Foley & Foley, PC

Your Workplace & Our Solutions

A Risk Management Toolbox for Employers

The Past, the Present, and the Future of

Massachusetts and Federal Employment Law

2016 Edition

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OUR MISSION

Risk Management Through Well-Informed Decisions and Best Practices

For employers, risk management is a constant and creates the need to continually monitor employment laws and regulations. Our mission is to help reduce that burden for you.

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I. A Stroll Down Memory Lane

Employment law continues to be dynamic and fluid! The past four years have seen tremendous change and more significant change is on the horizon.

Here is a checklist that will help you determine if you have kept pace with some of the recent developments in the law (your compliance obligations):

2010 Hot Topics:

- ☐ COBRA, the ADA, and the FMLA all received significant make-overs;
- ☐ Discrimination laws in Massachusetts were expanded to encompass even the smallest employers;
- ☐ Employers confront treble damages under Massachusetts Wage and Hour laws;
- ☐ New leave rights for military families;
- ☐ The impact of the Lily Ledbetter Fair Pay Act;
- ☐ Caregiver discrimination;
- ☐ The Employee Free Choice Act;
- ☐ Written Information Security Plans (WISP) mandated to protect personal information about a Massachusetts resident;
- ☐ Changes to the laws governing crime inquiries of applicants;
- ☐ The Commonwealth's Attorney General's Office aggressively enforces the Massachusetts Independent Contractor law.

2011 Brought New Developments:

- ☐ New personnel records mandates in Massachusetts;
- ☐ Changes to federal child labor regulations;
- ☐ The expanded role of social media in the workplace;
- ☐ The FTC and the National Labor Relations Board aggressively expanded their presence in the workplace;
- ☐ Looking to expand over $300 million in unreported income of the IRS committed to audit thousands of businesses over the next two years, with a focus on worker classification, fringe benefits, reimburse expenses and office/owner compensation;
- ☐ Health insurance reform requirements;
- ☐ Workplace bullying;
- ☐ The Department of Labor increased enforcement of fiduciary responsibility and participant disclosure under 401(k) and 403(b) plans, as well as the IRS;
- ☐ The ADA reasonable accommodation regulations were finalized; and
- ☐ Texting while driving becomes a hot topic.

2012 Massachusetts Employment Law Changes:

- ☐ Massachusetts Transgender Equal Rights Act- As of July 1, 2012, Massachusetts joined sixteen states and the District of Columbia in providing legal protection against

discrimination based on gender identity or expression in employment, housing, education, credit, and hate crimes.

□ Wages and Hours- Mandatory overtime for nurses- Effective November 4, 2012, hospitals are prohibited from requiring mandatory overtime except in the case of an emergency, or the safety of the patient requires its use and when there is no reasonable alternative. A nurse cannot be allowed to work more than sixteen consecutive hours in a twenty-four hour period. In the event the nurse works sixteen consecutive hours, the nurse must be given at least eight consecutive hours of off-duty time immediately after the worked overtime. The law does not impact collective-bargaining agreements.

□ Volunteer Firefighters- On June 21, 2012 Governor Patrick signed legislation protecting volunteer firefighters from termination by their employers for responding to an emergency related to a fire, rescue, emergency medical service call, hazardous materials incident, or a disaster.

2012 Federal Employment Law Changes:

□ EEOC Small Business Task Force - The U.S. Equal Employment Opportunity Commission (EEOC) launched an internal task force that will focus on expanding and improving outreach and technical assistance to small businesses. This task force will, among other things, develop recommendations on how to: utilize new technology to expand outreach to small businesses; develop technical assistance and training initiatives for small businesses; identify specialized approached to aid small businesses owned by women and minorities; identify specialized approaches for micro-business, generally those with fifty or fewer employees; and enhance small business information and training on the EEOC's website.

2013 Massachusetts Employment Law Updates:

□ Fair share employer contribution for health insurance- An Act Improving the Quality of Health Care and Reducing Costs through increased Transparency, Efficiency and Innovation changed the fair share employer contribution measurement in a significant manner. The new rules raise the fair share contribution threshold, the point at which employers become subject to fair share assessments, **from 11 to 21 full-time employees**. In addition, the new measurement no longer counts employees who have health care coverage through a spouse, government program, or elsewhere. The new rule goes into effect July 1, 2013.

□ On July 12, 2013 Governor Patrick signed fiscal year 2014 budget that included the repeal of the state's Fair Share Contribution Program.

□ The 2012 Economic Development Bill takes some pressure off employers in 2013 who are found out of compliance with the fair share contribution requirements. The Commonwealth's Department of Unemployment Assistance (DUA) must allow an employer sixty days, rather than ten, to appeal a finding of noncompliance. The DUA cannot remove funds from an employer's bank account while an appeal is pending.

☐ Tax incentive to employers for creating wellness programs- An act improving the quality of health care and reducing costs through increased transparency, efficiency and innovation also includes a provision that will provide employers an annual tax credit of up to $10,000.00 for instituting wellness programs for their employees. These tax incentives took effect on January 1, 2013. The Commonwealth's Department of Public Health is expected to issue regulations with details on how employers can insure that their wellness program qualifies for the tax credit.

☐ Temporary Worker's Right to Know- Effective January 31, 2013, staffing agencies must provide to each employee for each new assignment a written job order containing the following information:

- the name, address, and telephone number of the staffing agency and its workers' compensation carrier;
- the name, address and telephone number of the worksite employer
- the name of the department within which they will be assigned;
- the kind and character of the employment, including any requirement for special clothing, accessories, tools, equipment, training or licenses, and any costs that will be charged to the employee;
- the designated payday and the actual hourly rate of pay, overtime pay, and compensation;
- the daily starting time, anticipated end time, and, where known, the expected duration of employment;
- any meals provided by the staffing agency or worksite employer and the cost of such meals;
- details of the transportation required or offered to the employee by the staffing agency, the worksite employer, or any person acting on either's behalf and the cost of such transportation; and
- a multilingual notice that the job order contains important information about the employment and that the notice should be translated;

☐ Background Checks for School Employees- On January 10, 2013, Governor Patrick signed a law that authorizes the Department of Early Education and Care and school districts to conduct finger print-supported national criminal history background checks on all teachers, school employees, and early education providers in Massachusetts.

☐ The Massachusetts Commission Against Discrimination released an updated Fair Employment in Massachusetts Poster in September 2013. The new poster adds the new protected class of gender identification and adds new sections about disability discrimination, maternity leave and filing charges with the MCAD.

☐ On April 14, 2014, Massachusetts Governor Deval Patrick signed legislation freezing the employer contribution rate schedule at Schedule E for 2014. The law went into effect upon signing.

☐ On June 26, 2014, Massachusetts Governor Deval Patrick signed legislation increasing the state's minimum wage to $11 per hour by January 1, 2017. The increase is in the following phases:

- On January 1, 2015 the minimum wage will increase to $9 per hour.
- On January 1, 2016 the minimum wage will increase to $10 per hour.
- On January 1, 2016 the minimum wage will increase to $11 per hour.

In addition, the law increases the minimum wage for tipped employees to $3.75 per hour by 2017. The law also freezes unemployment insurance rates for three years beginning January 1, 2015, and changes the rating system to permit employers who lay off fewer workers to pay less into the system.

☐ On June 26, 2014, Massachusetts Governor Deval Patrick signed the Domestic Workers Bill of Rights. The law establishes labor standards for domestic workers. That law goes into effect April 1, 2015.

☐ On August 8, 2014, Massachusetts Governor Deval Patrick signed legislation regarding leave for employees who are victims of abusive behavior (defined as domestic violence, stalking, sexual assault, and kidnapping). The law applies to employers who employ 50 or more employees.

2013 Federal Employment Law Updates:

☐ Fair Credit Reporting Act (FCRA) Compliance - Effective January 1, 2013, the Consumer Financial Protection Bureau (CFPB) assumes responsibility for enforcing the FCRA. Employers that use and request consumer background checks from consumer reporting agencies are subject to FCRA regulations. Under those regulations, before an employer may seek to procure a consumer credit report, criminal background, or background check from a credit agency, applicants or employees subject to screen must be provided certain information, including information about the scope of the check being performed. Please remember that background information may not be obtained without the employer obtaining written consent from the employee or applicant. The CFPB has issued new regulations modifying the forms employers must use to notify employees and applicants of their rights. Employers were required to begin using the new forms on or before January 1, 2013.

☐ FMLA- Administrator's Interpretation Number 2013-1- On January 14, 2013, the Department of Labor's wage and hour division issued additional guidance regarding the definition of "son or daughter" for employees seeking leave under the Family and Medical Leave Act in order to care for adult children aged 18 and older. In order to take leave under the FMLA to care for a child under the age of 18, an employee must only show a need to care for the child due to a serious health condition; but if an employee needs to care for an adult child age 18 or older, the child must have a mental or physical disability and be incapable of self-care due to that disability.

☐ HIPAA- Final Rule- On January 17, 2013, the Department of Health and Human Services released the HIPAA Omnibus Final Rule. The Final Rule greatly enhances a patient's privacy protections, provides individuals new rights to their health insurance information, and strengthens the government's ability to enforce the law.

☐ Affordable Care Act- Proposed Rule- On January 18, 2013, the Department of Health and Human Services issued a proposed rule that would promote consistent policies and processes for eligibility notices and appeals to Medicaid, the Children's Health Insurance Program, and health insurance exchanges.

☐ FAQs about Affordable Care Act implementation part XI- See http://www.dol.gov/ebsa/ regarding the implementation of the affordable care act, including compliance with the new notice requirements; compliance of health reimbursement arrangements; disclosure of information related to firearms; self-insured employer prescription drug coverage supplementing Medicare part D; fixed indemnity insurance; and payment of Patient-Centered Outcomes Research Institute fees.

☐ Affordable Care Act Final Rule- Health Insurance Premium Tax Credit- On February 1, 2013, the Internal Revenue Service published a final rule providing guidance on when an employer-sponsored plan is considered "affordable" for an individual related to the employee for purposes of eligibility for a premium tax credit.

☐ February 4, 2013 the U. S. Department of Labor issued a final rule amending Family and Medical Leave Act regulations relating to military leave and flight crew eligibility. The final rule also clarifies the calculation of intermittent or reduced schedule leave, removes the forms from the regulations and adds clarifying language relating to physical impossibility.

☐ In regard to the FMLA's military leave provisions the final rule: expands the definition of serious injury or illness to include pre-existing injuries or illnesses of current service members that were aggregated in the line of duty and expands military caregiver leave to care for covered veterans; permits eligible employees to obtain certification of a service member's serious injury or illness from any healthcare provider as defined in the FMLA regulations, not only those affiliated with the Department of Defense; increases the amount of time an employee may take for qualifying exigency leave related to the military member's "rest and recuperation" leave from 5 days to up to 15 days; and creates and additional qualifying exigency leave category for parental care leave to provide care necessitated by the covered active duty of the military member for the military member's parent who is incapable of self-care.

- Flight Crew Employees – Establishes hours of service eligibility requirements; establishes a special method of calculation of leave (an eligible airline flight crew employee is entitled to 72 days of leave during any 12 month period of FMLA qualifying reasons other than military caregiver leave and 156 days of leave during any 12 month period for military caregiver leave; and establishes new record keeping requirements.

- ☐ Federal Contractors – Use of Criminal Background Checks – On February 5, 2013 the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published a new directive regarding compliance with Title VII's non-discrimination provisions as applied to the use of criminal background checks.

- ☐ Employee Misclassification- Voluntary Classification Settlement Program- On February 17, 2013, the Internal Revenue Service announced an expansion of the agency's Voluntary Classification Settlement Program (VCSP). The VCSP provides an opportunity for employers to reclassify their workers as employees for employment tax purposes for future tax periods with partial relief from federal employment taxes. To be eligible for the VCSP, an employer must currently be treating the workers in question as non-employees; consistently have treated the workers in the past as non-employees; and not currently be under audit on payroll tax issues by the IRS. In addition, the employer cannot currently be under audit by the Department of Labor or a state agency concerning the classification of these workers interested. Employers can apply for the program at least sixty days before they want to begin treating the workers as employees. Employers accepted into the program will generally pay an amount equaling approximately 1% of the wages paid to the reclassified workers for the past year. No interest or penalties will be due and the employer will not be audited on payroll taxes related to these workers for prior years.

- ☐ Affordable Care Act- Whistle Blower Protection (interim) - On February 22, 2013, the Occupational Safety and Health Administration published an interim final rule regarding Whistle Blower complaints filed under the Patient Protection and Affordability Care Act. This provision of the Federal Health Reform law offers protection to employees against retaliation by an employer for reporting alleged violations of the act or for receiving a tax credit or cost-sharing reduction as a result of participating in a health insurance exchange or market place.

- ☐ On February 22, 2013 the Department of Health and Human Services issued a final rule implementing the Patient Protection and Affordability Care Act prohibition against denying or charging discriminatory rates for health insurance for people with pre-existing medical conditions.

- ☐ February 22, 2013 the Occupational Safety and Health Administration (OSHA) published an interim rule regarding whistleblower complaints filed under the Patient Protection and Affordability Care Act. OSHA has also issued a Fact Sheet regarding whistleblower complaints under the ACA.

- ☐ Affordable Care Act- Final Rule for Multiemployer Health Care Arrangements- On February 28, 2013, the U.S. Department of Labor Employee Benefits Security Administration announced final rules under the Affordable Care Act to protect workers and employers whose health benefits are provided through Multi Employer Welfare Arraignments (MEWAs). The final rules increased the department's enforcement authority to protect

participants in MEWAs and call for such plans to adhere to enhanced filing requirements According the DOL, employers are often told that MEWAs are more affordable than traditional forms of coverage, but unscrupulous promoters, marketers, and operators of certain MEWAs have taken advantage of gaps in the law to avoid state insurance regulations, putting enrollees at risk. The Affordable Care Act includes provisions implemented by the final rules that are designed to remedy these gaps.

□ Immigration- New I-9 form- On March 8, 2013, the U.S. Citizenship and Immigration Services released a newly revised employment eligibility verification form, form I-9. Employers are required to use the form I-9 to verify the identity and employment authorization for their employees. Employers may continue to use older versions of the form until May 7, 2013.

□ Labor Relations- On March 12, 2013 the National Labor Relations Board announced that it would not seek a rehearing in *Noel Canning V. NLRB*, in which the U.S. Court of Appeals for the D.C. circuit held that the January 4, 2012, recess appointments of three members of the board were invalid. The NLRB, in consultation with the Department of Justice, intends to file a Petition for Certiorari with the U.S. Supreme Court for review of that decision.

□ Affordable Care Act- Proposed Rule on Waiting Periods- The Internal Revenue Service, the Department of Labor, and the Department of Health and Human Services have issued proposed rules on the Affordable Care Act requirements that prohibit group health plans and health insurance insurers offering group health insurance coverage from imposing any waiting period that exceeds ninety days.

□ On April 14, 2013 the U. S. Department of Homeland Security (DHS) and Department of Labor (DOL) jointly issued an interim final rule amending regulations governing certification for the employment of non-immigrant workers and temporary or seasonal non-agricultural employment.

□ On May 8, 2013 the Employee Benefits Security Administration issued a Technical Release that provides a temporary guidance regarding the notice requirement under Section 18B of the Fair Labor Standard Act and announces the availability of the Model Notice of Employees of Coverage Options. This Technical Release also provides and updated model election notice for group health plans for purposes of the continuation coverage provisions under Title X of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) to include additional information regarding health coverage alternatives offered through the Marketplace.

□ On May 10, 2013 the Centers for Medicare and Medicaid Services (CMS) released frequently asked questions on the Small Business Health Options Program Exchanges.

□ On May 13, 2013 the Internal Revenue Service (IRS) issued proposed regulations that provide guidance to Blue Cross and Blue Shield organizations, and certain other healthcare

organizations, on computing and applying the medical loss ratio added to the tax code by the Patient Protection and Affordable Care Act. The regulations are proposed to apply to tax years beginning after December 31, 2013.

☐ The Equal Employment Opportunity Commission (EEOC) has posted updated information on the Genetic Information Non-Discrimination Act (GINA). The EEOC enforces Title II of GINA, which prohibits the use of genetic information in making employment decisions in any aspects of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits or any other term or condition of employment.

☐ On May 29, 2013 the IRS, the Department of Health and Human Services, and the Employee Benefit Security Administration jointly issued final rules that clarified the reasonable design of health-contingent wellness programs, along with the reasonable alternatives they must offer in order to avoid prohibited discrimination. The final regulation increases the maximum permissible reward under a health-contingent wellness program offered in connection with a group health plan from 20% to 30% of the cost of coverage.

☐ On June 5, 2013 the U. S. Department of Labor's Employee Benefits Security Administration announced the launch of an online toolkit to help workers identify key issues related to retirement planning. The toolkit was prepared in cooperation with the Social Security Administration and the Centers for Medicare and Medicaid Services to help workers understand important decisions related to employment-based plans, social security and Medicare. The toolkit includes a timeline illustrating key decisions to be made about retirement benefits, social security and Medicare; general guidance and a list of publications and interactive tools to assist with planning.

☐ On July 5, 2013 the Centers for Medicare and Medicaid Services released a final rule regarding implementation of the Affordable Care Act.

☐ On July 9, 2013 the Internal Revenue Service released notice 2013-45 which provides transition relief from intended to provide employers, insurers and other providers of minimum essential coverage time to adapt their health coverage and reporting systems.

☐ On July 29, 2013 the U. S. Equal Employment Opportunity Commission announced the latest edition of its Federal Sector Digest of Equal Employment Opportunity Law. This quarterly publication prepared by the EEOC's Office of Federal Operations features recent agency decisions and federal court cases of interest: attorney's fees; compensatory damages; remedies; sanctions; settlement agreements; summary judgments; and pertinent timelines. While these summaries are not intended to be exhaustive or definitive as to their subject matter and may not be given the legal weight of a case law and citations, they are a good source of relevant information.

☐ On June 26, 2013 the IRS issued two new notices regarding the Affordable Care Act. The first notice defines minimum essential coverage under certain government health plans and

the other covers designated as minimum essential coverage for purposes of the premium tax credit. The second notice provides relief from the shared-responsibility penalty for individuals who are eligible for coverage and plans that are not on a calendar year.

☐ On June 26, 2013 the Supreme Court of the United States ruled that the Defense of Marriage Act (DOMA) was unconstitutional on the grounds that it violated the due process and equal protection principals of the Fifth Amendment. DOMA, which was fast under the Clinton administration in 1996, restricted same-sex couples from being recognized as married spouses under federal law.

☐ On June 28, 2013 the U.S. Department of Health and Human Services issued final rules on contraception coverage and religious organizations.

☐ On August 1, 2013 the IRS issued final regulations regarding the exception to the deduction limitations on certain expenditures paid or incurred under reimbursement or other expenses allowance arrangements. These regulations affect taxpayers that pay or receive advances, allowances, or reimbursements under reimbursement or other expenses allowance arrangements and clarify the rules for these arrangements.

☐ On August 9, 2013 the U.S. Department of Labor issued regulatory guidance on the Family and Medical Leave Act regarding benefits of same-sex couples. The new guidance comes in the form of an updated Fact Sheet No. 28F – FMLA spousal leave entitlements have been expanded to same-sex spouses in states that recognize same-sex marriages.

☐ On August 13, 2013 the Internal Revenue Service released final regulations authorizing the IRS under certain safe guards, to disclose certain tax payer information for use in verifying eligibility for healthcare affordability programs.

☐ On August 29, 2013 the U. S. Department of Treasury and the Internal Revenue Service ruled that same-sex couples, legally married in jurisdictions that recognize their marriages, will be treated as married for federal tax purposes. This decision applies regardless of whether the couples currently live in a jurisdiction that recognizes same-sex marriages or one that does not. Under the ruling, same-sex couples will be treated as married for all federal tax purposes, including income and gift and estate taxes. The ruling does not apply to registered domestic partnerships, civil unions or any other similar formal relationships recognized under state laws.

☐ EEOC – New "Digest of EEO Law"

- On September 25, 2013, the U.S. Equal Employment Opportunity Commission (EEOC) announced the latest edition of its federal sector Digest of Equal Employment Opportunity (EEO) Law. This quarterly publication, prepared by the EEOC's Office of Federal Operations (OFO), features recent Commission decisions and federal court cases of interest.

- The Spring 2013 edition of the Digest contains a sampling of summaries of noteworthy decisions selected by OFO from among the volume of decisions issued by EEOC each fiscal year, including topics such as:
- Attorney Fees
- Compensatory Damages
- Dismissals
- Finding on the Merits
- Remedies, Sanctions and Settlement Agreements
- Stating a Claim
- Summary Judgment
- Timeliness
    - While these summaries are not intended to be exhaustive or definitive as to their subject matter, and may not be given the legal weight of case law in citations, they provide practitioners with relevant information in one place.
    - IRS Provides Guidance on Special Tax Adjustment Procedures for Same-Sex Marriages
- On September 23, 2013, the U.S. Department of the Treasury and the Internal Revenue Service (IRS) issued Notice 2013-61, which continues the implementation of the Supreme Court's decision in Windsor v. United States. In Windsor, the Supreme Court struck down provisions of the Defense of Marriage Act (DOMA) that prohibited the recognition of same-gender couples as married for purposes of federal law. Notice 2013-61 provides guidance for employers and employees to make claims for refund or adjustments of overpayments of Federal Insurance Contributions Act (FICA) taxes and Federal income tax withholding (employment taxes) with respect to certain benefits provided to same-sex spouses and remuneration paid to same-sex spouses resulting from the Windsor decision and the holdings of Rev. Rul. 2013-17.

□ DOL - Guidance on Same-Sex Marriages and Employee Benefit Plans

- On September 18, 2013, the U.S. Department of Labor announced new guidance interpreting the Supreme Court's decision in *United States v. Windsor*. In a technical release, the department's Employee Benefits Security Administration provides guidance to plans, plan sponsors, fiduciaries, participants and beneficiaries on the decision's impact on the Employee Retirement Income Security Act of 1974.
- The release states that, in general, the terms "spouse" and "marriage" in Title I of ERISA and in related department regulations should be read to include same-sex couples legally married in any state or foreign jurisdiction that recognizes such marriages, regardless of where they currently live. On June 26, 2013, the *Windsor* decision struck down the provisions of the Defense of Marriage Act that denied federal benefits to legally married, same-sex couples.
- "This decision represents a historic step toward equality for all American families, and I have directed the department's agency heads to ensure that they are implementing the decision in a way that provides maximum protection for workers and their families," said Secretary of Labor Thomas E. Perez. "The department plans to issue additional guidance

in the coming months as we continue to consult with the Department of Justice and other federal agencies to implement the decision."

- "By providing greater clarity on how the Supreme Court's decision affects one of the laws we enforce, we are contributing to greater equality and greater protection for America's working families," said Assistant Secretary for Employee Benefits Security Phyllis C. Borzi.
- The EBSA protects the retirement, health and other workplace-related benefits of America's workers, retirees and their families. The agency oversees approximately 701,000 private sector retirement plans, 2.3 million health plans and other plans that provide benefits to more than 141 million Americans. Collectively, these plans hold more than $7.3 trillion in assets.

□ Consumer Financial Protection Bureau – Payroll Card Accounts

- On September 12, 2013, the Consumer Financial Protection Bureau (CFPB) published Bulletin 2013-10, which addresses the impact of the Electronic Fund Transfer Act (EFTA) – and Regulation E which implements it – upon "payroll card accounts".
- The bulletin reminds employers that they may not require employees to receive wages on a payroll card. The bulletin also explains some of the consumer protections that apply to payroll cards, such as fee disclosures, access to account history, limited liability for unauthorized transfers, and error resolution rights.
- The bulletin notes that most states place additional restrictions on the manner in which employers may make wages available to their employees, sometimes specifically addressing payment of wages via payroll card, or calling for particular alternatives to payroll cards. The EFTA and Regulation E preempt state laws "relating to" EFTs, among other things, only to the extent of any inconsistency between the state laws and the EFTA / Regulation E. A state law is not considered inconsistent with the EFTA and Regulation E if the state law affords consumers greater protections than afforded by the EFTA and Regulation E

□ On October 31, 2013 the Internal Revenue Service and the Treasury Department issued a notice modifying the long standing "used-or-lose rule" for health flexible spending arrangement (FSAs) for the first time, at the plan sponsor's options, employees participating in health FSAs will be allowed to carry over – instead of forfeiting – up to $500 of unused amounts remaining at year-end.

□ The Occupational Safety and Health Administration released the top ten most frequently cited standards for fiscal year 2013 (10/1/12-9/30/13):

- Fall protection (construction industry);
- Hazard communication;
- Scaffolding (construction industry);
- Respiratory protection;
- Electrical, wiring methods;
- Powered industrial trucks;

- Latters (construction industry);
- Lockout/tag out;
- Electrical, general requirements; and
- Machine guarding.

☐ On November 8, 2013 the Department of Labor, Treasury, and Health and Human Services released final rules implementing the Mental Health Parody and Addiction Equity Act which requires parody between mental health or substance abuse disorder benefits and medical/surgical benefits with respect to financial requirements and treatment limitations under group health plans and group and individual health insurance coverage.

☐ On November 14, 2013 the U. S. Department of Labor announced the availability of a new online resource that will provide guidance and information to states interested in developing or improving short-time compensation programs, also known as work-sharing. The STC program is designed to avert employee layoffs for businesses faced with a temporary slowdown in business activity.

☐ On November 14, 2013 the Office of Federal Contract Compliance Program (OFCCP) posted new frequently asked questions answering several of the questions the agency received from contractors and the general public about its recently published final rules to revise the OFCCP's regulations that implement the Vietnam Error Veterans' Readjustment Assistance Act of 1974 and Section 503 of the Rehabilitation Act of 1973.

☐ On November 18, 2013 the U. S. Citizenship Immigration Services announces an enhancement to the e-verify program that will help combat identity fraud by identifying and deterring fraudulent use of social security members for employment eligibility verification. This enhancement provides a critical safeguard to the e-verify system by detecting and preventing potential fraudulent use of SSNs to gain work authorization.

☐ Affordable Care Act – Beginning in 2014 the Patient Protection and Affordable Care Act provides new opportunities for Medicaid coverage for adults who earn up to 133% of the poverty level ($14,865 for an individual and $30,656 for a family of four). The proposed rules will help develop systems that will make it easier for consumers to determine if they are eligible for Medicaid or tax credits through the exchanges.

☐ On July 2, 2013 the U. S. Department of Treasury announced that the Obama Administration would postpone the Affordable Care Act's insurance mandate for employers in 2014. Under that mandate, employers with 50 or more employees are required to provide government-approved health insurance to their workers or pay a fine. The administration postponed the mandate until 2015 "after hearing significant concerns from employers about the challenges of implementing it".

☐ On August 26, 2013 the IRS published a proposed rule and intended to provide guidance on the tax credit available to certain small employers that offer health insurance coverage to

their employees under Section 45R of the Internal Revenue Code, as enacted under the Affordable Care Act. To take advantage of the tax credit, small employers (25 or fewer full-time equivalent employees) must have in place a contribution arrangement through which they can make a non-elective contribution on behalf of each employee who enrolls in a qualified health plan offered to employees by the employer. The contribution amount must be at least 50% of the premium cost. For tax years beginning in 2014 or later, the maximum credit will increase to 50% or premiums paid for small business employers and 35% of premiums paid for small tax-exempt employers.

- Proposed Reporting Options
  The proposed rules describe a variety of options to potentially reduce or streamline information reporting, such as:
  - Replacing § 6056 employee statements with Form W-2 reporting on offers of employer-sponsored coverage to employees, spouses, and dependents.
  - Eliminating the need to determine whether particular employees are full-time if adequate coverage is offered to all potentially full-time employees.
  - Allowing employers to report the specific cost to an employee of purchasing employer-sponsored coverage only if the cost is above a specified dollar amount.
  - Allowing self-insured group health plans to avoid furnishing employee statements under both § 6055 and § 6056 by furnishing a single substitute statement.
  - Limited reporting for certain self-insured employers offering no-cost coverage to employees and their families.
  - Permitting health insurance issuers to forgo reporting under § 6055 on individual coverage offered through a Marketplace because that information will be provided by the Marketplace.
  - Permitting health insurance issuers, employers, and other reporting entities under § 6055 to forgo reporting the specific dates of coverage (instead reporting only the months of coverage), the amount of any cost-sharing reductions, or the portion of the premium paid by an employer.
  - The IRS is asking stakeholders to submit comments on the proposed rules through November 8, 2013. The IRS will take the public comments into account when developing the final rules.
  - Once the final rules have been published, reporting entities will be encouraged to voluntarily implement information reporting in 2014 (when reporting will be optional), in preparation for the full application of the reporting provisions in 2015.

□ DOL – Final Rule on Direct Care Workers

- On September 17, 2013, the Department of Labor's Wage and Hour Division (WHD) published a final rule extending minimum wage and overtime protections under the Fair Labor Standards Act (FLSA) to home care workers. Under the final rule, effective on January 1, 2015, third party employers such as home care staffing agencies are not entitled to claim either the FLSA's companionship services or live-in domestic service employee exemptions. According to the WHD, the changes to current regulations will

apply the FLSA's requirements to nearly two million direct care workers, including home health aides, personal care aides and certified nursing assistants.

□ IRS Releases Proposed Rules on Information Reporting Requirements

- On September 9, 2013, the Internal Revenue Service (IRS) published two proposed rules regarding implementation of the information reporting requirements for insurers and certain employers under the Affordable Care Act (ACA).
- The ACA provides for information reporting (under Internal Revenue Code (IRC) § 6055) by insurers, self-insuring employers, and other parties that provide health coverage. It also provides for information reporting (under IRC § 6056) by employers that are large enough to be subject to the ACA's employer "shared responsibility provisions" (generally referred to as the "employer mandate"). Under the employer mandate, employers with 50+ full-time employees or full-time equivalents must provide affordable health coverage to employees or face a $2,000 fine per worker after the first 30 employees. While the employer mandate was originally scheduled to take effect in January 2014, its enforcement has been delayed until January 2015.
- The first proposed rule, *Information Reporting of Essential Coverage* relates to IRC § 6055, while the second proposed rule, *Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Plans* relates to IRC § 6056.
- Statutory Requirements
  The ACA requires employers, insurers, and other reporting entities to report, among other things:
- Under IRC § 6055:
- Information about the entity providing coverage, including contact information.
- A list of individuals with identifying information and the months they were covered.
- Under IRC § 6056:
- Information about the applicable large employer offering coverage (including contact information for the employer and the number of full-time employees).
- A list of full-time employees and information about the coverage offered to each, by month, including the cost of self-only coverage.

- Proposed Reporting Options
  The proposed rules describe a variety of options to potentially reduce or streamline information reporting, such as:
- Replacing § 6056 employee statements with Form W-2 reporting on offers of employer-sponsored coverage to employees, spouses, and dependents.
- Eliminating the need to determine whether particular employees are full-time if adequate coverage is offered to all potentially full-time employees.
- Allowing employers to report the specific cost to an employee of purchasing employer-sponsored coverage only if the cost is above a specified dollar amount.
- Allowing self-insured group health plans to avoid furnishing employee statements under both § 6055 and § 6056 by furnishing a single substitute statement.

- Limited reporting for certain self-insured employers offering no-cost coverage to employees and their families.
- Permitting health insurance issuers to forgo reporting under § 6055 on individual coverage offered through a Marketplace because that information will be provided by the Marketplace.
- Permitting health insurance issuers, employers, and other reporting entities under § 6055 to forgo reporting the specific dates of coverage (instead reporting only the months of coverage), the amount of any cost-sharing reductions, or the portion of the premium paid by an employer.
- The IRS is asking stakeholders to submit comments on the proposed rules through November 8, 2013. The IRS will take the public comments into account when developing the final rules.
- Once the final rules have been published, reporting entities will be encouraged to voluntarily implement information reporting in 2014 (when reporting will be optional), in preparation for the full application of the reporting provisions in 2015.

□ IRS Issues FAQS on Affordable Care Act Implementation Part XVI

- On September 4, 2013, the Department of Labor's Employee Benefits Security Administration (EBSA) issued its 16th set of Frequently Asked Questions (FAQs) on the implementation of the Affordable Care Act. The latest guidance addresses questions on the notice of coverage options available through the future health exchanges, and the limits on waiting periods for coverage.

  The ACA added a new section to the Fair Labor Standards Act (FLSA) that requires employers to notify employees of their health coverage options through the Exchanges. Earlier this year, the EBSA issued Technical Release 2013-02, which provided temporary guidance on this requirement as well as model notices.

  According to the FAQS, an employer will have satisfied its obligation to provide the notice with respect to an individual if another party provides a timely and complete notice. The Department of Labor notes that, as explained in Technical Release 2013-02, FLSA requires employers to provide notice to all employees, regardless of whether an employee is enrolled in, or eligible for, coverage under a group health plan. Accordingly, an employer is not relieved of its statutory obligation to provide notice under FLSA if another entity sends the notice to only participants enrolled in the plan, if some employees are not enrolled in the plan. When providing notices on behalf of employers, multi-employer plans, issuers, and third party administrators should take proper steps to ensure that a notice is provided to all employees regardless of plan enrollment, or communicate clearly to employers that the plan, issuer, or third party administrator will provide notice only to a subset of employees (e.g., employees enrolled in the plan) and advise of the residual obligations of employers with respect to other employees (e.g., employees who are not enrolled in the plan).

  In regards to the 90-day waiting period, the FAQs explain that plans and issuers can still

rely on guidance included in the March 21, 2013 proposed rule at least through 2014. If the final regulations wind up being more restrictive on plans or issuers, they will not be effective prior to January 1, 2015.

☐ On October 31, 2013 the Internal Revenue Service announced that the maximum in annual contributions that can be made to 401(k) plans in 2014 will remain at the current limit, while the maximum benefit that can be funded through defined benefit plans will increase. Here are the details:

- The maximum annual contribution an employee can make through salary reduction to a 401(k) plan in 2014 will stay at the current $17,500 limit, while the maximum catch-up contribution employees age 50 and older can make to 401(k) plans will be $5,500, unchanged from 2013;
- The maximum annual benefit funded through a defined benefit plan for a plan participant will increase to $210,000 from the $205,000 allowable amount in 2013. The amount of employee compensation that can be considered in calculating pension benefits and contributions to define contribution plans will increase $5,000 in 2014 to $260,000;
- The definition of a highly compensated employee for 401(k) plan non-discrimination testing purposes remains unchanged at earnings of at least $115,000 in 2014;
- The taxable wage base for 2014 increases to $117,000 from $113,700 in 2013.

☐ On November 27, 2013 the U. S. Department of Health and Human Services announced that online enrollment in the federal Small Business Health Options Program exchange would not be available until the 2015 open enrollment period in November 2014. In lieu of online enrollment, affected employers will need to enroll through and agent, broker or insurer. The Affordable Care Act does not require small employers with fewer than 50 full-time equivalents to offer health coverage to their workers.

☐ On December 6, 2013 the Internal Revenue Service announced the new 2014 standard mileage rates used to calculate the deductible cost of operating an automobile for business, charitable, medical or moving purposes. Effective January 1, 2014, standard mileage rates for use of an automobile (cars, vans, puck-up, SUVs or panel trucks) will be:

- 56 cents per mile for business miles driven;
- 23.5 cents per mile driven for medical or moving purposes; and
- 14 cents per mile driven in service of charitable organizations.
- The business, medical, and moving expense rates are a half cent less than the 2013 rates.

☐ On December 16, 2013 the Internal Revenue Service released a notice providing additional guidance for cafeteria plans, including health and dental care flexible spending arrangements and health saving accounts, as a result of the U. S. Supreme Court decision overturning the Defense of Marriage Act.

☐ On December 24, 2013 the U. S. Department of Labor, Health and Human Services, and Treasury proposed rules that would adjust regulations under the Health Insurance Portability and Accountability Act of 1996 regarding excepted benefits to include employee assistance

programs. Under the proposed regulations, vision and dental benefits provided by employers on a self-insured basis would be able to qualify as excepted benefits, even if they do not require contributions from employees. Effective for the plan years starting in 2015, the proposed rules would also treat as excepted benefits certain limited coverage provided by plan sponsors that "wraps around" an individual market policy. The value of the wrap around coverage could not exceed 15% of the value of the primary coverage offered by the plan sponsor, which must be affordable for at least the majority of employees.

2014 Employment Law Updates:

Here are some examples of the federal law changes that took effect in 2014:

□ On February 10, 2014, the U.S. Department of the Treasury and the Internal Revenue Service (IRS) issued final regulations implementing the employer responsibility provisions under the Affordable Care Act (ACA) that take effect in 2015. The employer responsibility rules assist employers affected by these policies in providing quality, affordable coverage to their workers. If employers decide not to offer insurance to their employees, they will make an employer shared responsibility payment beginning in 2015 to help offset the costs to taxpayers of their employees getting tax credits through the Health Insurance Marketplace.

How the final regulations affect employers:

- **Small Businesses with fewer than 50 employees:** Under the Affordable Care Act, companies that have fewer than 50 employees are not required to provide coverage or fill out any forms in 2015, or in any year, under the Affordable Care Act.
- **Larger employers with 100 or more employees:** The final rules phase in the percentage of full-time workers that employers need to offer coverage to from 70 percent in 2015 to 95 percent in 2016 and beyond. Employers in this category that do not meet these standards will make an employer responsibility payment for 2015.
- **Employers with 50 to 99 employees:** Companies with 50-99 employees that do not yet provide quality, affordable health insurance to their full-time workers will report on their workers and coverage in 2015, but have until 2016 before any employer responsibility payments could apply.

□ On March 7, 2014, the Equal Employment Opportunity Commission (EEOC) issued two new technical assistance publications addressing workplace rights and responsibilities with respect to religious dress and grooming under Title VII of the Civil Rights Act of 1964.

The question-and-answer guide, entitled "Religious Garb and Grooming in the Workplace: Rights and Responsibilities," and an accompanying fact sheet, provide a user-friendly discussion of the applicable law, practical advice for employers and employees, and numerous case examples based on the EEOC's litigation.

Employers covered by Title VII must make exceptions to their usual rules or preferences to permit applicants and employees to follow religiously-mandated dress and grooming practices unless it would pose an undue hardship to the operation of an employer's business. When an exception is made as a religious accommodation, the employer may still refuse to allow exceptions sought by other employees for secular reasons.

Topics covered in the publications include:

- Prohibitions on job segregation, such as assigning an employee to a non-customer service position because of his or her religious garb;
- Accommodating religious grooming or garb practices while ensuring employer workplace needs;
- Avoiding workplace harassment based on religion, which may occur when an employee is required or coerced to forgo religious dress or grooming practices as a condition of employment; and
- Ensuring there is no retaliation against employees who request religious accommodation.

Religious discrimination charges relating to a wide range of issues have steadily increased. In fiscal year 2013, the Commission received 3,721 charges alleging religious discrimination, more than double the 1,709 charges received in fiscal year 1997.

□ On March 10, 2014, the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Federal Trade Commission (FTC) released two co-published technical assistance documents that explain how the agencies' respective laws apply to background checks performed for employment purposes. One document is for employers; the other is for job applicants and employees. This is the first time that the two agencies have partnered to create resources addressing concerns in this key area. The documents are available on the EEOC's website: Background Checks: What Employers Need to Know and Background Checks: What Job Applicants and Employees Should Know.

The agencies emphasize that employers need written permission from job applicants before getting background reports about them from companies in the business of compiling background information. Furthermore, they reaffirm that it is illegal to discriminate based on a person's race, color, national origin, sex, religion, age (40 or older), disability, or genetic information, including family medical history, when requesting or using background information for employment, regardless of where the information was obtained.

At the same time, the agencies want job applicants to know that it is not illegal for potential employers to ask about their background, as long as the employer does not unlawfully discriminate. However, when people are turned down for a job or denied a promotion based on information in their background reports, they have the right to review the reports for accuracy.

□ On March 13, 2014, the Obama Administration signed a Presidential Memorandum authorizing the Department of Labor to examine changes that would increase the number of employees eligible for overtime pay under the federal Fair Labor Standards Act (FLSA). The Presidential Memorandum instructs the Secretary of Labor to update regulations regarding who qualifies for overtime protection. In so doing, the Secretary will consider how the regulations may be revised to:

- Update existing protections in keeping with the intention of the FLSA;
- Address the changing nature of the American workplace; and
- Simplify the overtime rules to make them easier for both workers and businesses to understand and apply.

□ On March 19, 2014, the EEOC issued a Final Rule which adjusts for inflation the civil monetary penalty for violation of the notice-posting requirements in Title VII of the Civil Rights act of 1964 (Title VII), the Americans with Disabilities Act (ADA), and the Genetic Information Non-Discrimination Act (GINA). Pursuant to the Final Rule, effective April 18, 2014, employers that willfully violate the posting requirements can be fined up to $210 for each violation.

□ On April 1, 2014, President Barack Obama signed into law the "Protecting Access to Medicare Act of 2014" (H.R. 4302). The law repeals the Affordable Care Act's caps on "small group" plan deductibles. The law primarily pertains to Medicare payments and operations. The clause regarding "small group" deductibles is the only item that affects employer-sponsored group health plans.

Previously, the Affordable Care Act (ACA) had limited the annual deductibles in "small group" policies to no more than $2,000 (single coverage) or $4,000 (family coverage) starting with policies issued or renewed on or after January 1, 2014. The dollar amounts were scheduled to increase in 2015. The ACA deductible caps did not apply to grandfathered plans, or to any "small group" policies issued in states that permitted higher deductibles to achieve a specific metal level (e.g., bronze). In most states, "small group" policies are available only to employers with up to 50 employees.

The repeal of the ACA "small group" deductible caps affects no policy or plan currently in force. A policy's terms may be changed only by an amendment agreed to by the carrier and policyholder. Going forward, however, carriers can offer a wider variety of deductible and plan design options to employers in the "small group" market.

The Affordable Care Act continues to set limits on annual out-of-pocket maximums for plan years starting on or after January 1, 2014. The out-of-pocket limits apply to all non-grandfathered plans, including health policies in the small and large group markets and self-funded health plans.

□ On April 4, 2014, the IRS issued guidance stating that sponsors of qualified retirement plans must recognize same-sex spouses of legally married participants as of the U.S. Supreme

Court decision regarding section 3 of Defense of Marriage Act (DOMA) on June 26, 2013. However, the IRS will not require retirement plans to recognize same-sex marriage prior to the court's Windsor decision.

Employers sponsoring retirement plans qualified for tax-deferred benefits must recognize legally married same-sex couples as of June 26, 2013, the date of the Supreme Court's ruling in United States v. Windsor. This recognition requires extending to same-sex married couples the same rights and benefits afforded to opposite-sex married couples.

The Windsor decision invalidated Section 3 of the 1996 Defense of Marriage Act (DOMA) that barred married same-sex couples from being treated as married under federal law. Subsequently, the IRS issued Revenue Ruling 2013-17 clarifying that a same-sex couple is treated as lawfully married for federal tax purposes if the jurisdiction in which they were married recognizes same-sex marriage, without regard for fact they may now live in a state that fails to recognize same-sex marriage.

Plans should enlist the advice of legal counsel to review any terms referring to section 3 of DOMA, or if spouse is only defined as a person of the opposite sex. Not all plans will need to be amended to be in compliance. An amendment is only required if the plan's terms are inconsistent with the Windsor decision or with IRS Revenue Ruling 2013-17. Any required amendments must be adopted by the later of December 31, 2014, or the applicable date under Revenue Procedure 2007-44.

It is important for plan administration to comply in both policy and practice. For example, IRC section 417(A)(4) requires certain plans to obtain the consent of the spouse of a married participant before making a loan to the participant. Compliance requires plan administration to treat all legally married spouses in a consistent manner.

Plan sponsors may, but are not required to, reflect the outcome of Windsor for periods prior to the date Windsor was decided (June 26, 2013). However, the IRS' guidance cautions employers that retroactively recognizing same-sex spouses for all purposes under a qualified retirement plan could have "unintended consequences," such as triggering ownership attribution requirements and other rules that are "difficult to implement retroactively."

□ On April 23, 2014, the U.S. Treasury Department and Internal Revenue Service (IRS) released Revenue Procedure 2014-30, which lists the 2015 indexed amounts, adjusted for inflation, for health savings accounts (HSAs) and high-deductible health plans (HDHPs).

The Revenue Procedure is effective for calendar year 2015.

□ On May 2, 2014, the Employee Benefits Services Administration (EBSA) of the Department of Labor issued proposed rules regarding continuation coverage that employers must provide to their employees under the Consolidated Omnibus Reconciliation Act (COBRA) of 1985.

The EBSA also released two model notice forms for employers to use for providing COBRA notices to their employees.

General and election model notices are currently located in appendix to COBRA regulations. The proposed rule would eliminate the current model notices from the regulation and instead provide model notices through guidance to make it easier to update the model notices. The new model notices reflect that coverage is now available in the Marketplace and the updated model election notice provides information on special enrollment rights in the Marketplace.

☐ On May 2, 2014, the Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury released new guidance (FAQs about Affordable Care Act Implementation Part XIX) regarding the updated Department of Labor model COBRA notices, limitations on cost-sharing, preventive services, Health Flexible Spending Accounts, and Summary of Benefits and Coverage (SBC).

In addition to the FAQs, the Department of Health and Human Services released a bulletin on new special enrollment periods (SEPs) and hardship exemptions.

☐ On May 7, 2014, the Internal Revenue Service (IRS) published a Final Rule on information reporting by Affordable Care Act (ACA) Exchanges. The Final Rule requires Exchanges to file annual and monthly reports for each Qualified Health Plan (QHP) purchased through the Exchange during the reporting period.

☐ On June 20, 2014, the U.S. Department of Labor announced a proposed rule that would extend the protections of the Family and Medical Leave Act (FMLA) to all eligible employees in legal same-sex marriages regardless of where they live. The proposed definitional change would mean that eligible employees, regardless of where they live, would be able to:

- Take FMLA leave to care for their same-sex spouse with a serious health condition;
- Take qualifying exigency leave due to their same-sex spouse's covered military service; or
- Take military caregiver leave for their same-sex spouse.

☐ On June 12, 2014 the U. S. Department of Labor announced a proposed rule implementing Executive Order 13658. Executive Order 13658, *Establishing a Minimum Wage for Contractors*, was signed by President Obama on February 12, 2014 and seeks to increase the minimum wage to $10.10 for all workers on federal construction and service contracts on January 1, 2015. The proposed rule provides guidance and sets standards for employers concerning coverage, including coverage of tipped employees and workers with disabilities.

☐ On July 14, 2014, the U.S. Equal Employment Opportunity Commission (EEOC) issued Enforcement Guidance on Pregnancy Discrimination and Related Issues, along with a question and answer document about the guidance, and a Fact Sheet for Small Business.

☐ On July 21, 2014, President Barack Obama signed an executive order prohibiting federal contractors from discriminating in employment decisions based on applicants' or employees' sexual orientation or gender identity.

☐ The Affordable Care Act (ACA) added two health coverage reporting requirements to the Internal Revenue Code. Both take effect for 2015, with the first reports due in early 2016:

- IRC § 6056 requires large employers (50 or more full-time employees including full-time equivalents) to file annual reports detailing the health coverage they offer to full-time employees. Information will include employee names and SSNs, along with indicators (codes) about the type of health coverage offered. Large employers will give a Form 1095-C to each employee, and also file these forms with the IRS using transmittal Form 1094-C.

  Caution: Large employers are those with 50 or more full-time employees (including full-time-equivalents). Although some mid-size (50-99) employers and/or some employers with non-calendar year plans may qualify for short-term transition relief under the ACA's "play or pay" rules, the ACA's reporting requirements still apply for 2015.

- IRC § 6055 requires insurers and self-funded plan sponsors to file annual reports detailing the health coverage provided to each individual. This includes any employer, large or small, that sponsors a self-funded health plan. For this purpose, employers will provide Form 1095-B to plan enrollees and members, and also file these forms with the IRS using transmittal Form 1094-B.

Large employers that also sponsor a self-funded health plan can use Form 1095-C to satisfy both the § 6056 and 6055 reporting requirements.

☐ On July 24, 2014, the IRS released Rev. Proc. 2014-37 providing indexing adjustments for several dollar amounts and percentages under the ACA. 2014-37 gives the methodology to determine the individual required contribution percentage for plan years beginning after calendar year 2014 and increased the individual affordable coverage threshold from 9.5 percent to 9.56 percent. Initially, many benefits firms and employers welcomed this news and believed that the IRS would automatically "align" the individual and Employer Shared Responsibility safe harbor testing rules, however, that is not the case.

Under the "Play or Pay" rules, large employers may be assessed penalties for failure to offer full-time employees minimum value coverage that is affordable. "Affordable" generally means the employee's contribution for self-only coverage (if elected) does not exceed 9.5

percent of the employee's income from that employer. Although 9.5 percent was the 2014 amount written into the original law, it is subject to change each year for inflation. Until the two sets of affordability indices are aligned and the IRS announces that alignment, it is unclear that the 9.56 percent applies to the employer mandate.

□ On July 31, 2014, President Obama signed the "Fair Pay and Safe Workplaces" Executive Order, which requires bidders on federal procurement contracts for goods and services (including construction) in excess of $500,000 to disclose labor law violations that have occurred within the three-year period immediately preceding the bid. In addition, the Executive Order requires federal contractors to provide individuals who perform work under the federal contract with information regarding hours worked, overtime hours, pay, and any additions made to or deductions made from pay. The Executive Order also prohibits federal contractors with contracts in excess of $1,000,000 from entering into mandatory pre-dispute arbitration agreements with their employees or independent contractors to resolve complaints under Title VII of the Civil Rights Act or tort claims arising out of alleged sexual assault or harassment.

□ On August 6, 2014, the U.S. Department of Labor's Office of Federal Contract Compliance Programs issued a Notice of Proposed Rulemaking requiring covered federal contractors and subcontractors with more than 100 employees to submit an annual Equal Pay Report on employee compensation. The proposed rule was published in the August 8, 2014 Federal Register.

Massachusetts New Compliance Obligations – 2015:

Here are some of the new laws and compliance obligations that take effect this calendar year:

□ **Sick Leave –** On June 19, 2015, the Massachusetts attorney general published the final regulations concerning the new earned sick time (EST) law that went into effect on July 1, 2015. These final regulations differ somewhat from the draft regulations submitted in April and provide clarification and additional detail to aid with implementation.

Basics: All employees in Massachusetts must be allowed to accrue and use up to 40 hours of EST in a calendar year, subject to certain conditions set forth in the law and the regulations. Under the previously announced "safe harbor" provision, companies that utilized a policy under which full-time employees received at least 30 hours of paid time off as of May 1, 2015, will be deemed compliant until January 1, 2016 relative to those employees and any other employees to whom the policy is extended on a proportional basis provided those employers meet certain additional criteria for the remainder of 2015. Additionally, starting July 1, all use of time, whether under the law itself or under the safe harbor provision, must be job protected and is subject to the law's anti-interference and anti-retaliation provisions.

- **EST runs concurrent to FMLA.** The final regulations state that EST may run concurrently with leave under the federal Family and Medical Leave Act (FMLA) and

other state leave laws. The draft regulations had stated that EST must be "in addition to" FMLA and other state leaves.

- **Additional "Travel Time" EST Use Added.** The law provides four purposes for which sick time may be used: care for a physical or mental illness, injury or medical condition; caring for a close family member with such a condition; attending medical appointments; and addressing the effects of domestic violence. The final regulations add a fifth category: EST may be used for "travel to and from an appointment, a pharmacy, or other location related to the purpose for which time was taken."
- "Same Hourly Rate" Defined.
  - Hourly employees are paid their regular hourly rate; those who earn two or more rates are paid an average "blended rate" based on their previous pay period.
  - Salaried employees are paid a rate based on the total compensation divided by hours worked in the previous pay period. For exempt salaried employees working 40 hours or more per week, the employer can assume 40 hours rather than using actual hours worked. However, employers cannot make that assumption for exempt salaried employees regularly working less than 40 hours per week or salaried non-exempt employees.
  - Employees paid on a piece-work or fee-for-service basis must be paid "a reasonable calculation of the wages or fees the employee would have received" for the work if the employee had worked.
  - Commissioned employees, whether commission-only or base rate plus commission, must be paid the greater of their base wage or the minimum wage.
  - Tipped employees must be paid the minimum wage.
- **Alternative Accrual Schedule.** The final regulations provide that employers who prefer not to track accrual of sick time over the course of the year may use a prescribed schedule for providing time off. The compliant alternate accrual schedule can be found at page 14 of the final regulations.
- **Accrual Can Be Delayed.** The final regulations make clear that once an employee has accrued 40 hours of unused time, employers may delay further accrual until the employee uses some of the accrued time. For example, if an employee rolls over 40 hours of accrued but unused EST from one calendar year to the next, the employer can delay further accrual until the employee uses some of the accrued time.
- **Frontloading Avoids Roll-Over Time.** Under the EST law, employees must be permitted to roll over up to 40 hours of accrued but unused EST from one calendar year to the next, allowing an employee with a legitimate need for EST early in the calendar year to use previously accrued time. However, neither the law nor the draft regulations contemplated how this provision would apply to employers who chose to grant employees their 40 hours at the beginning of the calendar year. The final regulations add clarity—employers that "frontload" EST at the beginning of the year do not need to track accrual or allow any roll-over of that time.
- **Notice and Documentation.** The final regulations include several provisions concerning how employees may use EST and how it may be documented:
  - EST cannot be invoked as an excuse to be late for work without an authorized purpose.

- An employee may not accept a specific shift assignment with the intention of calling out sick for all or part of the shift.
- You can require written verification that an employee has used EST for allowable purposes after using any amount of sick time, but you can only demand medical documentation after 24 consecutive missed work hours.
- You can require the employee to provide a fitness-for-duty certification if doing so is consistent with industry practice or state and federal safety requirements, and reasonable safety concerns exist regarding the employee's ability to perform duties.
- If an employee is exhibiting a "clear pattern" of taking leave on days just before or after a weekend, vacation, or holiday, you may discipline for misuse unless the employee provides personal verification of authorized use.

- **Break in Service.** If an employee returns to employment following a break in service, whether voluntary or involuntary, the employee retains the right to use EST for up to 12 months without restarting the 90-day vesting period. Following a break in service of up to four months, employees may use any EST accrued before the break. Following a break in service of between four and 12 months, the employee may use any EST previously accrued if the employee had at least 10 hours of EST previously accrued.

Suggested Actions:
Employers who have drafted new policies based on the EST law and draft regulations must review those policies to ensure that they are in full compliance with the final regulations.

Additionally, employers should consider how to communicate these changes to employees. All employers should display the attorney general's EST notice and distribute copies of this notice to their employees if they did not do so by July 1.

□ **Parental Leave –** Effective April 7, 2015, Massachusetts expands the current maternity leave law, G.L. c. 149, § 105D as follows:

- The Parental Leave Law is now gender neutral. Both men and women are entitled to parental leave.
- If the employer agrees to provide parental leave for longer than 8 weeks, the employer must reinstate the employee at the end of the extended leave unless it clearly informs the employee in writing before the leave and before any extension of that leave, that taking longer than 8 weeks of leave shall result in the denial of reinstatement or the loss of other rights and benefits.
- The law clarifies that the right to leave applies to employees who have completed an initial probationary period set by the terms of employment, but which is not greater than 3 months.
- The law expands the notice requirements, mandating that employers keep a posting in a conspicuous place describing the law's requirements and the employer's policies as to parental leave.
- The law provides that if two employees of the same employer give birth to or adopts the same child, the two employees are entitled to an aggregate of 8 weeks of leave.

- The law clarifies that an employee seeking leave must provide at least 2 weeks' notice of the anticipated date of departure and the employee's intention to return, but also permits the employee to provide notice as soon as practicable if the delay is for reasons beyond the employee's control.
- The law clarifies that an employee on parental leave for the adoption of a child shall be entitled to the same benefits offered to an employee on leave for the birth of a child.
- The law expands the notice requirements, mandating that employers keep a posting in a conspicuous place describing the law's requirements and the employer's policies as to parental leave.

□ **Domestic Violence Leave --** Massachusetts employers with 50 or more employees in the state must provide up to 15 days of unpaid time off in any 12-month period if the employee or a covered family member is a victim of abusive behavior and the employee needs time off for purposes of medical care, counseling, victim services, legal assistance or other issues directly related to the abusive behavior against the employee or family member. Employers may require employees to exhaust all personal, sick, and vacation time before taking unpaid leave. Employees must also provide advance notice of the need for time off unless there is a threat of imminent danger to the employee or the employee's family member. Employers cannot take negative actions against employees for unauthorized absences if, within 30 days of the last day of absence, the employee provides documentation that the absence was due to domestic violence.

Note: Employers covered by this law are required to notify employees about its provisions. This notice may be provided in an employee handbook and by posting a notice in a "conspicuous place" in a manner consistent with the notice posting requirements of the minimum wage law.

□ **Minimum Wage Increase:** The increase is in the following phases:
- On January 1, 2015, the minimum wage will increase to $9 per hour.
- On January 1, 2016, the minimum wage will increase to $10 per hour.
- On January 1, 2017, the minimum wage will increase to $11 per hour.
- Unemployment Insurance Rates freeze for three years beginning January 1, 2015.

□ **Gender Identity Protection --** The Office of Consumer Affairs issued guidance for employers regarding prohibited discrimination on the basis of gender identity or gender dysphoria including medically necessary transgender surgery or related healthcare services: http://www.mass.gov/ocabr/docs/doi/legal-hearings/bulletin-201403.pdf. Although under ERISA self-insured plans are theoretically excluded from the mandate to provide surgery, if the plan provides coverage for the various types of surgery for non-trans employees, practices may be found discriminatory. Employers should review their discrimination policies, and train management and HR employees regarding discrimination on the basis of gender identity or gender dysphoria.

□ **Employer Retaliation in Unemployment Cases --** Effective March 24, 2015, the Unemployment Insurance law creates a rebuttable presumption of retaliation against an employee who is terminated or experiences a substantial alteration of the terms of employment within 6 months of providing evidence or testifying at an unemployment hearing. To rebut the presumption, the employer must show clear and convincing evidence that the employer's actions were not a reprisal against the employee and that there is sufficient independent justification for the action.

□ **Wage Act Recovery Extended to 3 years**--The statute of limitations for violations of the Massachusetts Wage Act has been extended to three years, up from two years, as of the fall of 2014. Additionally, the time for filing is put on hold (tolled) from the time an employee files a complaint with the AG's office to when the AG issues a right to sue letter or its enforcement action becomes final. Together with Massachusetts' mandatory tripling of damages for Wage Act violations, this can lead to a significant increase in liability for employers facing Wage Act claims.

Best Practice Tips: What steps can employers take to comply with Massachusetts' new laws?

- Update employee handbooks, particularly focusing on leave, and retaliation policies.
- Update other documents to the extent necessary, including notices related to leave.
- Train managers and those who are responsible for properly applying company policies and ensuring compliance with state and federal employment laws.
- **Our office provides all of these services and stands ready to help.**

Federal New Compliance Obligations – 2015:

2014 was a busy year in employment and labor law and 2015 is proving to be even more so. Below is a recap of changes to the federal laws that impact the workplace. As always, do not hesitate to contact our office with questions or for assistance updating handbooks, manuals, policies and employee training.

□ **Handbook Updates**: On March 18, 2015, the National Labor Relations Board's (NLRB) Office of General Counsel released a report that provides new guidance on employee handbooks. Most employers will need to review and update the following sections of their handbooks to comply with the National Labor Relations Act (NLRA):

- Confidentiality rules.
- Professionalism rules.
- Anti-harassment rules.
- Trademark rules.
- Photography/recording rules.
- Media contact rules.

□ **The Affordable Care Act:** A wealth of employer guidance on the ACA was released in 2014, and the first quarter of 2015, including:

- **Tax Credits Remain Available in States Where the Federal Government Runs the Exchange:** A number of states have opted out of creating their own healthcare exchange, allowing the federal government to operate the exchange instead. In June, the U.S. Supreme Court held, in the case of King v. Burwell, that the Patient Protection and Affordable Care Act Section 36B's tax credits are available to individuals who purchase health insurance on an exchange created by the federal government.

- **Wrap Around Plans**: On March 16, 2015, the U.S. Departments of Labor, Health and Human Services, and Treasury released a Final Rule that permits employers to offer "wraparound coverage" to part-time employees with individual policies. This is not, however, a proposal to allow employers to reimburse employees for the cost of individual polices – that is strictly prohibited and can cost employers large sums in tax penalties. In theory, the individual plan together with the wraparound plan will provide a low-wage part-time employee with benefits comparable to the primary employer sponsored group health plan that is available to full-time and part-time employees, but which is unaffordable for the part-time employees.

- **FAQs about Affordable Care Act Implementation:** On November 6, 2014, the Internal Revenue Service (IRS), Department of Health and Human Services and the Treasury released the following guidance document: http://www.dol.gov/ebsa/faqs/faq-aca22.html, advising that employers are prohibited from making or offering any form of payment for individual policy premiums, whether through pretax reimbursements, premium reimbursement arrangements (HRAs), after-tax reimbursements, or cash compensation. Further, employers are prohibited from offering incentives to high-claims-risk employees to drop or forego coverage under the employer's group health plan.
  - On September 26, 2014, the Internal Revenue Service, Department of Labor, and the Centers for Medicare and Medicaid Services issued final regulations addressing the treatment of dental and vision benefits and employee assistance programs (EAP) as limited excepted benefits, which are generally exempt from the Affordable Care Act's market reform requirements.
  - On August 29, 2014, the Internal Revenue Service released updated questions and answers (Q&As) providing guidance on the information reporting requirements under the Affordable Care Act (ACA). Read Questions and Answers on Reporting of Offers of Health Insurance Coverage by Employers (Section 6056)

□ **OSHA:**

- On March 5, 2015, the Occupational Safety and Health Administration (OSHA) published a Final Rule governing employee retaliation or whistleblower claims under § 806 of the Sarbanes-Oxley Act of 2002 (SOX). SOX protects employees who report fraudulent activities and violations of Securities Exchange Commission (SEC) rules that can harm investors in publicly traded companies. The Final Rule establishes the final procedures and time frames for the handling of retaliation complaints under SOX.

- On September 11, 2014, The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) announced a final rule requiring employers to notify OSHA when an employee is killed on the job or suffers a work-related hospitalization, amputation or loss of an eye. The rule, which also updates the list of employers partially exempt from OSHA record-keeping requirements, went into effect on January 1, 2015, for workplaces under federal OSHA jurisdiction. Under the revised rule, employers will be required to notify OSHA of work-related fatalities within eight hours, and work-related in-patient hospitalizations, amputations or losses of an eye within 24 hours. All employers covered by the Occupational Safety and Health Act, even those who are exempt from maintaining injury and illness records, are required to comply with OSHA's new severe injury and illness reporting requirements. To assist employers in fulfilling these requirements, OSHA is developing a Web portal for employers to report incidents electronically, in addition to the phone reporting options. https://www.osha.gov/report_online/

□ **FMLA and Same Sex Marriage:**

- On February 23, 2015, the U.S. Department of Labor released a Final Rule that updates the definition of spouse under the Family and Medical Leave Act (FMLA). The Final Rule updates the FMLA regulatory definition of "spouse" so that an eligible employee in a legal same-sex marriage will be able to take FMLA leave for his or her spouse regardless of the state in which the employee resides.

- On June 25, 2015, the Supreme Court ruled that the Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. Prior to the ruling, many states had already legalized same-sex marriage. However, there were several that had not. As a result, benefits administration — especially among national companies — could suffer from uneven policies, procedures, and enforcement. Different states defined spouse differently, meaning two gay employees who work for the same company, in the same state, but who live in different states, could have different rights. That problem no longer exists.

For ERISA purposes, the Employee Benefits Security Administration had previously determined that the term "spouse" refers to any individuals who are lawfully married under any state law. Thus, all spouses in same-sex marriages across the country are now covered.

Other laws shouldn't change a great deal. While the Supreme Court's decision may be a springboard to pass legislation like the Employment Non-Discrimination Act (ENDA) that is currently before the U.S. House of Representatives and makes sexual orientation a protected class, for now, sexual orientation is not a protected class under Title VII of the Civil Rights Act. However, sex is; and a number of courts have found sex discrimination in cases of LGBT discrimination. Therefore, if your company makes it more difficult for gay or lesbian

employees to enjoy rights and benefits, there is real exposure for a sex discrimination lawsuit.

□ **Discrimination /ADA:**

- On February 3, 2015, the White House announced a new guide for employers that compiles key federal and federally-funded resources related to the employment of people with disabilities: https://www.whitehouse.gov/sites/default/files/docs/employing_people_with_disabilities_toolkit_february_3_2015_v4.pdf.

- **Sexual orientation and gender identity as protected classes:** On December 3, 2014, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced a Final Rule that will prohibit federal contractors from discriminating in employment on the basis of sexual orientation or gender identity.

- **Pregnancy Discrimination/Accommodation:** In March of 2015, the U.S. Supreme Court issued its opinion in Young v. United Parcel Service, Inc. setting forth the test for determining when to accommodate a pregnant employee.
  - In June 25, 2015, in response to the Young decision, the U.S. Equal Employment Opportunity Commission (EEOC) issued an update of its Enforcement Guidance on Pregnancy Discrimination and Related Issues (Guidance), along with a question and answer document and a fact sheet for small businesses. All are available on the EEOC's website at http://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm.

- **Religious Garb in the Workplace:** On March 7, 2014, the Equal Employment Opportunity Commission (EEOC) issued two new technical assistance publications addressing workplace rights and responsibilities with respect to religious dress and grooming under Title VII of the Civil Rights Act of 1964. The question-and-answer guide, entitled "Religious Garb and Grooming in the Workplace: Rights and Responsibilities," and an accompanying fact sheet, provide a user-friendly discussion of the applicable law, practical advice for employers and employees, and numerous case examples based on the EEOC's litigation.

  - **Title VII of the Civil Rights Act of 1964, bars employers from refusing to hire someone "because of" her religion, which includes religious observances.** On June 1, 2015, the Supreme Court held in the case of Elauf v. Abercrombie and Fitch that applicants do not need to show that an employer knew of a need for accommodation, only that the need for accommodation was a motivating factor. Below are the important take-aways for employers:
    - The Court rejected Abercrombie's argument that an applicant or employee cannot show discrimination unless she can demonstrate that the employer had "actual knowledge" that she was wearing the scarf for religious reasons and would need the store to accommodate her. This means that if an applicant or employee is wearing obvious religious attire, that attire cannot be a motivating factor in an

employment decision, even if the applicant or employee does not specifically state that the attire is for religious purposes or request accommodation to be allowed to wear the attire.

- The Court also clarified that even if an employer has a neutral dress policy (e.g. Abercrombie's policy of "no headwear") and applies it equally to everyone, regardless of religion, the employer can still be liable for discrimination. The Court explained that Title VII doesn't require the employer to be neutral when it comes to religious practices. Instead, the law gives religious practices "favored treatment," which means that policies which would otherwise be neutral must "give way to the need for an accommodation" of an applicant's religious practices.

- **Expansion of ADA:** On January 30, 2014, the U.S. Department of Justice (DOJ) issued a Notice of Proposed Rulemaking (NPRM) to implement changes made by the ADA Amendments Act of 2008 (ADAAA) as they apply to Titles II (non-discrimination in state and local government services) and III (nondiscrimination by public accommodations and commercial facilities) of the Americans with Disabilities Act (ADA). These proposed revisions state that the definition of "disability shall be interpreted broadly. The proposed revisions also make it clear that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their statutory obligations and that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis. In addition, the proposed revisions expand the definition of "major life activities" by providing a non-exhaustive list of major life activities and specifically including the operation of major bodily functions.

□ **Retirement Plans:**

- **Recognition of same-sex marriage:** On April 4, 2014, the IRS issued guidance stating that sponsors of qualified retirement plans must recognize same-sex spouses of legally married participants as of June 26, 2013, the date of the U.S. Supreme Court's Windsor decision regarding section 3 of Defense of Marriage Act (DOMA). However, the IRS will not require retirement plans to recognize same-sex marriage prior to the court's Windsor decision.

□ **Wage Protection:**

- **The Department of Labor Finally Announced the Proposed Overtime Rules!** In late June 2015, the DOL proposed that the minimum weekly salary to qualify for an exemption under the Fair Labor Standards Act be set at $921 per week ($47,892 annually). That will increase in 2016 to about $970 a week ($50,440 a year). Thereafter, the salary levels will adjust annually, without further rule-making, to the 40th percentile of weekly earnings for full-time salaried workers. How can employers prepare for these changes? There is a 60-day public comment period on the proposed changes to the overtime regulations. It is safe to say that the proposed new salary test will not change

much, if at all, between now and the final rule. With that in mind, there are several options for employers:

- Do nothing. Pay overtime (time and a half) to currently exempt employees who are below the 40th percentile of weekly earnings for full-time salaried workers.
- Reclassify employees and limit overtime possibilities. This may control wages paid on your current workforce; but may also have the adverse consequence of having to hire more employees.
- Give raises. Bring currently exempt employees who are below the 40th percentile of weekly earnings for full-time salaried workers up to the salary level needed to qualify for the exemption.
- Reclassify and cut pay. Convert to hourly those currently exempt employees who are below the 40th percentile of weekly earnings for full-time salaried workers, and readjust their wages down, taking into account the same number of hours worked per week and the overtime that you'll have to pay as a result.
- **Audit.** Regardless of the action you take or do not take in preparation for the new overtime rules, now is an important time to review job descriptions and employee classifications. Ensure job descriptions reflect the duties actually performed by the employee, and make sure independent contractors are not in fact misclassified employees. In the event that the primary-duty test is modified by the DOL before the final rules go into place, it is important to start considering reassigning the non-exempt duties that otherwise exempt employees perform to other non-exempt employees.

The FLSA is already fertile ground for litigation. With the press surrounding the new overtime rules, employees are going to be more likely to explore their legal rights. Our office is available to help you wade through the issues, update handbooks, and conduct a confidential workplace audit to ensure compliance to avoid this risk.

- On January 1, 2015, the minimum wage increased to $10.10 for all workers on federal construction and service contracts.

- On July 31, 2014, President Obama signed the "Fair Pay and Safe Workplaces" Executive Order, which requires bidders on federal procurement contracts for goods and services (including construction) in excess of $500,000 to disclose labor law violations that have occurred within the three-year period immediately preceding the bid.

- On March 13, 2014, the Obama Administration signed a Presidential Memorandum authorizing the Department of Labor to examine changes that would increase the number of employees eligible for overtime pay under the federal Fair Labor Standards Act (FLSA). As a result, a proposed rule regarding large scale changes to the FLSA, which has not been updated in over 10 years, is expected at any time. This will directly impact minimum wage, overtime, and classification of exempt workers.

- **Compensable Time –** The U.S. Supreme Court unanimously ruled that the time workers spend waiting to undergo and undergoing security screenings is not compensable under the Fair Labor Standards Act (FLSA) because the security screenings at issue were not the principal activities the employees were employed to perform, were not "integral and indispensable" to those activities and, thus, were non-compensable. The Court decided that an activity is "integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."

□ **Background Checks:**
- On March 10, 2014, the EEOC and FTC released two co-published technical assistance documents that explain how the agencies' respective laws apply to background checks performed for employment purposes. The agencies emphasize that employers need written permission from job applicants before getting background reports about them from companies in the business of compiling background information. Furthermore, they reaffirm that it is illegal to discriminate based on a person's race, color, national origin, sex, religion, age (40 or older), disability, or genetic information, including family medical history, when requesting or using background information for employment, regardless of where the information was obtained.

II. What Is On The Horizon?

Here are the Legislative Activities that we are tracking:

□ Efforts to mandate paid sick leave;

□ Bills that would curtail or negate entirely the protections of non-compete agreements;

□ Attempts to amend the current definition of "independent contractor" that has been problematic for employers;

□ Significant increases to state and federal minimum wage rates;

□ Legislation providing protection to victims of domestic violence and their immediate family members by guaranteeing up to 15 days of leave for their jobs in any 12-month period;

□ Immigration reform.

Here is a checklist that will allow you to determine if you are keeping pace with or tracking trends that affect today's workplace:

□ **Immigration Reform:**
- Congress is expected to take up comprehensive immigration reform;
- Department of Homeland Security employer-based audits will likely continue.

□ **What to Keep and What to Toss:**

- Destroy the wrong document, and you could destroy your career along with your chances of winning a law suit brought against your company;
- Virtually every federal employment law and some state employment laws carry specific record keeping obligations and timelines;
- The trend toward retaining documents in electronic format raises a variety of issues;
- Balancing record keeping obligations while positioning your company for litigation will become more complicated.

□ **The Massive "Misclassification" Initiative Will Continue:**
- The IRS and the U.S. Department of Labor will target employers with more audits and more scrutiny;
- The IRS estimates that 80% of workers classified as "independent contractors" are actually employees.

□ **Ready for OSHA- They're Here:**
□ With OSHA's increased focus on employer operations, it is risky to be unprepared for a safety inspection or a Whistle Blower complaint.

□ **The Courts Will Continue to Define Reasonable Accommodation Obligations:**
- The 2009 amendments to the ADA greatly expanded the definition of "disability" and turned the focus of an employer's defense to issues of defining *reasonable accommodation, qualified individual, undue hardship,* and *essential functions;*
- The developments highlight the importance of determining a job's essential functions.

□ **State Legislation: Impact of Legalized Marijuana on Employer Drug-Free Workplace Policies:**
- There may be a clash between new state "medical marijuana" laws and drug-free workplace and/or substance abuse testing policies;
- Employers will inherit new responsibilities to advise and remind applicants and employees that the drug-free workplace policies and other performance expectations remain in effect;
- These obligations are especially pertinent for employers in the transportation and other industries where federal regulations require routine testing for safety-sensitive positions.

Navigating the Second Decade of the 21st Century:

☐ HR is dead – long live HR! Human resources professionals take on a new role. Systemizing fades away as a strategic partner emerges; By 2020, Internet users worldwide will be more than double to nearly 4 billion, processing speeds will increase 100-fold, and capacity will expand exponentially; Social media is rapidly becoming a common and accepted form of communication by a wide array of business and individuals; Increased use of contingent employees is one of many contributing factors to an anticipated increase in telecommuting by 2020;

☐ Discrimination and harassment theories are morphing to protect employees with family responsibilities, secular world views, and victims of workplace bullying;

☐ Labor organizing efforts will intensify under the new NRLB;

☐ Revenue-driven Federal and State agencies are stepping up their enforcement;

☐ Discrimination, workplace safety and workplace bullying remain in the headlines;

☐ DOMA fades away – benefits are extended to same-sex spouses; and

☐ Health insurance costs will continue to rise and create more strain on operating budgets and strategic challenges for HR.

☐ **Telecommuting Will Expand To Almost All Types Of Workers:**

- Overhead is expensive – approximately $10,000 annually for the average worker;
- It is predicted that productivity gains resulting from telecommuting could save employers up to $200 billion dollars;
- This year, approximately 38 million adults in the U.S. telecommuted at least occasionally;
- By 2016, research suggests 63 million workers (or 43% of the U.S. workforce) will telecommute;
- Baby boomers were/are workaholics, but Gen-Hers and Gen-Yes are more family oriented;
- We can expect to see telecommuting options as part of the benefits package commonly offered by employers of tomorrow;
- More telecommuting will be an obvious advantage for a number of employers – the key will be to manage potential pitfalls; and
- Time to dust off or establish remote working arrangement agreements and a telecommuting policy.

□ **The Presidential Elections in 2016 will Dictate the Course of Workplace Regulations:** What happens in the 2016 presidential election will significantly impact the direction of labor and employment law over the next five to 10 years.

- Republican control of the White House and/or Congress could mean fewer new laws affecting employers and fewer changes to existing laws affecting employers; and
- Democratic control of the White House and/or Congress may lead to more laws and regulations, giving employees the upper hand.

□ **It's all about the Economy Stupid!**
Uncertainty in the market and the economy has resulted in less planned growth and less hiring. We will continue to see periodic hiring blitzes and reductions in force as employers adjust to changing economic and market conditions. This unpredictability has necessarily led to employees bringing an increasingly large number of claims with agencies and courts. EEOC charges have increased 25% over the past four years.

□ We believe that employers should be well prepared to respond to employee turmoil in the workplace for the foreseeable future: Internal/external complaints; performance issues; negative moral; lawsuits. We also believe employers should be prepared for a possible increase in union activity, as unions see these economic pressures as a time of opportunity to capture the attention of disgruntled employees.

As Economic Pressure Has Intensified, So Has Federal Agencies' Activity:

□ The Department of Labor is stepping up enforcement. The DOL is hiring 1,000 new employees (670 investigators); and adding 200 wage and hour division investigators.

□ OSHA continues to encourage employers to adopt health and safety programs and recently hired 160 new employees.

□ Federal contractors beware – OFCCP recently hired 213 new employees.

□ Not surprisingly, the large increase in the number of EEOC claims has resulted in over 300 new staff members being hired while the EEOC budget has increased more than $344 million dollars.

□ The NLRB is issuing more rulings that have significant impact on non-union employers.

The Digitization Of Work Will Continue to Raise Issues:

□ How does an employer determine and record the hours of work of a non-exempt employee working in his or her home, including time spent reviewing and responding to email on company-issued cell phones and laptops?

□ The fact that a non-exempt employee is telecommuting and/or voluntarily engaging in work related e-mail communication after hours does not change an employer's obligation to pay for overtime work;

- ☐ Overtime issues are present in all working environments and are extremely difficult to manage when the employee is working away from direct supervision and/or outside the office;

- ☐ More visible class action wage and hour lawsuits proliferate around the country, as employees seek overtime compensation for hours they claim they worked at home;

- ☐ An assistant to Oprah Winfrey claimed more than $65,000 in overtime over a 16 week period due to activity on her personal digital assistant (e.g. Blackberry or iPhone) and the company paid it;

- ☐ Increased employee connectivity to the office will expand exposure;

- ☐ Are employees classified correctly?

- ☐ Are your expectations defined?

- ☐ E-discovery issues continue to multiply exponentially as technology increases.

The Inter-Relationship of Statutory Leave Requirements is Becoming More Complicated and That Trend Will Continue:

- ☐ FMLA/Workers Compensation/ADA/state leave laws/military leave;

- ☐ It is almost impossible today for employers to consider leave issues and the implications of their decisions without some legal guidance;

- ☐ The issues of leaves of absence will continue to grow and become more complex during the next few years.

New Basis Of Discrimination Will Develop:

Expanded Protection for Domestic Violence, Stalking, Sexual Assault:

- ☐ The EEOC has asserted that Title XII and the ADA Amendments Act (ADAAA) apply to applicants and employees who are the victims of domestic or dating violence, sexual assault, or stalking;

- ☐ The EEOC appears committed to utilizing Title XII and the ADAAA to protect members of the lesbian, gay, bisexual and transgender community, as well as victims of domestic violence, stalking and sexual assault under an expanded view of the statutory protected classes thereunder.

□ **Caregiver Discrimination?**

- Currently no distinct statutory protection;
- Women are disproportionately likely to assume primary care giving responsibilities;
- Family responsibility discrimination becomes an extension of gender discrimination under Title VII;
- Part of family responsibility discrimination is the concept of flexibility stigma – based upon the assumption that one needs to be physically present at the office every day to qualify for advancement, without recognizing the need for flexibility;
- As more care givers enter the workforce and as the children of aging baby boomers take on more care giving responsibilities, pressure will mount to pass additional legislation to extend protections to care givers.

□ **Personal Appearance?**

- We are likely to see employees and applicants push the edges of existing state and federal law to make personal appearance discrimination illegal;
- Employers are likely to face resistance to implementing work rules that bar clothing styles that originate in Eastern, Muslim, and African cultures or in various religious denominations;
- It is also likely that more and more jurisdictions will pass legislation that prohibits personal appearance discrimination (employees appear overweight or unattractive) because such practices are perceived as unfair and unrelated to the work the employee performs.

□ **Socio-Economic Discrimination?**

- The association between racial, ethnic and national origin discrimination and socio-economic outcomes make this an area within which employers should focus attention over the coming decade;
- Do you have policies that provide protection?

□ **Worker Safety And Workplace Bullying Will Remain A Hot Topic:**

- Employers should be concerned about their employees' increasing use of mobile technology while they are working or driving company vehicles;
- Studies show that approximately 70% of all drivers admit to texting while driving;
- Studies also provide alarming data that demonstrates texting while driving increases the risk of accidents by more than 23%;
- The concept of workplace bullying has garnered much attention in recent years. One third of the U.S. workforce or 54 million workers feel they have been bullied on the job;
- The Workplace Bullying Institute, formed to raise awareness of the issues of workplace bullying, has developed the "Healthy Workplace Bill" and is currently lobbying state legislators to pass the bill;
- For your "to do" list – create or update your OSHA health and safety protection plan.

□ **Same Sex Spousal Benefits Will Likely Obtain Legal Protection Soon:**

- DOMA has been ruled unconstitutional and the Respect of Marriage Act is pending;
- Same sex spousal benefits will receive legal protection;
- In the meantime, your plan document's definition of "spouse" will be critical in determining who is eligible for spousal benefit.

III. Final Thought

We can help you navigate current and anticipated compliance obligations and achieve best practices. Our firm offers comprehensive proactive services that buttress and complement our clients' effort and practices to reduce HR-related risk management. Our Handbook updating and our Diagnostic Audit services form an Iron Dome of HR-related risk management protection. Rather than waiting and wondering about a legal issue, we can proceed with an Audit and a Handbook update now.