide the OFCCP with opportunities to improve its audit statistics by picking off ‘low-hanging fruit’ contractors which have not proactively adapted to this new environment.”

ERISA (Joy M. Napier-Joyce, Office Managing Shareholder of Jackson Lewis’s Baltimore office and leader of the firm’s Employee Benefits Practice Group): “The Employee Benefit Security Administration division of the DOL has a number of important initiatives on its agenda for 2015. It is expected that the DOL will continue to increase audit activity on ERISA health and welfare plans, including a focus on compliance with various mandates under the ACA. We also expect to receive the long-awaited proposed rule on fiduciary status under ERISA. It is widely thought that this rule will broaden the concept of who is a fiduciary under ERISA and define what is properly considered ‘investment advice.’ Other initiatives are expected to center on participant-disclosure requirements under qualified retirement plans.”

Persuader rules (Chris Bourgeacq): The new “Persuader Rules” revisions are expected sometime in 2015. The proposed revision would revise the DOL’s interpretation of Sec. 203(c) of the Labor-Management Reporting and Disclosure Act (LMRDA), which creates an “advice” exemption from reporting requirements that apply to employers and other persons related to persuasion of employees about their rights to organize and bargain collectively. The revised interpretation would narrow the scope of the advice exemption. “Those rules, if implemented as drafted, will chill employers’ ability to respond to union organizing efforts,” according to Bourgeacq.

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