Labor and Employment Law Roundup

HOUSTON, TEXAS • JANUARY 17, 2013

Agenda

8:00 – 8:30 AM .....Registration and Continental Breakfast

8:30 – 8:35 AM .....Welcoming Remarks

8:35 – 9:00 AM .....Keynote Presentation by R.J. Ruff, Jr.,
District Director, EEOC, Houston District Office

9:00 – 9:20 AM .....Top 10 Issues to Watch

9:20 – 9:40 AM ..... New Horizons in Discrimination Law

9:40 – 10:00 AM ..... Social Media and the Workplace

10:00 – 10:20 AM .....Trade Secret Update

10:20 – 10:30 AM .....Q&A

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Labor and Employment Law Roundup

A look at the Federal and Texas employment issues you need to know about in 2013 and beyond

The Houstonian Hotel

JANUARY 17, 2013

Keynote Presentation

Presented by:

R.J. Ruff, Jr.
Director, Federal Equal Opportunity Commission,
Houston District

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Top 10 Issues to Watch

Presented by:

Susan L. Bickley
Partner, Blank Rome LLP

Scott Cooper
Partner, Blank Rome LLP

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1: Watch For Increased Reach of NLRB

- "Employees shall have the right to . . . **engage in other *concerted activities* for the purpose of collective bargaining or other mutual aid or protection. . .**" **Sec. 7, NLRA**

- **In 2012, NLRB decisions under Sec. 7:**
  - Overbroad "at-will" employment policies/acknowledgements may violate Sec. 7. (Oct. 2012 Advice Memoranda)
  - Policies forbidding disparaging comments about employer on social media sites may violate Sec. 7. (NLRB Sept 25, 2012, *EchoStart Corp.*)
  - Blanket confidentiality policies for workplace investigations may violate Sec. 7. (NLRB July 30, 2012 *Banner Health System*)
  - Broad courtesy-at-work policy violated Sec. 7. (Sept. 2012 NLRB, *Knauz BMW*)

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2: Watch For EEOC To Implement New Strategic Enforcement Plan

- Nationwide Priorities Finalized In December
  - Eliminate systemic barriers in recruitment & hiring (including screening tools used pre-employment)
  - Protect immigrant, migrant, and other vulnerable workers unaware of rights
  - Address emerging issues (ADAAA, LGBT coverage under Title VII, PDA violations from forced unpaid leave)
  - Preserve access to the legal system (focus on retaliation, overbroad waivers, settlement provisions that prohibit EEOC charges)
  - Combat harassment (education and outreach campaign for employers and employees)

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#3: Watch for Decision in *Vance v. Ball State University*

- Argued before Supreme Court on 11/26/12
- Who is the supervisor for purposes of Title VII vicarious liability?
  - Person overseeing daily work, ***or***
  - Only those persons who can hire, fire, demote, promote, transfer or discipline.
- If the harasser is found to be the "supervisor," employer is vicariously liable subject to defenses.

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#4: Watch For Decision in *Genesis HealthCare Corp. v. Symczyk*

- Argued 12/3/12
- Whether a putative class action under FLSA can be mooted by offering plaintiff full satisfaction?
- This was a FLSA wage/hr case involving pay for work on meal breaks brought on behalf of plaintiff and others similarly situated.

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#5: Watch for US Supreme Court Arguments on Domestic Partner Issues

- Back-to-back arguments set on March 26 & 27, 2013 before Supreme Court - cases likely affecting employee benefits issues.

- *Hollingsworth v. Perry* -- Whether the Equal Protection Clause prohibits California from defining marriage as only between a man and a woman?
- *U.S. v. Windsor* – Whether DOMA's ban on federal benefits for same-sex partners violates the 5th Am.'s guarantee of equal protection when applied to legally married couple?

- *See* 2012 Request for Texas AG Opinion asking AG to find Texas public employers cannot grant same-sex partner benefits.

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#6: Watch for More Law Impacting Employees' Off-Duty Conduct

- Tobacco no-hire policies in healthcare arena
  - Dallas-based Baylor Health Care Sys. stopped hiring nicotine users in 2012
  - All facilities smoke-free
  - Offers stop-smoking program
  - Current smoking employees pay annual fee

- Health-contingent wellness programs examine
  - Tobacco use
  - Biometrics or health risk assessment (BP, Cholesterol, Body Mass Index, Glucose levels) ***and*** require meeting with a coach, health or fitness course, health improvement plan if outside norm.

- Legal impact for employers of legal marijuana in Colorado or medical use in California.

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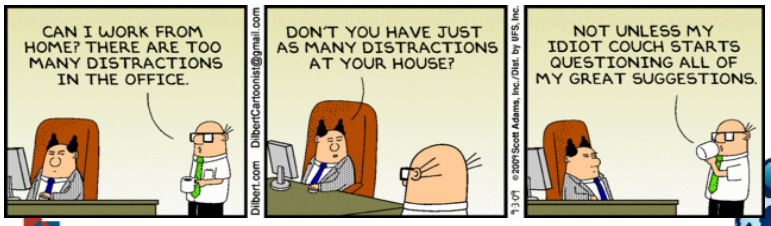
#7: Watch for Telecommuting Issues

- FLSA overtime claims from working at home. (*Brown v. Scriptpro LLC,* 10th Cir.)
- Discrimination claims when deny telecommuting request. (*Kline v. Berry,* D.C. Cir.)
- Retaliation claim when took away flex schedule/telecommuting option after charge filed. (*Kline v. Utah Anti-Discrim. & Labor Div.,* 10th Cir.)
- Disabled employee filed claim after employer asked for more information to support telecommuting proposal. (*Thomas-Bagrowski v. Lahood*, 7th Cir.)



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#8: Watch For OSHA's Whistleblower Emphasis

- 2010 review of OSHA Office of Whistleblower Program led to a renewed emphasis in 2012
- Nov. 2012 - OSHA named new director of Office of Whistleblower Protection Program
- In March 2012, Deputy Asst. Secretary issued Memo concerning Employer Safety Incentive and Disincentive Policies and Procedures
- Memo identified employer practices that may violate anti-retaliation provisions under 11c of Act:
  - Discipline for time/manner of reporting injury
  - Discipline based on pretextual application of a safety rule to penalize an injured worker
  - Safety incentive programs with raffles, bonuses, parties may provide an incentive *not* to report injuries

OSHA

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#9: Watch For Increase in Lawsuits Involving Veterans

- Uniformed Services Employment and Re-Employment Rights Act (USERRA)
  - Escalator principle: Entitled to return to the position the employee *would have obtained* had they remained employed – scope of this obligation *not* well understood.
- FMLA leave – caring for a covered service member (military caregiver leave)
  - Up to 26 weeks of leave -- coverage slightly broader than exigency leave
  - On a per-service member, per-injury basis
  - Types of documentation accepted
- FMLA qualified exigency leave – when military spouse, child, or parent on (or called to) active duty:
  - Short notice deployment
  - Military events/activities (ie. Military parades)
  - Childcare
  - Financial and legal arrangements (ie. Estate planning)
  - Counseling
  - Rest and recuperation leave
  - Post-deployment activities

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10: Watch For Upcoming Health Care Reform Issues

- Texas Governor : "No Texas health insurance exchanges."
- Requirements effective this year:
  - 1st open enrollment after Sept. 2012 - Summaries of Benefits/Coverage due
  - W-2 Reporting of employer-provided coverage
  - Flexible Spending Account limits for 2013
  - Increased Medicare tax
- Pay or Play Penalties Begin 2014
- Health and Wellness Programs
  - Increased incentive % for health contingent plans
  - For Guidance, *see* November 2012 proposed rules issued by DOL Employee Benefits Security Administration, Dept. of Health and Human Services, and Treasury Department

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New Horizons in Discrimination Law

Presented by:

Susan L. Bickley
Partner, Blank Rome LLP

Elizabeth Patterson
Associate, Blank Rome LLP

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Looking ahead, where are we going in discrimination law?

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Sex Discrimination Evolving to Include:

- Nursing Mothers
- Transgendered Applicants/Employees
- Emphasis on Caregivers
- Emphasis on Victims of Domestic/Sexual Violence

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Sex Discrimination: Nursing Mothers

- EEOC's recent position in a 5th Circuit Appellate Argument in *EEOC v. Houston Funding, Ltd.* (Nov. 2012)
  - Title VII prohibits discrimination based on lactation; and
  - Pregnancy Discrimination Act covers lactation and other "related medical conditions," even post-birth conditions.
  - Lower court had ruled that PDA coverage ended "on day employee gave birth."
- Awaiting ruling from 5th Circuit.

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FLSA Provisions: Nursing Mothers

- After healthcare reform, FLSA now requires:
  - Reasonable break time to express milk for non-exempt employees
  - Private area other than a bathroom to express milk
- Unless < 50 employees and causes undue hardship

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FLSA Provisions: Nursing Mothers

- 15 employers cited by Department of Labor for violations to date
- Courts are allowing retaliation claims based on employee complaints about compliance (*Eg.*, *Salz v. Casey's Marketing Co.*, (D. Iowa, July 2012)

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Transgendered Applicants/Employees

- EEOC's April 12, 2012 decision in *Macy v. Eric Holder* announces Title VII protects transgender status
- Discrimination against a transgendered individual is sex discrimination when based on: gender identity, change of sex, or gender stereotypes

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Mia Macy v. Eric Holder

- Macy, police detective, applies for ATF position as man
- "You have the job pending background check"
- Then reveals transitioning from male to female
- "Position no longer available due to budget cuts" and then "Filled by another"
- Claims not hired "because made transgender status known"
- Previous cases held sex discrimination includes "*not just biological sex, but gender stereotyping – failing to act/appear according to expectations defined by gender*"
- New ruling clarifies that EEOC position is discrimination on basis of transgender status is sex discrimination under Title VII

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City and County Ordinances Prohibit Discrimination Based on Gender Identity

- As of March 29, 2012, at least 163 cities and counties prohibit employment discrimination based on *gender identity* in ordinances.
- In Texas, these reportedly included:
  - Dallas County-2011
  - City of Fort Worth-2009
  - City of Austin-2004
  - City of Dallas-2002
  - City of El Paso-2003

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Discrimination Against Caregivers- What is Causing the EEOC Concern?

- "I know you can't travel"
- "You don't need the stress"
- "I am not sure I can depend on you"
- Benevolent stereotyping

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EEOC Focusing on "Caregivers"

- Given number of working mothers, and working persons caring for disabled or aging family, EEOC focus is to use existing laws to assure "caregivers" treated in non-discriminatory way
- Using Title VII and ADA -- asking whether women treated differently when leave taken for caregiving, or whether caregiver discriminated against based on "association with disabled person"
- Telling investigators to look for evidence of stereotyping, derogatory comments, different treatment on this basis

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EEOC's October 2012 Guidance on Victims of Domestic Violence

- No new legal protection – use of existing laws to benefit these victims
- Guidance says EEOC will focus on the following:
  - Sex-based stereotypes affecting such victims
  - Sexual harassment that turns employees into such victims
  - Retaliation issues against such victims

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EEOC's Guidance on Domestic Violence Targets Discriminatory Practices

- Such as assuming victims bring "drama" to workplace
- Penalizing male employees who are domestic violence victims based on gender stereotypes
- Treating crimes by strangers differently – allowing time off to attend court in some situations, but not for "your family issues"

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EEOC's April 2012 Guidance on Use of Arrest and Conviction Records

- EEOC noted inaccuracy in criminal history data bases and disparity in arrest and incarceration rates:
  - Hispanics (17.2%)
  - African Americans (32.2%)
  - Caucasian (5.9%)
- "Supports a finding that criminal record exclusions have a disparate impact based on race and national origin."
- So "an ***arrest*** record standing alone may not be used to deny an employment opportunity."
- Guidance on use of conviction record.
- However, an employer may permissibly consider the specific conduct underlying the arrest, and how that conduct may affect a person's fitness for a particular position.

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Religious Discrimination – New Areas

Chenzira v. Cincinatti Children's Hosp. (11th Cir., Dec. 27, 2012):

- Vegan hospital employee claims religious discrimination
- Refused flu shot because contains animal byproducts
- Fired for refusal
- Religious discrimination claim survives motion to dismiss
- "[Complaint] adequately alleges beliefs sincerely held so as to merit legal protection."

Arian Foster
(Prominent Houston Vegan)

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Age Discrimination: Stereotypes Hurt

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EEOC Final Rule Amends Regulations - "Reasonable Factors Other Than Age" Defense

- Effective 4/30/12, EEOC's final rule amends regs interpreting RFOA defense in ADEA claims
- Shows how EEOC will interpret whether an employer's reason for a decision is "reasonable."
- Rule is "must reading" when planning for a RIF.

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How is "reasonableness" evaluated?

Rule says evaluate the *extent* to which:

- ☑ Factor is related to stated business purpose?
- ☑ Factor is defined/applied accurately?
- ☑ Supervisor had discretion to use subjective assessment of the criteria?
- ☑ Employer looked at possible adverse impact?
- ☑ Protected age group harmed and if steps taken to reduce it?

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In Light of the New Rule. . .

- ☑ Read the detailed rule in advance and plan for any decision with likely impact on protected age group
- ☑ Carefully select criteria for decision, persons assessing criteria, final decision-maker
- ☑ Identify and document use of objective criteria to use in assessing employees
- ☑ Train personnel and decision-makers in the criteria to assure non-discriminatory application

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But, In light of the new rule. . .

- ☒ Do not ask supervisors to come up with their own criteria for a key decision with age-related impact without HR/management supervision
- ☒ Do not ask supervisors to use your selected criteria without training and guidance
- ☒ Do not make final decision without evaluating harm to protected age group

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Social Media and the Workplace

Presented by:

Darla Hill
Of Counsel, Blank Rome LLP

Susan L. Bickley
Partner, Blank Rome LLP

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Social Media: Treasure Trove or Minefield?

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Social Media Creates A Whirlwind of New Workplace Legal Issues

- **Recently in the News:**
  - Petraeus scandal – blur public/private
  - Netflix CEO – S.E.C. says his Facebook posting may violate Reg FD
  - New Orleans City Attorney resigns – his subordinates commented about active criminal investigations on nola.com
  - Domino's Pizza – employees' video prank harms brand. Says Domino's, "We got blindsided by two idiots with a video camera and an awful idea."

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What do we mean by "SOCIAL MEDIA"?

- Interaction in which people create, share, exchange and comment upon content among themselves in virtual communities and networks.
- Content is user- generated.
- Differs from traditional media in "quality, reach, **frequency,** usability, **immediacy** and **permanence**."
- Eg., Facebook, Twitter, Youtube, Pinterest, WordPress, Blogs, Second Life, LinkedIn, Google+, Tumblr, comments on websites, chat rooms, photo-share sites.

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What can you do to address the risks of social media?

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Inventory Social Media Use

- Perform ground-up review the employer's website and separate websites of any departments, including related activities (charity campaigns, etc) to find out how posting is occurring? By whom?
- Does the employer have *authorized* bloggers, Tweeters, commenters?
- Are authorized posters trained?
- Know whether social media content is reviewed in hiring, promotion, recruitment or in background checks? If so, how is access obtained?
- Know whether social media content or usage ever a factor in discipline?

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Be Aware of Industry-Specific Laws and Regulations

- *E.g.*, federal or state regulations such as Securities and Exchange Commission or Blue Sky regulations
- Texas Public Information Act
- *Quon* decision – 4th Amendment

- Industry-Specific Statutory Confidentiality Requirements
  - Hospitals must protect medical information of patients
  - Banks must protect certain financial information

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Pay Attention to Developments in Laws Related to Social Media

- National Labor Relations Board
  - Section 7 of the National Labor Relations Act protects workers' "concerted activities" ***whether the workforce is unionized or not***
  - NLRB found employers violated NLRA when disciplined for online activity related to wages or conditions of employment – viewed as "concerted activity" protected by NLRA
  - Many employer social media policies unlawful under this test.
- More states are enacting "**Facebook" laws**
  - To date, California, Illinois, Maryland, Michigan
  - Prohibit asking applicant/employee for to access to social media accounts
  - 3 such bills introduced by 83rd **Texas** Legislature, which convened on January 8, 2013
- Federal proposal

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Be Aware of Social Media in the Context of Other Employment Laws

- Title VII
- Age Discrimination in Employment Act
- Americans with Disabilities Act
- Family Medical Leave Act
- Fair Labor Standards Act
- Retaliation theories
- Tort law, such as defamation

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Prepare a Policy

- Define "social media" to leave room for technological developments
- Determine whether you sometimes *want* employees to engage in social media about work
  - If so, *which* employees? How will you authorize them?
  - How will you provide/maintain access to accounts?
  - How will you review content?
- Set the boundaries
  - Make it clear that harassment, discrimination, etc. are prohibited
  - Consider how to protect confidential information

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Prepare a Policy (Cont'd)

- Advise what is prohibited and give concrete examples
- Make clear the employer does not intend to violate the NLRA (use examples to show this is not intent)
- Set up mechanisms to comply with industry regulations
  - For example, TPIA
- Provide for management ownership and access to accounts and content where account is sponsored by or identifiable with employer
- Provide training on policy
- Refer to socialmediagovernance.com, which has a collection of social media policies adopted by companies, for a starting point

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Inventory How Social Media May Be Used At Each Stage of Employment

- Application/recruitment stage
  - If used to make employment decisions, may be part of an employment file and is subject to record retention rules
  - Consider whether social media sites you access during hiring process could provide information about protected categories (*e.g.*, disability or pregnancy) that you might be better off not knowing when making hiring decisions
  - If someone reviews social media material when hiring, consider at a minimum putting hiring decision in the hands of someone other than that reviewer
  - If background checks are outsourced, the screening service is likely subject to the Fair Credit Reporting Act - be sure the service you use complies with FCRA

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Discipline and Termination Stages (cont'd)

- Find out how employer found out about the issue?
- Are privacy issues implicated?
- Does the policy actually prohibit the conduct?
- Even if the policy prohibits the conduct, does the conduct represent **concerted activity**?
- Is the employee expressing only a personal view or is there some effort toward mutual aid or protection? *Hispanics United of Buffalo* decision
- Other, usual procedures apply
  - Investigate
  - Consider all employment statutes
  - Ensure any discipline is comparable to that given for other, similar transgressions
  - Ensure transition of any company social media accounts if worker is terminated

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Trade Secret Update

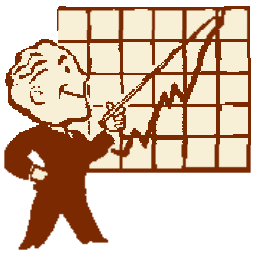
Presented by:

Susan L. Bickley
Partner, Blank Rome LLP

Scott Cooper
Partner, Blank Rome LLP

Trade Secret Litigation in State and Federal Courts

- Today, we'll review an interesting statistical analysis of trade secret litigation nationwide
- But first, let's review a few basic concepts and terminology



Basic Concepts & Terminology

- Trade Secret
- Non-Disclosure Agreement
- Non-Compete Agreement
- Non-Solicitation agreement
- What trends do we see?

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Statistical Analysis and Study of Trade Secret Litigation

- Review of thousands of state and federal decisions
- Coded trade secret cases by:
  - Type of trade secret
  - Who was the alleged misappropriator
  - What law was applied
  - What reasoning was used
  - Who won

- Full studies located at D.S. Almeling et al., *A Statistical Analysis of Trade Secret Litigation in State Courts*, 46 Gonz. L. Rev. 57, 67-68 (2011) [State Study] and D.S. Almeling et al., *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 Gonz. L. Rev. 291 (2010) [Federal Study]

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Lessons Learned From Statistical Analysis

- Trade secret litigation is on the rise.
- Half of all state cases in study came from only 5 states:
  - California (16%)
  - Texas (11%)
  - Ohio (10%)
  - New York (6%)
  - Georgia (6%)

- California, Texas, and New York also in top 5 in federal cases.
- In a majority of cases (68%), the courts applied statutes.
- In a minority of courts (24%), state common law applied.
- Texas and New York are only Top 5 not to follow the Uniform Trade Secrets Act ("UTSA")

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Trade Secrets Owners Generally Know the Alleged Thief

- In the vast majority of trade secret cases, the alleged misappropriator was someone the trade secret owner knew
- An employee or business partner in 93% of state court cases and 90% of federal cases

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Most Cases Involve Internal Business Secrets or Technical Trade Secrets

- Internal business trade secrets (i.e., customer lists and internal business information) are the subject of the theft in 70% of state cases
- Technical trade secrets (i.e., formulas, technical information, and software or computer programs) are involved in 36% of the state cases and a higher % of federal cases.

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How Owners Proved Their Case?

- A trade secret owner is not entitled to protection unless it took reasonable measures to protect the trade secret.
- *Only two* measures statistically predicted success on this element
  - (1) confidentiality agreements with employees, and
  - (2) confidentiality agreements with third parties.
- This was true across both state and federal court studies.

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Who Won and Who Lost in State Court?

- Trade secret owner won 41% of the time in the trial court
- Alleged misappropriator won 58% in the trial court
- On appeal, the trade secret owner again won 41% of the time
- Trade secret owner's win rate lower against a business partner rather than an employee
- As an aside, federal courts handled more cases involving business partners than did state courts

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Chances of Obtaining Preliminary Relief in Federal Court?

- More likely to succeed in obtaining preliminary relief (TRO or preliminary injunction) against employee -- 42% chance
- When against business partners, chance of obtaining preliminary relief was much lower -- 23% chance

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Labor and Employment Law Roundup

HOUSTON, TEXAS • JANUARY 17, 2013

Speaker Biographies

Roy James Ruff, Jr.

District Director, Houston District Office, U.S. Equal Employment Opportunity Commission
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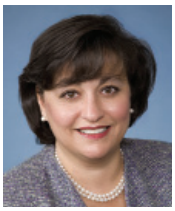
R.J. Ruff Jr. was appointed as District Director for the U.S. Equal Employment Opportunity Commission (EEOC) Houston District Office October 1, 2006. The Houston District Office with its New Orleans Field Office serves east Texas and Louisiana. R.J. joined civil service as a senior executive after a very distinguished military career in the United States Air Force, rising through the ranks from Airman to Colonel. Throughout his military career, he gained a wealth of experience managing equal employment opportunity programs and enforcing related laws.

Prior to becoming the EEOC District Director, he served as Region-10 Administrator for the Centers for Medicare and Medicaid Services (CMS). He helped the agency implement the prescription drug benefit under the congressionally mandated 2003 Medicare Modernization Act. He was responsible for the federal administration and enforcement of Medicare, Medicaid, and State Children's Health Insurance programs, and Quality Initiatives in Alaska, Idaho, Oregon, and Washington. He also served as the national leader to the CMS Tribal Technical Advisory Group which included over 232 tribes and Alaska natives.

From 2002 – 2004, R.J. served as the Associate Director of Administration for the National Institute of Mental Health Division Intramural Research Programs. He provided the executive leadership, resources, and management that enabled the institute to plan and conduct basic, clinical, and translational research to advance understanding of the diagnosis, causes, treatment, and prevention of mental disorders through the study of brain function and behavior.

R.J. is a transplanted Texan. He grew up in a military family environment, graduating from Frankfurt American High School in Frankfurt, Germany. He earned his Bachelor of Science Degree in Business Administration and a Master of Science in Management from Troy State University. Additionally, he is a graduate of the Interagency Institute for Federal Executives at George Washington University and a graduate of the Senior Executive Development Program at Harvard University.



Susan L. Bickley

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With more than 27 years of civil trial and appellate experience, Ms. Bickley's practice centers around representing both public and private employers in the full range of employment-related litigation. She has defended numerous public and private employers in cases and charges filed under Title VII, the Civil Rights Act of 1991, the Americans With Disabilities Act of 1990, the Pregnancy Discrimination Act, the Age Discrimination in Employment Act, the Texas Commission on Human Rights Act, the Texas Whistleblowers Act, Workers Compensation Act retaliation provisions, the Equal Pay Act, the Fair Labor Standards Act, the Texas Payday Act, the United States Constitution, the Texas Constitution, among other statutory and common law theories asserted against employers. As part of her practice, she also represents employers in cases involving the misappropriation of trade secrets, violations of covenants not to compete, and breaches of the common-law duty of loyalty. Based on her courtroom experience, Ms. Bickley also taught Trial Advocacy as an adjunct professor at the University of Houston Law Center from 2006 – 2010.

At Blank Rome LLP, Ms. Bickley leads the Houston office's Employment, Benefits & Labor Practice Group practice, and serves on the firm's Diversity Committee, Steering Committee of the Blank Rome LLP Women's Forum, and Steering Committee of the Trade Secret Litigation Group.

In 2010 and 2011, Ms. Bickley received the President's Award from the Houston Bar Association. She currently is a member of the State Bar Texas Disciplinary Rules of Professional Conduct Committee, a former chair and current member of the Houston Bar Association Community in Schools Committee, and previous member of the Houston Bar Association Gender Fairness Committee. She serves on the Steering Committee of the United Way Women's Initiative, works with other women business leaders to raise money for the United Way of Great Houston, and volunteers her time in connection with the HBA/CIS Summer Legal Internship Program. Ms. Bickley is a Phi Beta Kappa graduate of the University of Texas at Austin and an Honors graduate of the University of Houston Law Center. At law school, she was a research editor on the Houston Law Review, and is a member of Order of the Coif and Order of the Barons.

Scott F. Cooper

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Scott Cooper's practices involve litigation and counseling businesses and government entities. He is one of the Firm's leading employment law litigators and a founder of the Firm's Trade Secret Litigation group. He draws upon a unique blend of courtroom experience, work for members of the judiciary, political and civic involvement in advising clients.

Mr. Cooper focuses his practice on complex disputes in federal and state courts and before various government agencies throughout the country. He has appeared in more than two dozen state and federal courts, and is a member of the Bar of numerous courts, including the Supreme Court of the United States. He also has negotiated business agreements and collective bargaining agreements. He has a diverse client base, representing large publicly traded corporations, start-ups, partnerships, and government entities. He has represented clients in many areas, including:

- restrictive covenants and trade secrets litigation
- defending race, disability, age and gender discrimination matters
- overtime and wage payment issues
- family, medical leave and disability claims
- police and firefighter matters
- labor relations including negotiations and arbitrations
- electronic surveillance, technology policies and privacy issues
- funding public housing
- state takeover legislation
- public education
- professional sports
- reductions in force in many industries

Mr. Cooper is recognized by *Chambers USA* as a leader in labor and employment law. He has won numerous other professional awards, including the prestigious *Pennsylvania Law Weekly's* and *Legal Intelligencer's* "Lawyer on the Fast Track," and *Philadelphia Business Journal's* "Forty under Forty." He has also received the highest possible ratings from Martindale-Hubbell for both substantive legal knowledge and ethics. He is also included in the *American Lawyer Corporate Counsel 2012 Top Rated Lawyers Guide to Labor & Employment Law*. In 2010, Mr. Cooper served as President/Chancellor of the 13,500-member Philadelphia Bar Association.

Darla Hill

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Ms. Hill has been Certified in Labor and Employment law by the Texas Board of Legal Specialization since 1997. With substantial experience in executive contract and termination issues, noncompetition covenants, discrimination under federal and state statutes, wage claims and state employment law torts, including defamation and invasion of privacy, she has experience in a variety of settings, ranging from client counseling and policy drafting to litigation.

While in law school, Ms. Hill served as an associate editor for the Houston Law Review. She is a member of the Order of the Barons. Ms. Hill was elected to Phi Beta Kappa while an undergraduate at Rice University.

Margaret Elizabeth Patterson

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Elizabeth Patterson practices in the area of employment litigation, and represents both public companies and local governments and their officials. She has defended employment cases involving race, age, gender, national origin, and disability discrimination under Title VII, ADEA, ADA, and the Texas Labor Code. In addition, as part of her work involving government entities, she has worked on cases filed under Section 1983, Section 1981, the First Amendment and Fourth Amendment.

Ms. Patterson is a member of the Houston Bar Association Labor and Employment Section Council and is the Co-Chair of the Section's Events Committee. She is also a member of the Houston Association of Women Attorneys and the "Moms In Law" organization. As a member of the American Bar Association Pretrial Practice & Discovery *Iqbal* Task Force, she reports about developments related to pleading requirements under the Federal Rules of Civil Procedure in the Fifth Circuit.

While in law school, Ms. Patterson was a notes and comments editor for the Houston Law Review. Following graduation, she served as a law clerk to the Honorable Hilda G. Tagle, United States District Court, Southern District of Texas. Ms. Patterson is a member of the Order of the Coif and Order of the Barons, and recipient of the A.A. White Scholarship.

Prior to attending law school, Ms. Patterson taught elementary and middle school for eight years in urban, rural, and suburban schools, including two years as a Teach for America corps member in rural South Texas. Ms. Patterson is a member of Adoptive Families of Houston and serves as the Approved and Waiting Families coordinator for the Houston Gladney Family Association.

Employment, Benefits & Labor Alerts:

JANUARY 2012 – DECEMBER 2012

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National Labor Relations Board Postpones Notice Posting Deadline

January 2012 (No. 1)

Employment, Benefits & Labor Alert

SERVICES
Employment, Benefits & Labor

PROFESSIONALS
Cara Shafran

The National Labor Relations Board ("NLRB") has again postponed its rule requiring employers subject to NLRB jurisdiction to post a notice informing employees of their federal labor law rights. The rule, which is now scheduled to take effect on April 30, 2012, requires employers to post an 11-inch-by-17-inch notice describing employee rights and to publish the notice on an intranet or internet site if the employer customarily uses such channels to communicate with employees about rules and policies. The NLRB postponed the implementation of the rule to facilitate the resolution of legal challenges that have been filed with respect to the rule. Originally, the notice posting requirement was set to take effect on November 14, 2011 and was once already postponed until January 31, 2012.

If you have any questions regarding the NLRB's notice posting requirement, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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NLRB Rules that Federal Labor Law Bars Class Action Waivers in Arbitration Agreements

January 2012 (No. 2)

Employment, Benefits & Labor Alert

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PROFESSIONALS
Julie E. Reid

In a decision that may have wide-ranging effects for all employers, the National Labor Relations Board ("NLRB") recently ruled that class action waivers in employee arbitration agreements violate federal labor law and are therefore unenforceable. The decision greatly limits the United States Supreme Court's April 2011 decision in *AT&T Mobility LLC v. Concepcion*, which held that the Federal Arbitration Act ("FAA") preempts state laws barring the use of class action arbitration waivers.

In *D.R. Horton, Inc.*, the NLRB considered a mandatory arbitration agreement that required employees to submit all employment-related claims to arbitration, and prohibited class or collective action proceedings, either in arbitration or in court. The NLRB held that the agreement's class action waiver could not be reconciled with the National Labor Relations Act or the Norris-LaGuardia Act, both of which guarantee employees the right to engage in collective action. The NLRB reasoned further that employees' collective action rights are substantive, not procedural, and therefore should not yield to the broad pro-arbitration policy set forth in the FAA and reaffirmed by the Supreme Court in *Concepcion*. The NLRB's decision is likely to be appealed to federal court. Therefore, employers may consider waiting to amend their agreements until any challenges to the NLRB's decision are resolved.

If you would like further information about the NLRB's decision or how it may impact your business, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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Significant Labor & Employment Decisions In Store For 2012

January 2012 (No. 3)

Employment, Benefits & Labor Alert

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Employee Benefits

Employment Practices

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Wage and Hour

PROFESSIONALS
Julie E. Reid

In 2011, the Supreme Court of the United States and several state Supreme Courts issued significant labor and employment law decisions. As a new year begins, employers should be aware of the following labor and employment cases that may set important precedents in 2012:

Federal Health Care Reform Litigation

In March 2012, the Supreme Court of the United States is scheduled to hear argument in three consolidated challenges to the Patient Protection and Affordable Care Act, the 2010 federal health care reform law. The Court will consider whether the law's mandate that individuals buy health insurance or pay a penalty is constitutional, whether the individual mandate may be severed from the rest of the statute if found unconstitutional, and whether the Anti-Injunction Act bars a pre-implementation challenge to the individual mandate. The Court's resolution of these issues will directly affect the costs of health care coverage for employers and their employees.

Christopher v. SmithKline Beecham Corp.

In this case, the Supreme Court of the United States will address a growing circuit split on the question of whether pharmaceutical sales representatives are covered by the outside sales exemption to the Fair Labor Standards Act ("FLSA"). All employers should keep a close eye on the decision, which will be the Court's first interpretation of the "white collar" exemptions to the FLSA. The Court's decision will also provide insight regarding the level of deference that should be afforded to the Department of Labor's recent administrative efforts to narrow the white collar exemptions.

Brinker International, Inc. v. Superior Court

This case pending before the Supreme Court of California makes our list of matters to watch for the third straight year, and a decision is expected in early 2012. The central issue is whether California employers must ensure that employees actually take statutorily-required meal breaks, or need only ensure that the required breaks are made available to employees. A pro-employee ruling may create significant implementation challenges for employers, and may lead to a spike in wage and hour litigation regarding break periods.

If you have any questions regarding these pending cases and their potential impact on your organization, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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Laws and Regulations to Watch in 2012

January 2012 (No. 4)

Employment, Benefits & Labor Alert

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PROFESSIONALS
Julie E. Reid

Because 2012 is an election year, Congress is not expected to pass significant labor and employment legislation. However, a number of important administrative rules from the National Labor Relations Board ("NLRB") and other federal agencies are slated to go into effect this year:

NLRB Union Election Rule

On December 21, 2011, the NLRB adopted a final rule containing a wide range of amendments that would speed up the union election process. Of significance, the new rule will defer certain employer challenges until after a successful union election, including challenges to the scope of a proposed bargaining unit and to whether employees are supervisors. In addition, the new rule will allow the NLRB to more promptly determine if there is a question concerning representation and, if so, to resolve it by conducting a secret-ballot election and certifying the results. The new rule is scheduled to take effect on April 30.

NLRB Notice Posting Rule

The NLRB has twice delayed the effective date for its August 2011 final rule requiring employers to post notices informing employees of their rights under the National Labor Relations Act. The rule, which is now scheduled to take effect on April 30, is the subject of pending court challenges in South Carolina and Washington.

EEOC Rule on "Reasonable Factors Other Than Age" Under the ADEA

On November 16, 2011, the Equal Employment Opportunity Commission ("EEOC") approved a draft final rule clarifying the standards for the "reasonable factors other than age" defense to discrimination claims

under the Age Discrimination in Employment Act ("ADEA"). The EEOC's draft rule is more stringent than recent decisions by the Supreme Court of the United States and aims to heighten the standards necessary to establish the defense in an ADEA case. If approved by the Office of Management and Budget, the draft rule will likely require an individualized approach to determining whether an employment practice is grounded in reasonable factors other than age.

Department of Labor Persuader Activity Rule

In June 2011, the Department of Labor ("DOL") issued a proposed rule narrowing the "advice" exception to the Labor-Management Reporting and Disclosure Act ("LMRDA"). The LMRDA requires employers to disclose arrangements with labor relations consultants (including attorneys) where the consultant undertakes activities to persuade employees concerning their rights to organize and bargain collectively. The current advice exception exempts arrangements where the consultant does not directly contact employees and provides only oral or written materials to the employer. However, the proposed rule would limit this advice exception to "oral or written recommendations" from a consultant to an employer. Thus, if adopted, the proposed rule would significantly expand the circumstances where employer-consultant arrangements must be disclosed.

If you have any questions regarding these pending administrative rules and their potential impact on your organization, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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NLRB Issues Second Report on Use of Social Media in the Workplace

February 2012 (No. 5)

Employment, Benefits & Labor Alert

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PROFESSIONALS
Donald D. Gamburg

Mary Pierce

National Labor Relations Board ("NLRB") Acting General Counsel Lafe E. Solomon recently issued a second report reviewing fourteen NLRB decisions involving employee use of social media and online communications. The report supplements a prior report issued last year by the NLRB. A summary of the prior NLRB report can be found here.

In the summarized decisions, the NLRB continued its practice of distinguishing between employees who use social media to engage in concerted activity such as discussing terms and conditions of employment and employees who use social media to simply express personal gripes or rants about their employers. Employees in the former group were found to be protected by the National Labor Relations Act ("NLRA"), whereas employees in the latter group were not protected by the statute.

The NLRB report also provides guidance for employers drafting social media policies. In one decision cited in the report, the NLRB rejected as overbroad a social media policy that barred "defamatory" or "disparaging" online postings about an employer or its employees. The NLRB explained that such "defamatory" postings could include statutorily protected criticism of the employer's labor policy or treatment of its employees. By contrast, the NLRB upheld a policy that barred postings containing statements that were slanderous, threatening, or harassing in violation of the employer's workplace policies against harassment and discrimination.

In light of these decisions, employers should look carefully at their social networking and disciplinary policies to ensure compliance with the NLRA. If you would like further information about the NLRB's social media report or other information about social media policies, please

contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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Department of Labor Releases Notice of Proposed Rulemaking for Implementing FMLA Amendments for Military Caregivers and Airline Flight Crews

February 2012 (No. 6)

Employment, Benefits & Labor Alert

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PROFESSIONALS
Stephanie L. Aranyos

The U.S. Department of Labor announced that it will publish a Notice of Proposed Rulemaking to implement and interpret new statutory amendments to the Family and Medical Leave Act (FMLA), expanding military family leave provisions and leave eligibility for airline flight crew employees.

The proposed regulatory provisions would expand the scope of military caregiver leave to cover employees caring for recent veterans with a serious health condition or illness, in addition to family members of "currently serving" service members. The proposal would allow military caregiver leave to be taken up to five years after the service member leaves the military, and for serious injuries or illnesses that are the result of pre-existing conditions exacerbated by military service. The proposal would also extend FMLA leave for a "qualifying exigency" to employees whose family members serve in the Regular Armed Forces, in addition to the National Guard and Reserves.

The proposed rule also includes language intended to benefit airline flight crew employees. Among other changes, the proposed rule would add a special hours of service eligibility requirement to address the unique nature of scheduling in the airline industry, which has often left flight crews short of the 1,250 hours eligibility requirement. The proposed rule would also add specific provisions for calculating the amount of FMLA leave used by flight crews.

Following publication in the Federal Register, the Department of Labor will solicit comments on the proposed rule for a period of 60 days.

If you would like further information about the Notice of Proposed

Rulemaking or how it may impact your business, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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EEOC Extends Employer Recordkeeping Requirements to GINA

February 2012 (No. 7)

Employment, Benefits & Labor Alert

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PROFESSIONALS
Stephanie L. Aranyos

The Equal Employment Opportunity Commission (EEOC) recently published its final rule extending the recordkeeping requirements imposed under Title VII of the Civil Rights Act and the Americans with Disabilities Act (ADA) to employers covered by Title II of the Genetic Information Nondiscrimination Act (GINA). This rule will take effect on April 3, 2012.

Title II of GINA prohibits the use of genetic information in making employment decisions, restricts acquisition of genetic information by covered employers and entities, and strictly limits the disclosure of genetic information. GINA covers employers with 15 or more employees, employment agencies, labor unions, joint labor-management training programs, and federal sector employers.

The EEOC's final rule does not require the creation of any documents or impose any new reporting requirements. The rule merely imposes the same record retention requirements mandated under Title VII and the ADA to GINA. Employers must retain all employment and personnel records for one year from the date created or the date the personnel action was taken, whichever is later. In addition, all records relating to a charge filed under GINA must be maintained until final disposition of the charge.

If you have any questions regarding GINA or the EEOC's final rule on recordkeeping requirements, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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California Becomes Latest State to Join Forces With the DOL to Stop Employee Misclassification

February 2012 (No. 8)

Employment, Benefits & Labor Alert

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PROFESSIONALS
Stephanie L. Aranyos

California has become the twelfth state to partner with the U.S. Department of Labor ("DOL") to combat worker misclassification. As previously reported in September 2011, the DOL and the Internal Revenue Service ("IRS") signed a Memorandum of Understanding ("MOU") to coordinate efforts to stop businesses from misclassifying employees as independent contractors. Under the MOU, the DOL and IRS agreed to work together to share information to reduce the incidence of employee misclassification. Following the DOL's announcement, eleven states, including Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Montana, Utah and Washington, signed similar agreements with the DOL's Wage and Hour Division. California is the most recent state to join in the effort and enter into an agreement with the DOL. One of the principal goals of this agreement, like those entered into with other states, is to share resources to enhance enforcement by conducting joint investigations. This recent development is the latest in California's efforts to crack down on employee misclassification, following the enactment of SB 459, which imposes steep penalties for an employer's willful misclassification.

Because of the increased efforts by the DOL and state governments concerning employee misclassification, it is important now more than ever for employers to carefully analyze their classification of independent contractors. If you would like further information about the DOL's enforcement efforts or have questions about your company's classification of workers, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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EEOC Approves New Strategic Plan for the Next Four Fiscal Years

February 2012 (No. 9)

Employment, Benefits & Labor Alert

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PROFESSIONALS
Stephanie L. Aranyos

The Equal Employment Opportunity Commission (EEOC) recently approved a Strategic Plan for Fiscal Years 2012 through 2016. The Strategic Plan sets a framework for the EEOC to achieve its mission "to stop and remedy unlawful employment discrimination" through three main objectives of strategic law enforcement, education and outreach, and efficient service to the public. Designed to recognize a growing need for the EEOC's services in a time of "static" resources, the Strategic Plan establishes 14 performance measures to be achieved during the four year period. Some of the highlights of the Strategic Plan include:

- Developing a Strategic Enforcement Plan to "identify and pursue priority issues and practices that have a significant discriminatory impact on employees and employers" and integrate the EEOC's work in the investigation, conciliation, and litigation stages;
- Increasing the proportion of systemic discrimination cases in the EEOC's litigation docket;
- Maintaining significant partnerships with organizations that represent vulnerable workers and/or underserved communities as well as with the small and new business communities;
- Implementing a social media plan;
- Updating and/or augmenting the EEOC's guidance materials so that employers, employees and applicants understand their rights and responsibilities under the law;
- Strengthening the skills and improving the diversity of the EEOC's workforce;
- Implementing a new quality control system for investigations and conciliations; and
- Improving and streamlining the private sector discrimination

charge process.

The EEOC invites members of the public to submit written comments on any issues or matters discussed in the Strategic Plan through March 8, 2012. If you would like further information about the EEOC's Strategic Plan, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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EEOC Updates Guidance Relating to Employment of Veterans with Disabilities

March 2012 (No. 10)

Employment, Benefits & Labor Alert

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Employment, Benefits & Labor

PROFESSIONALS
Lucas T. Hanback

The Equal Employment Opportunity Commission (EEOC) recently issued two revised publications addressing the employment of veterans with disabilities under the Americans with Disabilities Act (ADA). The updated guides reflect amendments to the ADA which took effect in 2009, significantly broadening the definition of "disability" and the types of impairments that may require reasonable accommodations. The Guide for Employers explains the protections for veterans with service-connected disabilities under the ADA and the Uniformed Services Employment and Reemployment Rights Act (USERRA) and explains how employers can prevent disability-based discrimination and provide reasonable accommodations. The Guide for Veterans answers questions that veterans with service-connected disabilities may have about the protections to which they are entitled and explains the types of accommodations that may be appropriate to help them obtain and successfully maintain employment. With thousands of military personnel returning from service each year and one million expected to return over the next five years, many with service-connected disabilities, the EEOC's updated guidance is expected to help recent veterans and employers alike better understand their rights and obligations.

If you would like further information about the EEOC's updated guidance, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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Federal Court of Appeals Rules that Reassignment of Disabled Workers is Not Required When Better Qualified Applicants Apply for the Position

March 2012 (No. 11)

Employment, Benefits & Labor Alert

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PROFESSIONALS
Lucas T. Hanback

The United States Court of Appeals for the Seventh Circuit recently ruled, in *EEOC v. United Airlines, Inc.*, that the Americans with Disabilities Act ("ADA") does not require employers to reassign disabled employees, who will lose their positions due to a disability, to vacant positions for which they are qualified if better qualified candidates apply and it is the employer's "consistent and honest" policy to hire the best qualified applicant. This decision was in keeping with prior Seventh Circuit precedent. However, this issue has split the federal appeals courts, with the Tenth and District of Columbia Circuits holding that the ADA requires reassignment, and the Eighth Circuit agreeing with the Seventh Circuit.

The EEOC argued that a 2002 decision by the Supreme Court of the United States, *US Airways, Inc. v. Barnett*, undercut the Seventh and Eighth Circuit holdings. In *Barnett,* the Supreme Court ruled that a reassignment which would provide a preference to a disabled employee in violation of a seniority system did not automatically make the accommodation unreasonable provided the employee could show special circumstances which nonetheless justified the accommodation. The Supreme Court indicated that preferences would sometimes be necessary to comply with the ADA, but vacated and remanded the case because the lower courts had not required the employee to demonstrate special circumstances justifying the reassignment. Although the Seventh Circuit in *United Airlines* found no conflict with *Barnett*, the panel recommended *en banc* consideration of the case by all the judges of the Circuit Court to consider the EEOC's arguments.

This decision should serve as a reminder for employers to carefully consider the propriety of reasonable accommodations for disabled

workers in light of the specific facts at hand.

If you would like further information about this decision or ADA issues in general, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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Bipartisan Bill Would Lower Plaintiffs' Burden in Age Discrimination Suits

March 2012 (No. 12)

Employment, Benefits & Labor Alert

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PROFESSIONALS
Lucas T. Hanback

A bipartisan group of United States Senators recently introduced the Protecting Older Workers Against Discrimination Act in an effort to restore the legal landscape in employment discrimination cases that existed prior to the Supreme Court of the United States' decision in *Gross v. FBL Financial Services, Inc*. Prior to the *Gross* ruling, Age Discrimination in Employment Act ("ADEA") claims could proceed under the Title VII "mixed motives" standard, which required only that the plaintiff show that his or her age was a "motivating factor" in the employer's adverse employment action. The Supreme Court in *Gross*, however, rejected this standard and found instead that a plaintiff must show that his or her age was the "but for" or sole cause of the challenged employment action. This raised the plaintiff's burden in age discrimination cases substantially. Following *Gross*, some lower courts began requiring the "but for" standard under other discrimination statutes, including the Americans with Disabilities Act, Title VII, and the Rehabilitation Act of 1973. The new act would restore the availability of "mixed motives" claims under the ADEA as well as the other discrimination statutes, and it would allow proof of claims through any type of admissible evidence and through any available method of proof.

If you would like further information about the proposed act, the *Gross* decision, or discrimination claims in general, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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Third Circuit Rules that Federal Law Preempts Pennsylvania Prohibition on Class Action Waivers in Arbitration Agreements

March 2012 (No. 13)

Employment, Benefits & Labor Alert

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PROFESSIONALS
Lucas T. Hanback

Affirming the broad scope of the Supreme Court of the United States' April 2011 decision in *AT&T Mobility LLC v. Concepcion*, the U.S. Court of Appeals for the Third Circuit recently rejected a challenge to the validity of an employee arbitration agreement based on Pennsylvania law prohibiting the waiver of class action claims. In *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, the Third Circuit considered a mandatory arbitration agreement that was ambiguous regarding an employee's right to pursue a class action, either in arbitration or in court. The plaintiff challenged the agreement based, in part, on her assertion that it could be interpreted to bar class action claims, in violation of existing Pennsylvania law. However, in *Concepcion*, the Supreme Court held that the Federal Arbitration Act ("FAA") preempts state laws prohibiting class action waivers in arbitration agreements. Applying *Concepcion*, the Third Circuit held that Pennsylvania's prohibition on class action waivers was "egregious" and presented an untenable "obstacle to the fulfillment of the FAA's purposes." The Third Circuit's holding continues a trend in the federal courts to apply *Concepcion* broadly to foreclose state law challenges to the inclusion of class action waivers in employee arbitration agreements.

If you would like further information about the Third Circuit's decision or how it may impact your business, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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OSHA Highlights Safety Policies that May Violate Whistleblower Rights

March 2012 (No. 14)

Employment, Benefits & Labor Alert

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Employment, Benefits & Labor

Occupational Safety and Health

Whistleblower Complaints

PROFESSIONALS
Lucas T. Hanback

The United States Department of Labor's Occupational Safety and Health Administration ("OSHA") recently issued a memorandum identifying several types of employer safety policies that may violate the Occupational Safety and Health Act and other whistleblower protection laws. The guidance highlighted several workplace policies and practices that could discourage reporting by employees and could constitute unlawful discrimination and a violation of whistleblower protection provisions. Examples of such policies include those that punish employees who are injured on the job, regardless of the circumstances surrounding the injury; that punish employees for violation of a rule about the time or manner for reporting injuries and illnesses; or that impose discipline for injuries resulting from a violation of a safety rule by the employee. Additionally, OSHA expressed concerns about employer programs that unintentionally or intentionally provide employees an incentive to not report injuries, such as offering a prize or bonus to employees who are not injured over some period of time. This new guidance continues OSHA's recent efforts to heighten and ensure compliance with whistleblower initiatives.

If you would like further information about OSHA's initiatives and how they may affect your business, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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EEOC Issues Final Rule Under ADEA Clarifying Defense Based on Reasonable Factors Other Than Age

April 2012 (No. 15)

Employment, Benefits & Labor Alert

SERVICES
Employment, Benefits & Labor

PROFESSIONALS
Margaret Elizabeth Patterson

The Equal Employment Opportunity Commission (EEOC) recently published a final rule, which takes effect on April 29, 2012, amending the existing Age Discrimination in Employment Act (ADEA) regulations regarding disparate impact claims and the "reasonable factors other than age" (RFOA) defense. The final rule incorporates the holdings of two Supreme Court decisions under the ADEA: *Smith v. Jackson*, extending the ADEA to disparate impact claims; and *Meacham v. Knolls Atomic Power Lab.*, requiring employers to meet the burden of persuasion and production for the affirmative defense based on reasonable factors other than age.

The ADEA prohibits failing or refusing to hire, discharging, or otherwise discriminating against individuals who are 40 years of age or older because of their age. An affirmative defense is available to employers, however, when their actions are based on reasonable factors other than age. The amended regulations require employers to bear the burden of demonstrating the applicability of the RFOA defense: "To establish the RFOA defense, an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer." The newly-published rule provides a list of relevant considerations for determining whether an employer's practice is based on reasonable factors other than age.

If you would like further information about the EEOC's final rule or how it may impact your business, please contact a member of Blank Rome

LLP's Employment, Benefits, and Labor Practice Group.

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What the Brinker Decision Means to California Employers

April 2012 (No. 16)

Employment, Benefits & Labor Alert

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PROFESSIONALS
Michael L. Ludwig

This morning the California Supreme Court ruled that California employers do not have to ensure that employees perform no work during statutory meal breaks. The Court referenced a "wave" of wage and hour class action litigation that was engendered by the imposition in 2000 of monetary penalties for employers who violate California's meal and rest break laws. The Court held that an employer's duty to provide meal breaks to its employees is satisfied "if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." Importantly, this means that employers do not have to "police" meal breaks and ensure that the employees perform no work during the break. Nevertheless, it is critical that California employers have clear policies that provide meal breaks to employees.

An employer cannot, however, undermine its own meal break policy by pressuring employees to perform their duties in a way that omits breaks. For example, an employer must refrain from practices such as scheduling workers in a way that makes taking meal breaks extremely difficult or informally ridiculing or reprimanding employees for taking meal breaks. Note also that where an employee voluntarily chooses to perform work during a meal break, the employer still may be liable for straight pay when it knew or reasonably should have known that the employee was working through the authorized meal break.

If you would like further information about the *Brinker* decision and how it may impact your business, please contact a member of Blank Rome LLP's Employment, Benefits, and Labor Practice Group.

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Maryland Legislation Would Prohibit Employers From Requesting Facebook, Twitter Passwords

April 2012 (No. 17)

Employment, Benefits & Labor Alert

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Margaret Elizabeth Patterson

Maryland recently became the first state to pass legislation prohibiting employers from requesting or requiring user names or passwords for the social media accounts of employees or job applicants. If Governor Martin O'Malley signs the legislation, the new law will take effect on October 1, 2012.

Under this new law, employers may not discharge, discipline, or penalize employees for refusing to disclose any user name, password, or other means for accessing a personal account or service and may not refuse to hire an applicant who declines to provide such information. The law excludes actions taken by an employer during an investigation into an employee suspected of downloading unauthorized information or engaging in misconduct through social media websites.

Other states are expected to follow Maryland's lead. Lawmakers in California, Illinois, New Jersey, and Washington have proposed or expressed an interest in similar bills. Members of Congress are also considering federal legislation to address the concerns of employees and job applicants who have been asked to provide login information for their social media accounts, and U.S. Senators Charles Schumer and Richard Blumenthal recently called on the Equal Employment Opportunity Commission and the Department of Justice to investigate the practice of conducting social media background checks of job applicants.

If you would like further information about the Maryland social media legislation or how it may impact your business, please contact a member of Blank Rome LLP's Employment, Benefits, and Labor Practice Group.

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D.C. Circuit Enjoins NLRB from Requiring Posting of Notice of Employees' Rights

April 2012 (No. 18)

Employment, Benefits & Labor Alert

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Margaret Elizabeth Patterson

Following conflicting decisions from two federal district courts, the U.S. Court of Appeals for the District of Columbia Circuit temporarily enjoined implementation of the National Labor Relations Board's ("NLRB") final rule requiring employers to post notices of employees' rights. Shortly after the injunction was issued, the NLRB announced that it will not implement the rule, which was scheduled to take effect on April 30, 2012.

The rule would require all private-sector employers subject to the National Labor Relations Act to post a notice of employees' rights under the Act, including the right to unionize, but has been subject to legal challenges regarding the NLRB's authority to implement the rule. Last month, the U.S. District Court for the District of Columbia held that the NLRB had authority to promulgate the rule, but exceeded its authority by making an employer's failure to post the notice an unfair labor practice and tolling the statute of limitations for filing an unfair labor practice charge if an employer failed to post the notice. On April 13, 2012, a federal district court in South Carolina held that the NLRB lacked authority to issue the notice-posting rule. In light of these conflicting holdings, the D.C. Circuit temporarily enjoined the NLRB's rule to preserve the status quo while the court resolves the issues on the merits. No ruling is expected until September at the earliest.

If you would like further information about the NLRB's final rule or the legal challenges to the rule, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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EEOC Holds That Transgender Employees and Job Applicants Are Protected By Title VII

April 2012 (No. 19)

Employment, Benefits & Labor Alert

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Tara G. La Fiura

The Equal Employment Opportunity Commission ("EEOC") recently issued a ground-breaking decision holding that Title VII of the Civil Rights Act of 1964 prohibits discrimination against transgender employees and job applicants. The EEOC decision followed an administrative complaint filed by Mia Macy, who alleged that she was turned down for a contract job at the Bureau of Alcohol, Tobacco, Firearms and Explosives after she informed a hiring official that she was transitioning gender from male to female. Macy's complaint stated that she was discriminated against on the basis of "my sex, gender identity (transgender woman) and on the basis of sex stereotyping." After some deliberation about how Macy's claim should be characterized and whether it was covered by Title VII, the EEOC noted that Macy was "clear that she believes she was not hired for the position as a result of making her transgender status known." Ultimately, the EEOC concluded that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII."

The *Macy* decision represents a significant change in how the EEOC views claims of discrimination brought by transgender individuals. As a result, employers should consider revising their policies to conform to this important precedent. In addition, employers should train their managers on how to respond when applicants or employees communicate their intent to undergo a gender transition.

If you would like further information about how this new decision impacts your business, please contact a member of Blank Rome LLP's Employment, Benefits, and Labor Practice Group.

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National Labor Relations Board's Controversial Union Election Rule Declared Invalid

May 2012 (No .20)

Employment, Benefits & Labor Alert

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Tara G. La Fiura

A federal judge in Washington, D.C. ruled Monday that the National Labor Relations Board's ("NLRB" or "Board") controversial rule aimed at streamlining union elections is invalid because it was enacted without the required three-member quorum. (*Chamber of Commerce v. NLRB*, D.D.C., No. 11-cv-2262, 5/14/12). In ruling, U.S. District Judge James Boasberg stated that only "[t]wo members of the Board participated in the decision to adopt the final rule" that speeds up the pace of union representation elections and "two is simply not enough." The new rule went into effect April 30.

Since the Board's adoption of the new rule in December, business groups have vigorously challenged the rule claiming that it exceeded the Board's statutory authority, did not give employers enough time to counter union organizers and was contrary to the First and Fifth Amendments guaranteeing the rights to free speech and due process. In addition, business groups argued that by issuing a final rule on the signature of just two members, the Board's actions were "arbitrary, capricious, and an abuse of discretion."

At the time the change to the Board's representation case rules was approved, the five-member Board only had three members – two Democrats and one Republican. Federal law requires a quorum of at least three Board members to consider new rules. The two Democrat members of the Board used the NLRB's electronic case management system to cast final votes in support of the new rule. Brian Hayes, the lone Republican member, however, did not vote or take any action. Member Hayes had previously voiced his opposition to the election rule. Judge Boasberg found that because Member Hayes did not take any action he did not technically participate in a final vote on the rule and thus did not satisfy the strict requirements of federal law with regards to a

quorum. Under the decision, the new rule is invalid and the old election rules still apply.

The court's decision is a positive one for employers and employees alike because it stops the Board from rushing the election process in a way that would be harmful to the ability of employees to have time to consider the question of unionization and employers' ability to communicate with them. That being said, Judge Boasberg's decision in *Chamber of Commerce v. NLRB* focuses only on a technical problem. Judge Boasberg did not address the merits of the rule and, in fact, he specifically stated that the NLRB could simply take a new vote to approve it. While employers can breathe a sigh of relief for the time being, we likely have not seen the last of the Board's "quickie" election rule.

If you would like further information concerning the future of the NLRB's union election rules, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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NLRB Issues Third Report on Social Media in the Workplace

June 2012 (No. 21)

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Lauren Fox

National Labor Relations Board ("NLRB") Acting General Counsel Lafe E. Solomon recently issued a third report reviewing seven NLRB decisions involving employer policies governing the use of social media. The report supplements two prior reports issued in January 2012 and August 2011 by the NLRB.

In the detailed decisions, the NLRB found policy provisions in six employer social media policies to be unlawful when they interfered with the rights of employees under the National Labor Relations Act ("NLRA"). The memo reviews one social media policy the NLRB found to be lawful.

The memo provides that ambiguous policies without limiting language or context are more likely unlawful, while "rules that clarify or restrict their scope by including examples of clearly illegal or protected conduct, such that they could not reasonable be construed to cover protected activity, are not unlawful." Further, the NLRB continued to find that inclusion of a "savings clause," providing a policy will be administered in compliance with the NLRA, will not cure an otherwise overbroad or ambiguous policy.

In light of these decisions, employers should look carefully at their social networking and disciplinary policies to ensure compliance with the NLRA. If you would like further information about the NLRB's social media report or other information about social media policies, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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Supreme Court Affirms that FLSA "Outside Salesperson" Exemption Includes Pharmaceutical Sales Representatives

June 2012 (No. 22)

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Lauren Fox

The Supreme Court of the United States issued an opinion today in *Christopher v. SmithKline Beecham Corp.,* affirming, in a 5-4 decision, the Court of Appeals for the Ninth Circuit's holding that SmithKline Beecham does not have to pay overtime to its pharmaceutical sales representatives. The Supreme Court found that pharmaceutical sales representatives, who visit doctors' offices to discuss pharmaceutical products and obtain nonbinding commitments to prescribe those pharmaceuticals, are "outsides sales people" exempt from the overtime pay requirements of the Fair Labor Standards Act ("FLSA").

The FLSA generally requires employers to pay employees overtime pay, but includes limited exemptions for certain employee classifications, including "outside salesmen." In *Christopher,* the Court analyzed whether pharmaceutical sales representatives made sales within the meaning of the FLSA or merely promoted products to doctors. The Court, rejecting the Department of Labor's narrow interpretation of the exemption as "quite unpersuasive," utilized a functional inquiry into the employees' duties and responsibilities in the context of the pharmaceutical industry's "unique regulatory environment" and concluded that the employees made sales as contemplated by the FLSA. The Court also reasoned that pharmaceutical sales representatives, who are typically well-compensated, were "hardly the kind of employees that the FLSA was intended to protect." The Court therefore concluded that the employees were exempt from the FLSA's overtime requirement.

In light of this decision, employers should review their classification of employees under the FLSA. If you would like further information about the Supreme Court's opinion in *Christopher v. SmithKline Beecham* and how it may impact your Company, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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NLRB Releases New Webpage Describing Protected Concerted Activity

June 2012 (No. 23)

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Lauren Fox

The National Labor Relations Board ("NLRB") recently released a webpage highlighting the rights of employees "to act together to try to improve their pay and working conditions or fix job-related problems, even if they aren't in a union." The webpage describes recent NLRB cases from across the country involving protected concerted activity and other rights protected by the National Labor Relations Act. This initiative may signal the NLRB's intent to expand its activity in non-union workplaces.

If you would like further information, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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Federal Court Dismisses Former Employee's Lactation Rights Claim but Allows Retaliation Claim to Proceed

July 2012 (No. 24)

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Richard W. Diaz

Julie E. Reid

A federal district court in Iowa recently held, in Salz v. Casey's Marketing Company, that a former employee cannot maintain a lawsuit under the Fair Labor Standards Act ("FLSA") for an employer's failure to provide reasonable break time and a private space to express breast milk, but that retaliation claims relating to complaints concerning lactation rights may proceed in court. As previously reported, employers with 50 or more employees must provide reasonable break times and a private space for mothers to express milk for one year following a child's birth. In Salz, a former employee alleged that her employer failed to provide a secure and private place to express milk and discharged her after she complained. The court dismissed the claim for violation of lactation rights, holding that an employee may only pursue such a claim by filing a complaint with the United States Department of Labor. However, the Salz court held that the former employee's retaliation claim could proceed in court, as contemplated by the FLSA's anti-retaliation provision.

This decision serves as an important reminder that employers should review their policies and practices with respect to break time requested by nursing mothers. In addition, employers should ensure that they do not retaliate in any way against employees who request such break time.

If you would like further information about this recent case or the FLSA's break time requirement, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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NLRB and EEOC Question Workplace Investigation Practices

August 2012 (No. 25)

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Richard W. Diaz

Federal agencies have recently shown increased interest in how employers conduct workplace investigations pursuant to the laws they are charged with protecting. First, in *Banner Estrella Medical Center*, the National Labor Relations Board (the "Board") ruled that a hospital's blanket prohibition on employee discussion of workplace investigations violated the National Labor Relations Act ("NLRA"). In that case, the employer directed employees making a complaint to refrain from discussing the matter with their coworkers while the investigation was ongoing. According to the Board, the blanket prohibition violated the NLRA by infringing on employees' rights to engage in protected, concerted activity.

Shortly thereafter, according to Lorene F. Schaefer, Esq., of One Mediation, the U.S. Equal Employment Opportunity Commission's Buffalo, NY office stated that, in connection with a discrimination charge, it would investigate whether an employer's written policy, warning all employees who participate in internal investigations of harassment that they could be subject to discipline or discharge for discussing "the matter," violates Title VII's anti-retaliation provisions.

These developments call into question practices that many employers utilize in trying to maintain the confidential nature of investigations.

If you would like further information about these developments or conducting workplace investigations in general, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

EEOC Issues Draft Strategic Enforcement Plan

September 2012 (No. 26)

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Harrison Lee

On February 22, 2012, the Equal Employment Opportunity Commission ("EEOC") approved a Strategic Plan for Fiscal Years 2012-2016, which included a directive to the EEOC to establish EEOC priorities and to integrate the agency's various responsibilities. Pursuant to that directive, the EEOC recently released a draft Strategic Enforcement Plan ("SEP") for public comment.

The draft SEP highlights five distinct national priorities: (1) eliminating systemic barriers in recruitment and hiring, specifically class-based intentional hiring discrimination and facially neutral hiring practices that have an adverse impact on certain groups; (2) protecting immigrant, migrant and other vulnerable workers; (3) addressing emerging issues, including interpretation and application of the ADA Amendments Act and LGBT (lesbian, gay, bisexual and transgender) coverage under Title VII; (4) preserving access to the legal system, including retaliation and overly-broad waivers; and (5) combating harassment.

Public comments are due by September 18, 2012, 5:00 pm EST and may be submitted by e-mail to strategic.plan@eeoc.gov. The SEP is set to take effect October 1, 2012, and will remain in effect through September 2016 (or until a new SEP is approved by the EEOC).

If you would like further information about the EEOC and its initiatives, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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NLRB Issues Social Media Decision In Line With Acting General Counsel Reports

September 2012 (No. 27)

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Harrison Lee

In its first decision addressing the validity of an employer's social media policy, the National Labor Relations Board ("NLRB") recently invalidated Costco's handbook policy that prohibited employees from electronically posting messages that "damage the Company, defame any individual or damage any person's reputation." *See Costco Wholesale Corp.*, 358 NLRB No. 106. The NLRB found that Costco's employees could reasonably construe the policy as regulating and chilling their right to engage in protected, concerted activity. The NLRB reasoned that "employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications (i.e., those that are critical of the Respondent or its agents)."

The NLRB's *Costco* decision comes on the heels of and aligns with Acting General Counsel Lafe Solomon's prior reports on social media policies, which we reported on in August 2011, February 2012, and June 2012. The decision also serves as a reminder to employers to review the scope of their social media policies and to carefully analyze how they may be construed. The NLRB will likely continue to scrutinize overbroad employer policies and handbooks in an effort to invalidate those that it deems to violate employee rights under the National Labor Relations Act.

If you would like further information about the NLRB's decision and its potential impact on your business or social media policies, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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New Jersey Employers Take Notice: New Pay Equality Posting and Notice Requirements

October 2012 (No. 28)

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Harrison Lee

New Jersey Governor Chris Christie recently signed into law new posting and notice requirements for employers, scheduled to take effect November 21, 2012, relating to pay equality under state and federal law. The law, which applies to employers with 50 or more employees, directs employers to "conspicuously post" a notice that details employees' "rights to be free of gender inequity or bias in pay, compensation, benefits or other terms or conditions of employment" under the New Jersey Law Against Discrimination, Title VII of the Civil Rights Act of 1964, and the Equal Pay Act.

In addition to the posting requirement, the law also requires covered employers to distribute a written copy of the notification to each employee (i) within 30 days after the notification form is issued by the New Jersey Department of Labor and Workforce Development ("NJDLWD"); (ii) at the time of an employee's hiring; (iii) annually on or before December 31; and (iv) any time upon first request by an employee. Employers are permitted to distribute the notice via email, printed material (i.e., pay check insert, brochure, handbook, flyer), or through the employer's internet/intranet site (if the site is for the exclusive use of employees, can be accessed by all employees, and the employer provides notice to employees of the posting). Upon receipt of the notice, employees will be required to sign an acknowledgement – which must be included with the notice form – and return it to the employer within 30 days. The law requires employers to post and distribute notices in English, Spanish, and any other language which an employer believes is the first language of a significant number of its employees (if notification in such language is made available by the NJDLWD).

If you would like further information about these New Jersey requirements or other state or federal posting and notice requirements, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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National Labor Relations Board Issues First Decision Addressing "Facebook Firings"

October 2012 (No. 29)

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Cara S. Friedlander

The National Labor Relations Board ("NLRB") recently issued its first decision addressing the legality of a termination for an employee's Facebook postings. In *Karl Knauz Motors* (Case 13–CA–046452), the NLRB adopted an administrative law judge's findings that a car dealership lawfully discharged a salesman due to Facebook posts highlighting an accident at an affiliated dealership that – according to the employer – damaged the reputation of the company and the individuals involved in the accident. The NLRB determined that the salesman's Facebook posts did not involve concerted activity protected by the National Labor Relations Act.

This decision is consistent with the NLRB's increased focus on social media postings and policies, and the NLRB is likely to issue more decisions on these topics in the coming months. If you would like further information about this decision or best practices for social media policies, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

EEOC Issues New Guidance Relating to Victims of Domestic Violence, Sexual Assault, and Stalking

October 2012 (No. 30)

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Julie E. Reid

The U.S. Equal Employment Opportunity Commission (EEOC) recently issued guidance highlighting how Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA) may apply to situations involving applicants and employees who experience domestic or dating violence, sexual assault, or stalking. The guidance provides several examples of employment decisions based on an applicant's or employee's experience with such conduct that may violate Title VII or the ADA. The examples include situations involving stereotypes based on sex or mental illness and caution employers about avoiding disparate treatment, harassment, and retaliation based upon sex or an actual or perceived disability. The guidance serves as an important reminder for employers to ensure that human resources and management personnel are sensitive to these issues.

If you would like further information about this EEOC guidance or about preventing discrimination or harassment in general, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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National Labor Relations Board Releases Guidance On At-Will Employment Policies

November 2012 (No. 31)

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Cara S. Friedlander

The National Labor Relations Board ("NLRB") recently released memoranda analyzing at-will employment clauses in two employee handbooks that the NLRB concluded do not violate the National Labor Relations Act ("NLRA"). Earlier this year, the NLRB determined that a broadly-worded at-will agreement would violate labor law if it precluded an employee from engaging in concerted activity to change his or her at-will status.

The new memoranda concern charges alleging that the at-will clauses of a California trucking company and a restaurant in Arizona were so broad that their employees reasonably would think that they could not engage in concerted activity to alter their at-will status. The NLRB explained, however, that one clause explicitly stated that the at-will employment relationship could be changed, so employees would not reasonably assume that their NLRA rights were prohibited. As to the other clause, the NLRB noted that it did not require employees to agree that the employment relationship could not be changed in any way, but merely highlighted that the employer's representatives are not authorized to change it. Thus, neither of the subject clauses reasonably would be interpreted to restrict an employee's rights to engage in concerted activity to change his or her at-will status.

The law involving employee handbook provisions that restrict the future modification of an employee's at-will status remains unsettled. If you have questions about your own at-will employment policies, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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Inclement Weather Wage and Hour Issues

November 2012 (No. 32)

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Michael L. Ludwig

Inclement weather can raise unique wage and hour issues under the Fair Labor Standards Act. While employee safety always should be a paramount consideration in the event of inclement weather, employers also must remain mindful of wage and hour implications.

With respect to exempt employees, for example, employers may not dock their pay if they are sent home on account of inclement weather after working a partial day. The employer must pay them for the entire day. If an exempt employee misses a full day of work when the workplace is open, however, the employee's salary may be deducted for the missed time. In the event the workplace is closed for less than a week, generally the exempt employees must be paid for those days although an employer may require an exempt employee to use paid time off to the extent it is permissible under state law. An employer does not need to pay an exempt employee if the workplace is closed for an entire week and the employee performs no work during that week.

Non-exempt employees generally only must be paid for the hours they actually work. Accordingly, an employer ordinarily does not need to pay non-exempt employees for hours not worked if they were scheduled to work but sent home early for inclement weather. Some states, however, have "reporting time pay" laws that may require an employer to pay a non-exempt employee a specified amount for showing up to work even if the employee is sent some because of inclement weather.

If you have questions about how to handle your own weather-related wage and hour issues, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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Supreme Court Hears Arguments on Supervisor Qualification under Title VII

November 2012 (No. 33)

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Cara S. Friedlander

On November 26, 2012, the U.S. Supreme Court heard oral arguments in *Vance v. Ball State University,* a case that may resolve a split between the federal appellate courts regarding the definition of a "supervisor" for purposes of employer liability under Title VII. The First, Seventh, and Eighth Circuits have held previously that to be a supervisor, an employee must have the power to hire, fire, demote, promote, transfer or discipline other employees. By contrast, the Second, Fourth, and Ninth Circuits have held that any employee with the authority to direct and oversee an alleged victim's daily work may be considered a supervisor for purposes of Title VII. The distinction is significant because if an alleged harasser is a supervisor, the employer generally will be held vicariously liable for the supervisor's conduct unless the employer can prove that it had an effective anti-harassment policy in place and the employee failed to utilize the employer's preventative or corrective measures. The Supreme Court is expected to issue its decision by next June.

The *Vance* case is an important reminder that employers should work to ensure that employees who may be considered supervisors understand the breadth of potential employer liability under Title VII. If you have questions about the *Vance* case or Title VII, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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EEOC Approves Strategic Plan Establishing Enforcement Priorities

December 2012 (No. 34)

Employment, Benefits & Labor

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Julie E. Reid

The U.S. Equal Employment Opportunity Commission ("EEOC") recently approved a Strategic Enforcement Plan to establish national enforcement priorities and integrate enforcement responsibilities throughout the EEOC's various offices. The Plan promotes more strategic use of agency resources, which the EEOC hopes will have a "sustainable impact" in reducing and deterring discriminatory workplace practices. The Plan identifies six national priorities: (1) eliminating barriers in recruitment and hiring; (2) protecting immigrant, migrant and other vulnerable workers; (3) addressing emerging and developing employment discrimination issues; (4) enforcing equal pay laws; (5) preserving access to the legal system; and (6) preventing harassment through systemic enforcement and targeted outreach. In addition to the national priorities, the Plan also seeks the development of local and federal sector priorities and seeks to ensure "consistent and integrated enforcement" throughout the private, public, and federal sectors.

If you would like further information about the EEOC's Strategic Enforcement Plan or initiatives, please contact a member of Blank Rome LLP's Employment, Benefits and Labor Practice Group.

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What the Supreme Court's Decision on Health Care Reform Means for Employers

June 2012 (No. 2)

Employee Benefits & Executive Compensation Update

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Barry L. Klein

Kari Knight Stevens

After many months of speculation, the Supreme Court of the United States ruled yesterday that the central provision of Health Care Reform, the individual health insurance mandate, is constitutional. The result is that this provision and the other provisions of the Patient Protection and Affordable Care Act will remain intact. Accordingly, employers should act now to ensure that they are in compliance with currently effective provisions of the law, as well as those that are slated to come into effect in the coming months and years.

Background

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (P.L. 111-148) ("Health Care Reform"). The centerpiece of Health Care Reform is the requirement that, with limited exceptions, all individuals must be covered by an employer-provided health plan or individual health insurance policies that provide "minimum essential coverage" (i.e., the "individual mandate") beginning in 2014. In order to help individuals find such coverage at a reasonable expense, states must set up insurance exchanges and individuals will be provided with tax credits to help pay insurance premiums. Employers will have the choice to offer compliant health coverage for employees or pay significant penalties ("pay or play").

Constitutional Challenge & Supreme Court Ruling

In response to the enactment of Health Care Reform, several parties, including a joint effort of 26 states, challenged its constitutionality, particularly that of the individual mandate. Challengers to the law argued that the individual mandate was an abuse of Congress's federal authority under the Commerce Clause of the United States Constitution. They concluded that because this key piece of the law is unconstitutional, the entire law must also be overturned.

The court challenges to Health Care Reform reached several Federal Circuit Court of Appeals, but the results were conflicting. The Fourth and Sixth Circuit Court of Appeals found the individual mandate to be constitutional. The Eleventh Circuit Court of Appeals found that the individual mandate was unconstitutional, but did not find the entire law to be invalid.

The Supreme Court agreed to resolve the split among the Circuits, and did so yesterday, in a 5-4 opinion in the matter of *National Federation of Independent Business v. Sebelius* authored by Chief Justice John Roberts. The Supreme Court found that, while the individual mandate is not a valid exercise of Congress's power under the Commerce Clause, it is constitutional under Congress's taxing authority. The Supreme Court also found that while Health Care Reform's expansion of Medicaid programs is constitutional, the federal government may not threaten States that do not comply with these new standards with the loss of their existing funding.

What does this mean for Employers?

The results of yesterday's Supreme Court decision mean that nothing has changed for employers subject to Health Care Reform. Below is a summary of the Health Care Reform rules and requirements (many that are already in effect) that employers should

re-familiarize themselves with now to avoid significant penalties for noncompliance:

Application

Health Care Reform applies to both fully-insured and self-insured employer health plans. The extent to which these plans are subject to certain aspects of the law, however, depends on whether the plan is considered "grandfathered" or "non-grandfathered." Grandfathered plans include any group health plan or individual plan that was in existence on March 23, 2010. The Departments of Health and Human Services, Labor and Treasury have issued a comprehensive set of regulations regarding how a group health plan loses grandfathered status. For more information, click here and here.

Currently Effective Requirements of Health Care Reform

Generally beginning in 2011, the following requirements went in effect under Health Care Reform:

Requirements Applicable to Grandfathered Plans

- ☑ No lifetime benefit limits.
- ☑ No revocation of coverage (except for fraud/intentional conduct).
- ☑ Limited restrictions on annual limits.
- ☑ Requirement of plan coverage of dependent children up to age 26 if the dependent is not eligible to enroll in another employer-sponsored health plan.
- ☑ No preexisting condition exclusions for enrollees under age 19.

Requirements Applicable to Non-Grandfathered Plans

- ☑ No lifetime benefit limits.
- ☑ No revocations of coverage (except for fraud/intentional conduct).
- ☑ No restrictions on annual limits on the dollar value for "essential health benefits" as determined by the Department of Health and Human Services ("HHS").
- ☑ Requirement for coverage of certain preventive health services and immunizations without cost to covered individuals.
- ☑ No discrimination in favor of higher-wage employees for fully-insured group health plans (self-insured group health plans had previously been subject to this rule under Section 105(h) of the Internal Revenue Code) [currently subject to a delayed effective date].
- ☑ No preexisting condition exclusions for enrollees under age 19.
- ☑ Requirement for plan coverage of dependent children up to age 26.
- ☑ New rules for processing claims appeals.

Additional Programs

- ☑ **Reinsurance:** Employers could apply to be covered by a temporary program that is currently in place that provides reimbursement to employers whose group health plans cover individuals who retire, do not currently qualify for Medicare, and are between the age of 55 and the date on which the individual is eligible for Medicare. Employers providing such coverage may qualify for reimbursement of up to 80 percent of the costs of providing the coverage to such individuals. The reimbursements must be used to lower costs in the employer's plan. Applications to participate in this program were due by May 5, 2011. The temporary program expires on January 1, 2014.
- ☑ **Small Business Tax Credit:** Qualifying small businesses currently receive a federal tax credit to offset up to 35 percent of health insurance costs. Beginning in taxable years after 2013, the employer must participate in an insurance exchange in order to claim the credit, which may be up to 50 percent, and may only claim the credit for up to two years after 2013.

Requirements of Health Care Reform Not Yet Effective

Coverage Disclosure

- ☐ **Summaries of Benefits and Coverage:** Generally beginning with the first open enrollment period on or after September 23, 2012, employers must

provide a summary of benefits to each employee that is not more than four pages in length, that is written in a culturally and linguistically appropriate manner, and contains certain content related to covered benefits, exclusions, cost sharing, and continuation coverage. Failure to comply may result in a penalty of up to $1,000 for each failure.

Tax Related Changes

- **Form W-2 Reporting:** Beginning with Form W-2s issued for employees with respect to 2012, employers must report the cost of employer provided health coverage. Employers who do not comply face substantial penalties of $200 per Form W-2, capped at $3 million per employer. Certain exemptions apply. For more information click here.
- **FSA Limitations:** Effective January 1, 2013, contributions to a flexible spending account for medical expenses are limited to $2,500 per year, increased annually by a cost of living adjustment.
- **Medicare Tax Adjustments:** Effective January 1, 2013, the employee-side Medicare Part A tax rate increases from 1.45 percent to 2.35 percent on individuals earning more than $200,000 (indexed) and married couples filing jointly earning more than $250,000 (indexed). There is no corresponding increase in the employer-side payroll taxes. Health Care Reform also imposes a 3.8 percent tax on unearned income for higher-income taxpayers, for which the thresholds are not indexed.

"Pay or Play" – Health Insurance Exchanges

Beginning in 2014, states will begin to operate health insurance exchanges for both the individual and the small group market. These exchanges are intended to provide affordable coverage to those who seek to purchase coverage due to the individual mandate. Exchanges will offer insurance that complies with new federal standards for "essential health benefits."

- **Employer Penalties:** While there is no mandate that an employer provide health care coverage, effective 2014, Health Care Reform imposes a fine on employers if an employee purchases health insurance through an exchange and receives a federal credit towards such purchase. Presumably an employee would do this only if his or her employer does not offer coverage or the coverage is expensive. The fines are as follows:

  - Employers (1) with more than 50 employees; (2) that do not offer health care coverage; and (3) have at least one full-time employee (FTE) who receives a premium tax credit from the federal government will be fined $2,000 per FTE per year. In calculating the number of FTEs, the first 30 FTEs are subtracted.
  - Employers (1) with more than 50 employees; (2) that offer health care coverage; and (3) have at least one FTE who receives a premium tax credit from the federal government will be fined the lesser of $3,000 for each FTE employee receiving a credit or $2,000 for each FTE.
  - In determining the number of FTEs, an employer must aggregate the number of hours of service of non-FTEs for a month and divide by 120 to determine the number of additional FTEs it should add to its actual number.

- **Notification:** Beginning on March 1, 2013, employers must provide written notice to current employees—and new employees as they are hired—of the existence of a health insurance exchange and how the employee may contact the exchange to request assistance. If the employer's share of the total costs of benefits is less than 60 percent of the costs (actuarial value), the employer must inform each employee that he or she may be eligible for a premium tax credit if the employee purchases insurance through the exchange, but that the employee will lose the employer contribution (if any) made with respect to health coverage.
- **IRS Reporting:** Effective January 1, 2014, employers with more than 50 FTEs must certify to the IRS whether they offer employees minimum essential coverage, the length of any waiting period, monthly premiums, the employer's share of the total costs of benefits, number of FTEs per month, and identifying employee information, including whether the employee was covered under any benefit plan. The IRS may by regulation require additional information. Employers must also provide employees with notice of the information provided to the IRS.

Additional Provisions

- **Automatic Enrollment:** Beginning on a date to be specified by the Department of Labor in future guidance (no sooner than 2015), employers with more than 200 FTEs that offer health insurance will be required to

automatically enroll employees in a group health plan if a plan is offered by that employer. Employees must be given reasonable advance notice and the opportunity to elect to enroll in a different level of coverage, if available, or to opt-out altogether.

- **More Requirements for Grandfathered Plans:**
  - **Pre-existing Condition Exclusions:** Effective January 1, 2014, the prohibition of pre-existing condition exclusions for all ages applies to all enrollees in grandfathered plans.
  - **Dependent Coverage:** Effective January 1, 2014, grandfathered group health plans must provide for adult dependent children up to age 26 regardless of whether they are offered other employer-provided coverage.
  - **Coverage limits.** Any remaining annual limits on benefits under grandfathered plans must be eliminated.
- **No Excessive Waiting Periods:** Effective for plan years beginning on or after January 1, 2014, group health plans may not impose waiting periods in excess of 90 days.
- **Increased Incentive Percentages under Health and Wellness Programs:** Health Care Reform increases the maximum incentive available under outcome based wellness programs to 30 percent of the total cost of coverage and authorizes the Secretaries of Labor, Treasury, and HHS to increase the incentive percentage limitation to 50 percent by regulations.
- **Excise Tax on Insurers of High-Cost Plans:** Beginning on January 1, 2018, Health Care Reform imposes an excise tax with respect to employer-sponsored group health plans (both self-funded and fully-insured) whose annual premiums exceed $10,200 for an individual and $27,500 for family. The bill indexes the threshold premium to the consumer price index for urban consumers (CPI-U) beginning in 2020. In addition, threshold amounts will be increased for retirees age 55 and older who are not eligible for Medicare and for employees in high-risk professions. The tax is equal to 40 percent of the value of the plan that exceeds the threshold amounts.

This summary does not address all of Health Care Reform provisions applicable to employers. If you have any additional questions or concerns, please contact a member of Blank Rome's Employee Benefits and Executive Compensation Group.

BLANK ROME LLP
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COLA Increases for Dollar Limitations on Benefits and Contributions

October 25, 2012

Employment, Benefits & Executive Compensation

SERVICES
Employee Benefits

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PROFESSIONALS
Barry L. Klein

The Internal Revenue Service announced cost-of-living adjustments applicable to dollar limitations for qualified plans and other items for tax year 2013.

Code Section	2013	2012	2011	2010	2009	2008	2007	2006
401(a)(17)/404(l) Annual Compensation	$255,000	$250,000	$245,000	$245,000	$245,000	$230,000	$225,000	$220,000
402(g)(1) Elective Deferrals	17,500	17,000	16,500	16,500	16,500	15,500	5,500	15,000
415(b)(1)(A) DB Limits	205,000	200,000	195,000	195,000	195,000	185,000	180,000	175,000
415(c)(1)(A) DC Limits	51,000	50,000	49,000	49,000	49,000	46,000	45,000	44,000
414(v)(2)(B)(i) Catch-up Contributions	5,500	5,500	5,500	5,500	5,500	5,000	5,000	5,000
414(v)(2)(B)(ii) Simple Catch-up Contributions	2,500	2,500	2,500	2,500	2,500	2,500	2,500	2,500
408(k)(2)(C) SEP Minimum Compensation	550	550	550	550	550	500	500	450
408(k)(3)(C) SEP Maximum Compensation	255,000	250,000	245,000	245,000	245,000	230,000	225,000	220,000
408(p)(2)(E) Simple Maximum Contributions	12,000	11,500	11,500	11,500	11,500	10,500	10,500	10,000
409(o)(1)(C) ESOP	1,035,000	1,015,000	985,000	985,000	985,000	935,000	915,000	885,000
Distribution Limits	205,000	200,000	195,000	195,000	195,000	185,000	180,000	175,000
414(q)(1)(B) HCE Compensation Threshold	115,000	115,000	110,000	110,000	110,000	105,000	100,000	100,000
416(i)(1)(A)(i) Key Employee	165,000	165,000	160,000	160,000	160,000	150,000	145,000	140,000

457(e)(15) Deferral Limits	17,500	17,000	16,500	16,500	16,500	15,500	15,500	15,000
Taxable Wage Base	113,700	110,000	106,800	106,800	106,800	102,000	97,500	94,200

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Departments Issue Proposed Regulations on Wellness Programs Under Health Care Reform

November 2012 (No. 3)

Employee Benefits & Executive Compensation

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Kari Knight Stevens

On November 20, the Department of Labor's Employee Benefits Security Administration (EBSA), U.S. Department of Health and Human Services (HHS), and the Treasury Department issued proposed rules titled "Incentives for Nondiscriminatory Wellness Programs in Group Health Plans." On the same day, the EBSA also issued a fact sheet on wellness programs as they relate to Health Care Reform. The proposed rules would be effective for "grandfathered" and "non-grandfathered" group health plans in plan years beginning on or after January 1, 2014.

Prior to Health Care Reform, rules regarding wellness programs for group health plans were included in regulations promulgated under HIPAA. These rules set for the distinction between "participatory wellness programs" (those that provide an award for mere participation in a wellness program regardless of outcome) and "health-contingent wellness programs" (programs that require individuals to meet a specific health-related standard in order to receive an incentive). Under the prior rules, health-contingent wellness program incentives were limited to 20 percent of the cost of coverage and additional requirements regarding eligibility, purpose, and alternatives under such programs needed to be satisfied in order for such programs not to be considered discriminatory under HIPAA.

The proposed rules retain most of the prior rules governing both participatory and health-contingent wellness programs, but: (i) codify certain key changes under Health Care Reform; and (ii) offer clarifications with respect to the design of health-contingent wellness programs and the reasonable alternatives such programs must offer under the law. These changes and clarifications include:

- Incentives offered under health-contingent wellness programs may be increased from 20 percent to 30 percent of the total cost of employee-only coverage under the plan (or the total cost of coverage in which the participant is enrolled if dependents are eligible to participate). In the case of programs designed to prevent or reduce tobacco use, the maximum award may further increase to 50 percent.
- Health-contingent wellness programs have always been required to provide a reasonable alternative to obtaining incentives if the proposed standard was unreasonably difficult or medically inadvisable to attempt to achieve. The proposed rules build upon this rule through:
  - Providing that if a reasonable alternative standard is an educational program, the plan cannot require individuals to find such a program on their own, nor may the plan require individuals to pay for the program. Similarly, the plan must pay for the cost of any weight loss program offered as a reasonable alternative.
  - Continuing to permit group health plan sponsors to obtain physician verification that an individual's health factor makes it unreasonably difficult for the individual to satisfy, or medically inadvisable for the individual to attempt to satisfy, the otherwise applicable standard. However, under the proposed rules it would not be reasonable for a plan to seek verification of a claim that is obviously valid based on the nature of the individual's known medical condition.
  - Issuing new language to communicate to health-contingent wellness program participants the opportunity for a reasonable alternative to obtaining an incentive as follows:
    Your health plan is committed to helping you achieve your best health

status. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at _____ and we will work with you to find a wellness program with the same reward that is right for you in light of your health status.

- Further confirming that adverse benefit determinations regarding the availability of a reasonable alternative standard under a health-contingent wellness program qualify for Federal external review under Health Care Reforms claims and appeals procedures.
- Health-contingent wellness programs must be reasonably designed to promote health or prevent disease. The proposed rules clarify that where the initial standard for the reward is based on a measurement, test or screening, health plans will be required to offer a different, reasonable means of qualifying for the reward to any individual who does not meet the standard based on the measurement, test or screening. For example, a health plan that ties an incentive to a target body mass index ("BMI") will meet this requirement if it offers the same incentive to a participant who does not meet the BMI target but who complies with a reasonable exercise program.

The Departments seek comments regarding the proposed regulations and other wellness program related issues, which must be submitted by January 25, 2013.

During the past several years, wellness programs have increased in popularity among employers as a means to control costs and to encourage healthy behavior in their workforce. The proposed rules offer important developments impacting wellness programs, particularly though permitting more meaningful incentives and through clarifying several unanswered questions left from the prior rules. Employers should act now to consider how the proposed rules will impact their wellness programs beginning in 2014 and to plan any changes or enhancements to their programs. In addition to the proposed rules, employers must also continue to be mindful of other laws that impact upon wellness programs such as the Americans with Disability Act, the Genetic Information Nondiscrimination Act, and federal and state tax and privacy laws.

If you have any questions about the proposed rules and how they impact your company's wellness program, please contact a member of Blank Rome's Employee Benefits and Executive Compensation Group.