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Workplace Policy Institute: A Look Ahead to Legislative and Regulatory Changes in 2014

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The government is divided, congressional midterm elections are looming, and the President is approaching "lame duck" status. Although this political landscape may lead employers to assume that 2014 will be a quiet year on the legislative and regulatory front, the year ahead is shaping up to bring significant changes to workplace policy at the federal as well as state and local levels. The year began with President Obama announcing a renewed focus on income inequality.[1] Pushes to increase the minimum wage and extend unemployment benefits are clear examples of this agenda. Yet other, less obvious, legislative and regulatory proposals impacting employers may well accompany the focus on income inequality. With Congress effectively deadlocked by a Republican-controlled House and a Democrat-controlled Senate, the administration will look past Congress to advance its agenda. At the same time, states will continue to look past Washington to enact changes in workplace policy. Accordingly, 2014 looks to be anything but quiet with respect to employment, labor, and benefits policy. Amidst the specter of the Affordable Care Act (ACA) implementation, employers should prepare for new requirements coming from Washington and around the country.

Congressional Outlook

The 113th Congress has thus far produced little in the way of legislation. The budget deal passed at the end of last year may preclude a repeat of the government shutdown and a battle over government funding, but it is unlikely to clear the way for major legislation to make its way through both chambers of Congress. Employment and labor bills are expected to be caught in this legislative logjam. For example, the Employment Non-Discrimination Act (ENDA), which would prohibit discrimination on the basis of sexual orientation or gender

1 The White House, Office of the Press Secretary (Dec. 4, 2013). *Remarks by the President on Economic Mobility* [Press release] *available at* http://www.whitehouse.gov/the-press-office/2013/12/04/remarks-president-economic-mobility.

identity, passed the Senate last year. However, Speaker John Boehner announced that the House would not consider the legislation. With an eye to the midterm elections, both parties are instead expected to pursue "message" bills which are beneficial to campaigns, but have little chance of becoming law.

The House began the year with votes on bills highlighting problems with the rollout of the ACA website, Healthcare.gov. The legislative assault on the ACA will likely continue throughout the year. House Republicans are also sure to continue scrutinizing the administration with respect to the ACA and labor and employment rulemaking activities through congressional hearings and oversight.

There are a few possible exceptions to the prediction that no significant new federal labor and employment laws will be enacted in 2014. Despite the legislative logjam, immigration reform remains possible, particularly with Republicans eyeing gains in the 2014 midterm elections and beyond. While passage of a comprehensive immigration bill remains unlikely, piecemeal bills that both Republicans and Democrats could tout as victories on the campaign trail may succeed. Mandatory use of E-Verify and new visa rules for skilled and unskilled workers could be among the changes making their way to the President's desk. Multiemployer pension plan relief legislation may generate enough bipartisan support to pass. Enhanced protection for whistleblowers has received support from both sides of the aisle in the past, and may be included in new legislation as well.

While the legislative stalemate generally is expected to continue, Senate Democrats have eased the path for approval of presidential nominees. The so-called "nuclear option" changed Senate rules to eliminate the filibuster for presidential nominations. Now, only 51 votes, instead of 60, are needed to end debate on nominees, except in the case of the U.S. Supreme Court. With confirmed nominees in place, the Executive Branch agencies are poised to pursue a workplace policy agenda even more dramatic than stalled legislation would be.

Regulatory Outlook

With a gridlocked Congress, the Obama Administration is turning to the federal agencies to bring about changes to labor, employment, and benefits policy. The specter of reelection is no longer inhibiting aggressive new rulemaking. The Fall 2013 Regulatory Agenda, released last November, is a loud and clear signal that the administration will use its regulatory authority to pursue sweeping changes to workplace policy.[2] Yet, the regulatory agenda does not paint a complete picture of the policy changes on the horizon. Subregulatory guidance outside of the public rulemaking process and enhanced enforcement of labor, employment and benefits laws will create new challenges for employers. The following summarizes the key initiatives that the Department of Labor (DOL), Equal Employment Opportunity Commission (EEOC), National Labor Relations Board (NLRB or Board), and Department of Health and Human Services (HHS) consider priorities for 2014.

Department of Labor

Under the leadership of Secretary Thomas Perez, the DOL will be at the core of pursuing the Obama Administration's "income inequality" agenda, which could have a myriad of implications for employers. Secretary Perez has linked the war on poverty with a strong labor movement.[3] In his swearing-in speech in September 2013, he announced that "we must do everything in our power to ensure a safe and level playing field for American workers."[4] In the four months since Perez took office, the DOL has finalized several stalled rules that create serious challenges for government contractors and the home healthcare industry, and has released an ambitious regulatory agenda that will impact employers across the country. According to the DOL's Fall 2013 Agency Rule List, the agency either has recently issued or is ready to publish 24 final rules in the months ahead. In addition, the DOL is working on 31 rules at the proposed stage, 11 regulatory measures in the pre-rule category, and six long-term regulatory efforts. According to the DOL's Statement of Regulatory Priorities, the agency plans to continue its Plan/Prevent/Protect initiative. The DOL's Plan/Prevent/Protect initiative, first announced in 2010, reflects the Department's approach to rulemaking and enforcement, one that will impose new burdens on employers and increase the likelihood the DOL will come knocking on the door of their workplaces.

2 Michael J. Lotito, *Federal Agencies Issue Fall 2013 Unified Agendas and Regulatory Plans*, D.C. Employment Law Update (Nov. 27, 2013), *available at* http://www.littler.com/dc-employment-law-update/federal-agencies-issue-fall-2013-unified-agendas-and-regulatory-plans.

3 Michael J. Lotito, *Labor Secretary Highlights Some Administration Priorities During Anti-Poverty Event*, D.C. Employment Law Update (Oct. 30, 2013), *available at* http://www.littler.com/dc-employment-law-update/labor-secretary-highlights-some-administration-priorities-during-anti-pover.

4 U.S Dept. of Labor, *Remarks By Secretary of Labor Thomas E. Perez, Swearing-In Ceremony* (Sept. 4, 2013), *available at* http://www.dol.gov/_sec/media/speeches/20130904_Perez.htm.

The following highlights some key upcoming DOL initiatives:

Persuader Rule: The DOL's Office of Labor-Management Standards (OLMS) has pushed off the release of its contentious "persuader" rule until March 2014. This rule, if it resembles the proposal, would broaden the scope of reportable activities by substantially narrowing the DOL's interpretation of the "advice exemption" in § 203(c) of the Labor-Management Reporting and Disclosure Act (LMRDA). This final rule would greatly expand the types of union-related activities that would trigger reporting requirements, including, for example, multi-employer seminars or webinars, and could have a drastic impact on the confidential nature of the attorney/client relationship. Moreover, many small employers without in-house counsel to assist with the LMRDA's reporting requirements would be placed at a disadvantage. It remains to be seen how closely the final version of the rule resembles the proposal. If finalized, the rule is certain to further Secretary Perez's goal of fostering a strong labor movement, and will tip the scales decidedly in favor of unions during organizing campaigns. On a related matter, by October 2014, the OLMS intends to issue a proposed rule that would require employers to electronically file Form LM-21, Receipts and Disbursements Report, which is required under § 203(b) of the LMRDA.

OFCCP: Last year, the Office of Federal Contract Compliance Programs (OFCCP) issued final rules revising affirmative action regulations for protected veterans and individuals with disabilities. The new rules will make compliance with government contractors' affirmative action and EEO obligations more expensive and difficult. Government contractors face even more changes and challenges in 2014. By May 2014, the OFCCP plans to issue proposed rules that would revise sex discrimination guidelines for federal contractors and subcontractors. According to the agency, because current sex discrimination guidelines have not been updated in more than 30 years, they warrant a "regulatory lookback" to reflect the current state of the law in this area. The OFCCP is scheduled to develop a new compensation data collection tool that would identify contractors likely to engage in sex- and race-based compensation discrimination. This tool, which is scheduled to be issued in January 2014, "could play a key role in OFCCP's establishment-specific, contractor-wide, and industry-wide analyses." By April 2014, the OFCCP intends to issue an affirmative action rule applicable to construction contractors. According to the agency, existing affirmative action goals and timetables for this industry are outdated. An updated rule would "remove these outdated goals and provide contractors increased flexibility to assess their workforce and determine whether disparities in the utilization of women or the utilization of a particular racial or ethnic group in an on-site construction job group exist," and "strengthen affirmative action programs particularly in the areas of recruitment, training, and apprenticeships."

OSHA: The Occupational Safety and Health Administration (OSHA) has an ambitious regulatory agenda that includes moving forward with an Injury and Illness Prevention Program (I2P2). By September 2014, OSHA plans to issue a proposed rule requiring employers to implement an I2P2, which "involves planning, implementing, evaluating, and improving processes and activities that promote worker safety and health hazards." While the specifics of the proposal are not yet known, its scope and impact on businesses are sure to be significant, potentially undermining voluntary health and safety programs that many employers have already implemented.

OSHA activities this year will also include:

- Electronic Recordkeeping. OSHA recently issued a proposal that would require employers to file certain injury and illness data electronically and make such information publicly available.
- Infectious Disease Standards. OSHA is looking to develop regulations to reduce the risk of worker exposure to infectious diseases, particularly in healthcare settings. OSHA plans to initiate Small Business Regulatory Enforcement Fairness Act (SBREFA) consideration of such a proposal in January 2014.
- Whistleblower Protection Regulations. OSHA is the federal agency charged with enforcing the whistleblower provisions of 22 separate statutes. The Fall 2013 Regulatory Agenda lists upcoming final rules "that will establish consistent and transparent procedures for the filing of whistleblower complaints" under the following statutes: § 1558 of the Affordable Care Act of 2010; § 806 of the Corporate and Criminal Fraud Accountability Act of 2002; National Transit Systems Security Act; Surface Transportation Assistance Act; Federal Railroad Safety Act; Consumer Financial Protection Act; Seaman's Protection Act; FDA Food Safety Modernization Act; and the Employee Protection Provision of the Moving Ahead for Progress in the 21st Century Act. According to OSHA, these rules will address enforcement and provide specific timeframes and guidance on filing whistleblower complaints, avenues of appeal, and allowable remedies.

- Other Safety Standards. OSHA intends to proceed with proposals governing occupational exposure to crystalline silica, beryllium, and combustible dust.

Wage and Hour: The Wage and Hour Division (WHD) intends to issue regulations in March 2014 to revise the definition of "spouse" under the Family and Medical Leave Act in light of the Supreme Court's decision in *United States v. Windsor*. Notably, the WHD appears committed to pursuing the so-called "Right to Know" rule that would "update the recordkeeping regulations under the Fair Labor Standards Act in order to enhance the transparency and disclosure to workers of their status as the employer's employee or some other status, such as an independent contractor, and if an employee, how their pay is computed." While the WHD does not set a date for movement on this proposal, the agency recently sent a proposed Worker Classification Survey to the Office of Management and Budget (OMB) for review and approval, which many believe will be used to justify the need for a right-to-know rule. The survey tool is problematic, and even more so if it is used to support a rule that would impose significant new burdens on businesses. The Right to Know rule is part of DOL's ongoing campaign to target the misclassification of employees as independent contractors. These efforts will likely be enhanced even further under the tenure of Secretary Perez, as well as David Weil, President Obama's nominee for WHD Administrator.

Healthcare Reform: The Employee Benefits Security Administration (EBSA), along with HHS and Internal Revenue Service (IRS), plan to continue implementing various ACA provisions. Even as scrutiny of the ACA by lawmakers continues, the regulators will focus their efforts on finalizing the rules governing compliance with existing and upcoming requirements. By February 2014, the regulators are scheduled to release a final rule regarding the 90-day waiting period limitation and other technical amendments regarding health coverage requirements under the ACA. By August 2014, the HHS intends to issue a proposed rule regarding the ACA's nondiscrimination provisions. This proposal would "implement prohibitions against discrimination on the basis of race, color, national origin, sex, age, and disability, as provided in § 1557 of the Affordable Care Act." With the employer "play-or-pay" mandate and new reporting requirements now slated to become effective in 2015, employers must develop their ACA strategies this year to ensure they are prepared. The IRS is planning to issue final regulations on the play-or-pay and reporting requirements, which will shape employers' ACA planning and implementation. However, even after final regulations are issued, questions and uncertainty about the ACA and its impact on employers and employees will remain.

Retirement Benefits: In addition to the ACA, EBSA rulemaking will include measures related to employee retirement plans. By August 2014, the EBSA plans to take a second shot at revising who constitutes a "fiduciary" when providing investment advice to retirement plans and other employee benefit plans, to participants and beneficiaries of such plans, and to owners of individual retirement accounts (IRAs) under ERISA. The EBSA withdrew its initial fiduciary rule in 2011 after the proposal faced significant opposition. In the coming months, the EBSA also intends to issue final rules governing annual funding notices (March 2014), target date disclosures (March 2014), and amendment of its abandoned plan program (April 2014).

National Labor Relations Board

With a full five-member Democrat-controlled Board now in place, the NLRB is poised to make even more dramatic changes to labor-management relations. In conjunction with DOL's intent to finalize the persuader rule, these changes could have a more pronounced and harmful impact on employers than the long-stalled Employee Free Choice Act (EFCA). Employers enjoyed a regulatory victory in knocking down the NLRB's notice posting rule. However, there is cause for concern and not celebration with respect to the NLRB's decision to dismiss its appeal of the decision striking down the so-called "quickie" or "ambush" election rule. The move clears the way for a fully operational Board, unhindered by questions about its validity, to pursue the even more expansive changes to the union election process originally proposed in June 2011. In the Fall 2013 Regulatory Agenda, the NLRB announced that it continues to consider additional broad changes to union election rules, and lists the election rule as a "long term action" with no definite date for finalization. Now that the NLRB has dismissed its appeal, there is no reason to believe that it will stall or temper its earlier attempt to change the rules governing pre- and post- election procedures.

The challenges employers face from the new NLRB extends beyond rulemaking. Recent Board decisions have paved the way for expanding labor's reach, and this will continue—if not accelerate—under the current Board. The impact is not limited to the unionized workplace. The NLRB is likely to continue examining work rules and policies in both union and non-union facilities to determine whether they reasonably tend to interfere with § 7 rights. At the same time, the Board may seek to build upon the *Specialty Healthcare* decision and its fostering of

micro-bargaining units. In *Specialty Healthcare*, the Board adopted a new standard for determining appropriate bargaining units, requiring employers that argue that the unit should include additional employees to demonstrate that employees in a larger unit share an "overwhelming" community of interest with those in the petitioned-for unit.

With former Board recess appointee Richard Griffin, Jr. confirmed as NLRB General Counsel, a strong labor advocate is now in a position that wields enormous power. These activities at the NLRB come as organized labor is trying to reinvent itself. As outlined in its recent report, the AFL-CIO is embarking on an outreach program to expand its shrinking base and create "new models of representation" to engage people in the labor movement.[5] Employers enter 2014 facing challenges on numerous fronts. With DOL pushing forward with the persuader rule, 2014 could bring changes that fundamentally alter the balance of power between employers and unions during organizing campaigns by seriously impeding the employer's ability to respond effectively.

Equal Employment Opportunity Commission

After beginning President Obama's first term with the passage of the Lilly Ledbetter Fair Pay Act, the administration's employment agenda has stalled in a now divided Congress. During the remaining years of the President's second term, the administration will turn to the EEOC to advance its employment law agenda. With five confirmed members on the Commission, the agency can make important changes to the interpretation and enforcement of existing laws that will create new hurdles for employers. The seven items on the EEOC's 2013 Fall Regulatory Agenda may not have a big impact on employers, but new guidance and enhanced enforcement will.

Recent public meetings of the Commission indicate where the agency is focusing its efforts and where new guidance may be forthcoming. On November 13, 2013, the EEOC held a hearing to examine national origin discrimination in the workplace,[6] a signal that guidance on English-only policies is under consideration. On May 8, 2013, the EEOC held a hearing on employer wellness programs.[7] The overlapping and inconsistent treatment of wellness programs under the Americans with Disabilities Act (ADA), Genetic Information Nondiscrimination Act (GINA), Health Insurance Portability and Accountability Act (HIPAA) and the ACA has created uncertainty and challenges for employers seeking to control healthcare costs and improve the health of their workforce though such programs. Any additional guidance by the EEOC may prove to be at odds with ACA incentives to expand the use of employer-sponsored wellness programs. In 2012, the EEOC issued guidance on the use of criminal background checks by employers in hiring.[8] At the time, the Commission delayed issuing guidance on the use of credit history or leaves of absence as reasonable accommodations. Such guidance may still be on the Commission's plate as it continues to scrutinize employer screening tools.

Employers certainly can expect the EEOC's aggressive enforcement to continue in 2014. The Strategic Enforcement Plan (SEP) reaffirms the agency's focus on strategic enforcement.[9] The SEP outlines nationwide priorities, including eliminating systemic barriers in recruitment and hiring. As part of the initiative, the EEOC will examine screening tools (*e.g.*, pre-employment tests, background screens, date of birth screens in online applications) that adversely impact groups protected under the law. The EEOC also plans to target disparate pay, job segregation, harassment, trafficking, and discriminatory language policies affecting immigrant, migrant, and other vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them. Among the emerging and developing issues that the EEOC will address are LGBT coverage under Title VII's sex discrimination provisions, as they may apply, and accommodating pregnancy when women have been forced to take unpaid leave after being denied accommodations routinely provided to similarly situated employees. The EEOC may effectively broaden the reach on federal non-discrimination laws even in the absence of legislative action. The EEOC will target compensation systems and practices that discriminate based on gender. In addition, the EEOC will likely target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts.

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5 Michael J. Lotito et al., *A Special Labor Day 2013 Report: Is Labor Poised For Rebirth?* Littler Report (Aug. 2013), *available at* http://www.littler.com/publication-press/publication/special-report-2013-is-labor-poised-for-rebirth.

6 EEOC, *Meeting of November 13, 2013—National Origin Discrimination in Today's Workplace, available at* http://www.eeoc.gov/eeoc/meetings/11-13-13/index.cfm.

7 EEOC, *Meeting of May 8, 2013—Wellness Programs Under Federal Equal Employment Opportunity Laws, available at* http://www.eeoc.gov/eeoc/meetings/5-8-13/index.cfm.

8 *See* Rod Fliegel et al., *EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers*, Littler ASAP (Apr. 30, 2012), *available at* http://www.littler.com/publication-press/publication/eeoc-issues-updated-criminal-record-guidance-highlights-important-stra.

9 Barry Hartstein et al., *Annual Report on EEOC Developments: Fiscal Year 2013*, Littler Report (Jan. 2014).

State Outlook

With employment and labor legislation stalled in Washington, states and localities are stepping in to fill the void.[10] As Congress debates raising the federal minimum wage, a central tenet of the White House's "income inequality" campaign, some states and cities are not waiting for Congress to act. California and New Jersey raised their minimum wages in 2013 and other states may follow suit if federal legislation continues to languish. Congress has failed to enact paid sick and family leave requirements, but employers may find themselves facing new paid leave requirements under state law. Employers can expect more restrictions on the use of an applicant's criminal history as "ban the box" laws proliferate at the state and local levels. New restrictions on the use of credit information and access to social media passwords will likely accompany an increased focus on workplace privacy by state legislatures.[11]

What Does This Mean for Employers?

Employers begin 2014 facing new requirements and compliance challenges coming from multiple directions. The congressional logjam will serve to accelerate efforts by the federal regulators and by states and local governments to enact changes in employment, labor and benefits law. Neither the impending midterm congressional elections nor the President's lame duck status will deter these initiatives. Taken together, the actions of the federal agencies and state and local lawmakers may result in changes to workplace policy even more sweeping than laws making their way to the President's desk. The use of federal administrative rather than legislative channels to alter labor, employment, and benefits policy—coupled with increased lawmaking at the state and local level—requires added vigilance and attention by employers. Littler's Workplace Policy Institute™ is a resource for employers to navigate this increasingly complex legislative and regulatory landscape in Washington and around the country.

Ilyse Schuman, a Shareholder in Littler's Washington, D.C. office, and Michael J. Lotito, a Shareholder in the San Francisco office, are Co-Chairs of Littler's Workplace Policy Institute™ (WPI). Littler's WPI is devoted to developing and influencing workplace legislative and regulatory developments at the federal and state levels. WPI provides the employer community with advocacy services, including litigation support. In addition, WPI closely monitors important labor, employment, and benefits policy initiatives and provides clients, trade associations, and policymakers with timely and thoughtful analysis of the practical implications of such proposals. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Ms. Schuman at ischuman@littler.com, or Mr. Lotito at mlotito@littler.com.

10 *See* Matthew Ruggles and Cynthia Brown, *New Compliance Obligations for 2014: Fewer New Laws, But Important Changes for Employers*, Littler ASAP (Dec. 26, 2013) *available at* http://www.littler.com/publication-press/publication/new-compliance-obligations-2014-fewer-new-laws-important-changes-emplo.

11 *See* Philip Gordon, *Workplace Privacy 2014: What's New and What Employers May Expect*, Littler ASAP (Jan. 7, 2014), *available at* http://www.littler.com/publication-press/publication/workplace-privacy-2014-what%E2%80%99s-new-and-what-employers-may-expect.