LABOR, IMMIGRATION &
EMPLOYEE BENEFITS DIVISION
U.S. CHAMBER OF COMMERCE

Key Labor, Employment, and Immigration, Regulatory Initiatives in the Obama Administration

The following is a summary of key regulatory actions, completed, underway, or anticipated, in which the Chamber has been, or plans on being, actively engaged.

Table of Contents

Key Labor, Employment, and Immigration, Regulatory Initiatives in the Obama Administration 1
Labor and Employment Related Regulatory Activity 5
Executive Orders 5
Establishing a Minimum Wage for Contractors 5
Non-Retaliation for Disclosure of Compensation Information 5
Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government and Executive Order 11246, Equal Employment Opportunity 6
Fair Pay and Safe Workplaces Executive Order 7
Presidential Memoranda 8
Updating and Modernizing Overtime Regulations 8
Achieving Pay Equality Through Compensation Data Collection 9
Completed Rulemakings 9
Representation-Case Procedures (Ambush Elections-Part I) 9
Representation-Case Procedures (Ambush Elections II) 10
Notice of Employee Rights under Labor Laws 12

Family and Medical Leave Act, as Amended 13
Systemic Compensation Discrimination Under Executive Order 11246 and Voluntary Guidelines for Self-Evaluation 13
Federal Contractor Affirmative Action Obligations under the Rehabilitation Act 13
Federal Contractor Affirmative Action Obligations under the Vietnam Era Veterans Readjustment and Assistance Act 15
Revising "Companionship" Exemption to the Fair Labor Standards Act 15
OSHA Recordkeeping Update from SIC codes to NAICS codes; reporting of hospitalizations and amputations 16
OFCCP Scheduling Letter and Itemized Listing 17
FAR Regulation: Ending Trafficking in Persons 17
Rulemakings Underway *18*
Adding New Column to Track Ergonomic Injuries Under OSHA Injury Logs 18
Employer and Consultant Reporting Under the LMRDA's Persuader Regulations 19
Genetic Information Nondiscrimination – Title I Regulation of Health Risk Assessments . 20
Compensation Data Collection Tool 20
Treasury Department Acquisition Regulations Proposed Contracting Language for Minority and Women Inclusion under Dodd-Frank Act 21
Worker Classification Survey 21
OSHA Revised Silica Standard 22
OSHA Proposed Injury and Illness Reporting Regulation 23
Chemical Management and Permissible Exposure Limits 23
Sex Discrimination Guidelines for Federal Contractors 24
Workplace Wellness Programs and Employment Discrimination 24
Anticipated Rulemakings *24*
OSHA Injury and Illness Prevention Program (I2P2) Regulation 24
Construction Contractor Affirmative Action Requirements 25
"Right to Know" under the Fair Labor Standards Act 25
Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Professionals 26
Significant Non-Regulatory Activities **26**
Department of Labor *26*

Proposed Interpretation of "Feasible" Under OSHA's Noise Exposure Standard 26
OSHA Memo on Whistleblowers and Employer Safety Incentive Programs 26
OSHA Letter of Interpretation Permitting Union Representatives to Accompany an OSHA Inspector at Non-Union Workplaces 27
Changes to Strategic Partnership Programs 27
informACTION App Challenge (WHD and OSHA) 27
Persuader Reporting Orientation Program (OLMS) 28
U-VISA Determinations (WHD) 28
Memorandum of Understanding for Employee Misclassification Initiative (WHD) 28
Aggressive Strategic Plans (OFCCP) 29
Guidance on the Applicability of the Worker Adjustment and Retraining Notification Act to layoffs that may occur among Federal Contractors, including in the Defense Industry as a Result of Sequestration (ETA) 29
Complying with Nondiscrimination Provisions: Criminal Record Restrictions (OFCCP) ... 29
OFCCP Procedures for Reviewing Contractor Compensation Systems and Practices (OFCCP) 29
Calculating Back Pay as Part of Make-Whole Relief for Victims of Employment Discrimination (OFCCP) 30
Agricultural Workers (WHD) 30
Memo on Implementation of the President's Executive Order on Fair Pay and Safe Workplaces 30
Equal Employment Opportunity Commission *30*
Credit and Criminal History Background Checks 30
Religious Garb and Grooming in the Workplace 31
Enforcement Guidance on Pregnancy and Related Issues 31
National Labor Relations Board *31*
Protected Concerted Activity Website 31
Memorandum of Understanding with Justice Department 31
Letter of Agreement Between The Office of General Counsel and the Ministry of Foreign Affairs of Mexico 32
Immigration Regulatory Activity 33
Completed Rulemakings *33*
H-2B Program Rule and Wage Methodology 33

I-9 Employment Eligibility Verification 35
Automation of Form I-94 Arrival/Departure Record 35
H-4 Spousal Work Authorization 35
Rulemakings Underway *36*
Updating Immigration Procedures for Consistency in E-3, H-1B1, CW-1, and EB-1 Processing 36
Labor Condition Application (ETA 9035) for H-1B Petitions 37
Asia-Pacific Economic Cooperation (APEC) Business Travel Card 38
Notice of Request For Information 38
Anticipated Rulemakings *38*
Expand STEM Practical Training for Students with Prior STEM Degrees 38
Procedural and Technical Employment Verification (I-9) Violations 38
Nonimmigrant Classes: Temporary Visitors to the United States for Business or Pleasure . 39
Implementation of Amendments Affecting Petitions for Employment Creation for Aliens . 39
Significant Non-Regulatory Activities 39
Department of Homeland Security *39*
L-1B Adjudication Policy (USCIS) 39

Labor and Employment Related Regulatory Activity

Executive Orders

Establishing a Minimum Wage for Contractors

On February 12, 2014, President Obama signed an Executive Order, entitled "Establishing a Minimum Wage for Contractors" that raises the wages paid by federal contractors with service and construction contracts to $10.10 per hour. The Executive Order also applies to subcontractors of federal contractors and companies with concession agreements on federal properties or leasing space in federal buildings. The E.O. also specified that workers who are merely supporting the covered contracting activity would be covered. The new minimum wage requirements will be effective January 1, 2015, for new and renewed contracts and the minimum wage will be increased each year by an inflation based adjustment.

On June 17, 2014, the Department of Labor promulgated the proposed rule to implement the requirements of the Executive Order.

On July 28, 2014, the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/comment/joint-comments-proposed-regulations-establishing-minimum-wage-contractors

On October 7, 2014, the Department of Labor issued final regulations. The rules became effective beginning December 5, 2014. Among other things, the final regulations create a new notice posting requirement; impose two additional recordkeeping requirements for contractors (the requirement to maintain records reflecting each worker's occupation (s) or classification (s) and the requirement to maintain records reflecting total wages paid); and provides an exemption for workers performing in connection with covered contracts for less than 20 percent of their work hours in a given workweek as long as the contractor segregates the hours worked in connection with the covered contract from other work not subject to the Executive Order for that worker. However, none of the problems in the proposed regulation, with respect to coverage of vendors on federal property or which employees must be included, were cured.

Non-Retaliation for Disclosure of Compensation Information

On April 8, 2014, President Obama signed an Executive Order, entitled "Non-Retaliation for Disclosure of Compensation Information" which amends Executive Order 11246 to provide that federal contractors shall not discriminate against employees or applicants that share compensation data. Specifically, the Executive Order states that:

"The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions

discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information."

The Executive Order provides that the Secretary of Labor shall issue regulations within 160 days to implement the requirements of the Order.

On September 17, 2014, DOL issued the proposed implementing regulations for the Executive Order. The proposal would apply to covered federal supply and service contracts and federally assisted construction contracts worth more than $10,000 and entered into or modified on or after the effective date of a final rule. The regulations provide that contractors must incorporate the new nondiscrimination requirement into their employee manuals or handbooks, as well as disseminate it to employees and applicants either through electronic or physical postings. The proposal establishes two defenses that contractors may use against allegations of pay secrecy violations—one based on legitimate workplace rules and the other based on the essential functions of an employee's job.

On December 16, 2014, the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/comment/comments-ofccp-government-contractors-prohibitions-against-pay-secrecy-policies-and-actions

Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government and Executive Order 11246, Equal Employment Opportunity

On July 21, 2014, President Obama signed an Executive Order, entitled "Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government and Executive Order 11246, Equal Employment Opportunity," which amends Executive Order 11246 to provide that federal contractors cannot discriminate on the basis of "sex, sexual orientation, gender identity, or national origin."

The Executive Order provides that the Secretary of Labor shall issue regulations within 90 days to implement the requirements of the Order. The Order will take effect pursuant to a timeframe set in regulations by the Department of Labor.

On December 9, 2014, the OFCCP published the final rule. The rule requires contractors to update the equal opportunity clause included in new or modified subcontracts or purchase orders, to ensure that applicants and employees "are treated without regard to their sexual orientation and gender identity, and to update the "equal opportunity language used in job solicitations" and workplace notices. The rule became effective on April 8, 2015.

On December 9, 2014, the OFCCP also published an information collection request with respect to the final rule. The information request seeks comments that covered federal contractors will need to modify language in the equal opportunity clause used in their subcontracts and purchase orders; modify the "tag line language" used in job advertisements and other employment

solicitations; and report to the State Department and the OFCCP when employees or applicants "are denied a visa visa or entry to a country in which or with which it is doing business if it believes the denial is due to sex, race, color, national origin, sexual orientation or gender identity." Comments were due by February 6, 2015.

Fair Pay and Safe Workplaces Executive Order

On July 30, 2014, President Obama signed Executive Order 13673, entitled "Fair Pay and Safe Workplaces." The E.O. will govern new federal procurement contracts valued at more than $500,000, and mandate that companies provide information to the federal government if there "has been any administrative merits determination; arbitral awards or decision or civil judgment, as defined in guidance issued by the Department of Labor" with respect to labor law violations that are severe, respeated, willful, or pervasive, and that have occurred within the prior three years and to be updated every 6 months. The labor laws that are covered include:

- the Fair Labor Standards Act;
- the Occupational Safety and Health Act;
- the Migrant and Seasonal Agricultural Worker Protection Act;
- the National Labor Relations Act;
- the Davis-Bacon Act;
- the Service Contract Act;
- EO 11,246 on equal employment opportunity;
- Section 503 of the Rehabilitation Act;
- the Vietnam Era Veterans' Readjustment Assistance Act;
- the Family and Medical Leave Act;
- Title VII of the 1964 Civil Rights Act;
- the Americans with Disabilities Act;
- the Age Discrimination in Employment Act;
- EO 13,658 on increasing the minimum wage for contractors' employees; and
- equivalent state laws as defined by the DOL.

This reporting requirement will flow down to any subcontractor level with a contract of $500,000 or more. Subcontractors must report their violations to the next level up contractor. The E.O. directs the General Services Administration to develop a single website for contractors to meet reporting requirements.

Under the terms of the E.O., labor law violations will be reviewed by a Labor Compliance Advisor (LCA) in each designated agency in consultation with the Department of Labor. The LCA is directed to provide instructions to contracting officers as part of the responsibility determination in determining whether such violations are "serious, repeated, willful, or pervasive." A contracting officer, prior to making an award is required as part of the responsibility determination to provide an offeror the opportunity to "disclose any steps taken to correct the violations or improve compliance with the labor laws, including any agreements entered into with an enforcement agency." The E.O. states "that, subject to the determination of the agency in most cases a single violation of the law may not necessarily give rise to a

determination of a lack of responsibility, depending on the nature of the violation." It also instructs contracting officers and contractors (as they make responsibility determinations of subcontractors) to "ensure appropriate consideration is given to any remedial measures or mitigating factors, including any agreements by contractors or other corrective action taken to address violations."

In addition, the E.O. restricts federal contractors of $1 million or more from requiring their employees to enter into predispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment. Furthermore, contractors will be required to give their employees information concerning their hours worked, overtime hours pay, and any additions to or deductions made from their pay.

The E.O. provides that the FAR Council shall issue regulations to implement the requirements of the Order and the Secretary of Labor shall issue guidance explaining how the various levels of violations wil be applied to the different laws, as well as explaining the different state equivalent laws that may apply. The FAR Council proposed regulations and DOL guidance have been under review at OIRA since March 6, 2015. The Chamber has met with administraton representatives to express our concerns and opposition.

Presidential Memoranda

Updating and Modernizing Overtime Regulations

On March 13, 2014, President Obama issued a Presidential Memorandum to update overtime regulations (Section 541) under the Fair Labor Standards Act. The Memorandum specifically directs the Secretary of Labor to"propose revisions to modernize and streamline the existing overtime regulations." In doing so, the Secretary of Labor is required to "consider how the regulations could be revised to update existing protections consistent with the intent of the Act; the changing nature of the workplace; and to simplify the regulations to make them easier for both workers and businesses to understand and apply."

The rulemaking is expected to make changes to the two criteria for an employee to be considered exempt under the executive, administrative, professional, outside sales, or computer professional exemptions: the salary threshold and what constitutes the employee's "primary duties." No details have been released about what changes may be proposed, but the salary threshold is likely to be raised, and some form of quantification analysis for determining how much time an employee spends on "primary duties" is a distinct possibility. On June 10, 2014, Secretary of Labor Perez hosted a meeting with Chamber representatives including several companies to hear concerns from employers about the impact of this rulemaking. Several of the attendees made clear that their employees have resisted being reclassified from exempt to non-exempt in the past as they see this as a demotion and often lose access to preferred benefits.

The Fall 2014 Regulatory Agenda, published on November 21, 2014, indicated that the proposed regulation was to be published by February, 2015**.** Instead, the proposed regulation went to OIRA for clearance on May 5 meaning that it is likely on its way to being published.

Achieving Pay Equality Through Compensation Data Collection

On April 8, 2014, President Obama issued a Presidential Memorandum to instruct the Secretary of Labor to develop regulations within 120 days to require federal contractors and subcontractors to submit to the Department of Labor summary data on the compensation paid their employees, including data broken down by race and sex.

See commentary below for information regarding the proposed rulemaking pursuant to this memorandum. On August 8, 2014, the Office of Federal Contract Compliance Programs promulgated a proposed rule, developing a compensation data collection tool. Contractors and subcontractors would be required to submit additional data in an "Equal Pay Report." The report would require the submission of summary data on employee compensation by sex, race, ethnicity, specified job categories, and other relevant data points such as hours worked, and the number of employees. Comments were originally due by November 6, 2014. On October 31, 2014, OFCCP extended the public comment period until January 5, 2015.

On January 5, 2015, the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/sites/default/files/chamber_comments_on_ofccp_comp_data_nprm.pdf

Completed Rulemakings

Representation-Case Procedures (Ambush Elections-Part I)

On June 22, 2011, the National Labor Relations Board published a notice of proposed rulemaking that would have amended procedural elements governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with an employer.

The proposal would have significantly limited the time period between when a petition is filed, and an election for a union is scheduled to be held. In addition, the regulations would have imposed new requirements on employers by requiring that the voter eligibility list to be provided to the union include "each employee's work location, shift, and classification" and additional contact information, such as telephone numbers, and e-mail addresses (where available). In addition, for any pre-election hearing, an employer would have been potentially barred from raising any new issues during the hearing if the relevant issue in dispute is not raised first in a new Statement of Position Form. The proposed rule also would have created a bright-line test with respect to proposed unit eligibility by declaring that if "the hearing officer determines that the only genuine issues remaining in dispute concerning the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer will close the hearing." The cumulative impact of these proposed changes would have in all likelihood lead to a muzzling of employer free speech rights.

The Chamber participated in the Board's July 18th, 2011, public meeting on the rulemaking, and filed comments on the proposal on August 22, 2011. On September 6, 2011, the Chamber filed

"reply comments" with the NLRB, with a focus on responding to arguments raised by the AFL-CIO and SEIU.

The Chamber's comments may be accessed here:
https://www.uschamber.com/comment/comments-nlrb-ambush-elections-proposed-rule

The Chamber's reply comments may be accessed here:
http://www.uschamber.com/issues/comments/2011/responsive-comments-nprm-speeding-representation-elections

On November 29, 2011, the Board unveiled a revised proposal to be voted upon in a meeting held on November 30, 2011. The revised proposal defered decisions on many of the proposed provisions such as the new Statement of Position form, and the inclusion of e-mail addresses and phone numbers in the voter eligibility list until a later date. However, the Board's proposal still included several important provisions, such as the effective elimination of pre-election appeals that would have dramatically shortened election times.

On December 22, 2011, the National Labor Relations Board published a final rule to alter the regulations governing representation case procedures, consistent with its November 30th resolution.

The rule went into effect on April 30, 2012. Prior to publication in the *Federal Register*, on December 20, 2011, the U.S. Chamber of Commerce and the Coalition for a Democratic Workforce filed a lawsuit against the National Labor Relations Board in the District of Columbia, challenging this regulation. On May 14, 2012, the judge in the District of Columbia case invalidated the rule, due to a lack of a quorum. The judge rejected the NLRB's request for reconsideration on July 27, 2012. On August 7, 2012, the NLRB appealed the decision to the D.C. Circuit. On February 19, 2013, the Court issued an Order holding in abeyance an appeal of the case. On December 9, 2013, the NLRB agreed to voluntarily dismiss its appeal with the consent of the U.S. Chamber of Commerce and the Coalition for a Democratic Workforce. On January 22, 2014, the NLRB published a final rule rescinding these changes.

Representation-Case Procedures (Ambush Elections II)

On February 6, 2014, the National Labor Relations Board published a notice of proposed rulemaking that is in essence a reissuance of the 2011 proposed changes, which will amend procedural elements governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with an employer.

The proposal will significantly limit the time period between when a petition is filed, and an election for a union is scheduled to be held. In addition, the regulations impose new requirements on employers by requiring that the voter eligibility list to be provided to the union include "each employee's work location, shift, and classification" and additional contact information, such as telephone numbers, and e-mail addresses (where available). In addition, for any pre-election hearing, an employer could potentially be barred from raising any new issues during the hearing if the relevant issue in dispute is not raised first in a new Statement of Position

Form. The proposed rule also would create a bright-line test with respect to proposed unit eligibility by declaring that if "the hearing officer determines that the only genuine issues remaining in dispute concerning the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer will close the hearing." The cumulative impact of these proposed changes will in all likelihood lead to a muzzling of employer free speech rights.

On April 7, 2014, the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/sites/default/files/documents/files/NLRB%202011%200002%20US%20Chamber%20of%20Commerce.pdf

On April 11, 2014, the Chamber testified before the NLRB, expressing opposition to the regulation in its current form.

On April 14, 2014, the Chamber submitted "reply comments," which may be accessed here: https://www.uschamber.com/sites/default/files/documents/files/NLRB%202014%20Election%20Rule%20US%20Chamber%20of%20Commerce%20Reply%20Comment%20-%204-14-2014.pdf

On December 15, 2015, the National Labor Relations Board promulgated the final rule. The final rule among other things, makes the following changes: states that the regional director will set the hearing to open 8 days—rather than 7 days—from service of the notice of hearing excluding intervening federal holidays and states that regional director may postpone the opening of the hearing up to 2 business days upon request of a party showing special circumstances, and for more than 2 business days upon request of a party showing extraordinary circumstances; alters the requirement in the Statement of Position form that if the proposed unit is not appropriate, the employer would be required to identify the most similar unit to stating the basis for its contention that the proposed unit is inappropriate, and the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it *an* appropriate unit, alters the bright-line test with respect to proposed unit eligibility from a 20 percent threshold to a discretionary matter, rejects the proposal to vest hearing officers with the authority to determine whether parties may file post-hearing briefs, and instead vests that authority with the regional director; clarifies that employers are not required to provide the work e-mail addresses or work phone numbers of its employees as part of a voter list to either the nonemployer parties or the regional director; and provides that regional directors may extend the time for filing offers of proof in support of election objections upon request of a party showing good cause.

On January 5, 2015, the U.S. Chamber filed a lawsuit challenging the National Labor Relations Board's (NLRB) ambush election regulation. The Coalition for a Democratic Workplace, the National Association of Manufacturers, the National Retail Federation and the Society for Human Resource Management joined the Chamber in the lawsuit, which was filed in the U.S. District Court for the District of Columbia.

The Chamber is alleging that, the rule violates the National Labor Relations Act and the Administrative Procedure Act, as well as employers' free speech and due process constitutional

rights. In particular, the lawsuit challenges the Board's rule as impermissibly limiting employers' rights to communicate with employees about unionization by dramatically shortening the period between the filing of a union election petition and the holding of the election itself. On January 14, 2015, the Associated Building of Contractors also filed a separate lawsuit against the NLRB in federal court in Texas seeking an injunction.

On February 5, 2015, the U.S. Chamber filed a brief, asking the court to vacate the rule. On April 14, 2015, the rule took effect while both lawsuits are still pending.

Notice of Employee Rights under Labor Laws

On August 30, 2011, the National Labor Relations Board finalized regulations mandating that all employers covered by the NLRA post a notice of employee rights under the NLRA. The regulation had been proposed on December 22, 2010. On September 19, 2011, the Chamber filed a lawsuit against the National Labor Relations Board in South Carolina, challenging this regulation. A similar lawsuit was also filed in federal court in the District of Columbia.

The federal court in D.C. upheld the authority of the Board to require employers to post notices. However, the D.C. court invalidated most of the enforcement provisions, including the creation of a new unfair labor practice and the tolling of the statute of limitations. Meanwhile, on April 13, 2012, the federal court in South Carolina ruled that the Board does not have the authority to issue the rule at all. On April 17, 2012, the federal appellate court in D.C. enjoined enforcement of the rule, pending appeal. On May 2, 2012, the Board published a notice in the *Federal Register*, indicating that the NLRB will not enforce the rule until the lawsuits have been decided. Further, the Chamber has obtained a letter from the Board indicating that it will not seek enforcement of the law unless the Fourth Circuit or U.S. Supreme Court overturns the decision of the federal judge in the Chamber's lawsuit.

On May 7, 2013, the Ct. of Appeals for the District of Columbia issued a unanimous decision invalidating the NLRB's regulation requiring employers to display a poster describing employees' rights to unionize. Employer groups, including the Chamber, had strongly criticized this requirement as being completely one sided since there was no mention of employees'rights to decertify a union or withhold contributions to the union that would be used for political purposes. Also criticized was the fact that the rule created a brand new unfair labor practice and tolled the statute of limitations for failure to post the notice. In its decision, the court focused on the poster as impinging on an employer's free speech rights, ruling that the Board violated the National Labor Relations Act in making a failure to post the Board's notice an unfair labor practice and evidence of an anti-union animus. On June 14, 2013, in the lawsuit brought by the Chamber, the 4th Circuit Court of Appeals struck down the regulation, stating that the NLRB did not possess the statutory authority to promulgate the notice-posting requirement. On August 12, 2013, the 4th Circuit Court of Appeals denied NLRB's petition for rehearing en banc. On September 4, 2013, the Court of Appeals for the D.C. Circuit denied a similar request by the Board. On January 3, 2014, the NLRB did not petition the case to the Supreme Court, effectively ending the litigation.

The Chamber filed comments on the proposal on February 22, 2011.

The Chamber's comments to the proposed regulation may be accessed here: https://www.uschamber.com/comment/comments-notification-employee-rightsposting-under-nlra

Family and Medical Leave Act, as Amended

On June 27, 2014, the Department of Labor promulgated a Notice of Proposed Rulemaking, which revises the definition of "spouse" in light of the United States Supreme Court's decision in *United States v. Windsor*—the case that decided the federal government will recognize same sex marriages in states that permit them. In particular, the test for FMLA applicability would change from a "state of residence" rule to a "place of celebration" rule. The Chamber submitted comments in conjunction with SHRM and the College and University Professional Association for Human Resources on August 11, 2014. The comments asked for greater clarification on determining proof of marriage.

On February 25, 2015, the Department of Labor promulgated final rules. On March 26, 2015, a U.S. District Judge in Texas issued a Stay in favor of four states that brought a lawsuit challenging the regulation, meaning that for the time being, the rule will not go into effect in Texas, Arkansas, Louisiana, and Nebraska.

Systemic Compensation Discrimination Under Executive Order 11246 and Voluntary Guidelines for Self-Evaluation

On January 3, 2011, the Office of Federal Contract Compliance Programs (OFCCP) published a notice proposing to rescind guidance issued during the last administration related to systemic compensation discrimination. The existing guidance makes it clear that the OFCCP will not use the debunked pay-banding (or the so-called DuBray method) of determining whether discrimination may have occurred, but will instead use more robust and accurate methodologies such as multivariable regression. It also issued voluntary guidelines for self-evaluation. On February 28, 2013, the OFCCP published a final notice rescinding both the guidance and the voluntary guidelines. In their place, OFCCP issued directive 307, described in the significant non-regulatory activities section.

The Chamber filed comments on this proposal on March 4, 2011.

The comments may be accessed here: http://www.uschamber.com/issues/comments/2011/comments-ofccp-rescission-compensation-guidance

Federal Contractor Affirmative Action Obligations under the Rehabilitation Act

On July 23, 2010, the Labor Department published an advanced notice of proposed rulemaking (ANPRM) that seeks information on how the Office of Federal Contract Compliance Programs can strengthen the affirmative action requirements of the regulations implementing section 503

of the Rehabilitation Act. The ANPRM solicited comments from the public on 18 separate questions.

On September 21, 2010, the Chamber filed comments on this proposal questioning the ability for the Department to develop measures to set goals and numerical targets, among other things.

The comments may be accessed here:
https://www.uschamber.com/comment/chamber-comments-ofccp-regarding-affirmative-action-individuals-disabilities-under

On December 9, 2011, OFCCP published a notice of proposed rulemaking, significantly altering the regulations implementing Section 503 of the Rehabilitation Act. On January 17, 2012, the Chamber requested an extension of time to respond to the proposal. Although the original deadline was set for February 7, 2012, OFCCP later extended the due date until February 21, 2012. The Chamber submitted comments on February 21, 2012.

The comments may be accessed here:
https://www.uschamber.com/comment/comments-affirmative-action-and-nondiscrimination-obligations-contractors-and-subcontractors

On May 24, 2012, the U.S. Chamber joined with nine other groups to write a letter to Labor Secretary Hilda Solis expressing concern with achieving the numerical target.

On July 31, 2013, the Chamber signed on to a multi-industry letter to Secretary Perez, respectfully requesting to set up a meeting to discuss implementation issues with the upcoming OFCCP 503 regulation.

On September 24, 2013, the final regulations were published in the *Federal Register*.

As initially proposed, the rulemaking would have been incredibly burdensome and expensive while likely doing little to increase the hiring of individuals with disabilities. However, through various comments, letters, and meetings, the Chamber convinced OFCCP to eliminate or dramatically reduce many of the more onerous provisions in the final regulations. Of the five costliest elements as identified by the Chamber, three have been eliminated from the final regulations. Across all items, it appears that OFCCP's final rule eliminates about $250 million or nearly half of the first year costs that the Chamber estimated for the rule as proposed. On-going annual compliance costs after the initial year are likely to be at least $100 million less per year under the final rule than they would have been under the proposed rule.

On January 22, 2014, the Office of Management and Budget's Office of Information and Regulatory Affairs approved the agency's voluntary disability self-identification form (Form CC- 305).

Federal Contractor Affirmative Action Obligations under the Vietnam Era Veterans Readjustment and Assistance Act

On April 26, 2011, OFCCP issued a proposed rule that seeks to strengthen affirmative action requirements by requiring federal contractors to conduct more substantive analyses of recruitment and placement actions under the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA, as amended) and the use of numerical targets to measure effectiveness. The proposal also imposes vast new recordkeeping and other burdens on contractors and subcontractors. On June 15, 2011, the Chamber requested a 90-day extension to the filing deadline. On June 22, 2011, the Labor Department announced a 14-day extension to the comment period. The Chamber filed comments, in conjunction with other employer associations, on July 11, 2011, emphasizing the significant new burdens that would be imposed on contractors should the rule be implemented, and offered alternative and less burdensome mechanisms to achieve the shared goal of increasing employment opportunities for our nation's veterans.

The Chamber's comments may be accessed here: https://www.uschamber.com/comment/coalitions-request-withdraw-nprm-affirmative-action-and-nondiscrimination-obligations

On September 24, 2013, the final rule was published in the *Federal Register*. Due to the fact that the Veterans and 503 regulations have many overlapping provisions, the cost reduction from final versus proposed elements of the Veterans regulation seem to be similar.

Revising "Companionship" Exemption to the Fair Labor Standards Act

On December 27, 2011, the Wage and Hour Division published a proposed rule to effectively eliminate the statutory exemption afforded to companionship services providers and live-in domestic services providers under the Fair Labor Standards Act. Specifically, the Department's proposal explicitly states that third party providers of these services will no longer be covered by the exemption from the FLSA, meaning that they will now be subject to minimum wage and overtime requirements. For those workers hired directly by the family or recipient of the services, the new proposal would impose a 20 percent threshold for the amount of time incidental services may be performed. Many of these functions are ordinary household activities that are some of the main reasons clients hire people to provide companionship services. These restrictions are so severe as to eliminate, for any practical purpose, the availability of the exemption which Congress provided in the statute. This will have a dramatic effect on how providers of these services operate and their competiveness. In addition, the proposed regulation also states that an employer of live-in domestic service employees would be required to keep a record of hours worked.

On March 21, 2012, the Chamber submitted comments.

The comments may be accessed here: https://www.uschamber.com/comment/comments-dol-proposed-rulemaking-regarding-application-fair-labor-standards-act-domestic

On October 1, 2013, the Department of Labor published the final rule in the *Federal Register*, without any meaningful changes from the proposal. The final regulation was scheduled to go into effect on January 1, 2015.

On September 9, 2014, the Department of Labor issued a policy statement, indicating that there will be a time-limited non-enforcement policy, beginning January 1, 2015 and ending June 30, 2015. Beginning July 1, 2015 to December 31, 2015, the Department has indicated that the agency will exercise "prosecutorial discretion" in determining whether to bring an enforcement action.

On December 22, 2014, the D.C. District Court invalidated the portion of the rule that home health care workers employed through a third party agency or other businesses are no longer exempt from FLSA minium wage and overtime rules. On December 31, 2014, the D.C. District Court stayed enforcement of the entire rule until January 15, 2015. On January 14, 2015, the D.C. District Court vacated the rule, meaning that at this moment, the rule will not go into effect. The District Court's decision has been appealed by the Department of Labor.

OSHA Recordkeeping Update from SIC codes to NAICS codes; reporting of hospitalizations and amputations

OSHA published a proposed regulation on June 22, 2011, that would do several things: update the industry codes on which OSHA relies from the old Standard Industrial Classification (SIC) system to the newer and more widely used North American Industry Classification System (NAICS); change the reporting requirement for hospitalizations to within 8 hours for any work-related hospitalization—instead of just when three or more employees were hospitalized; and require reporting any work-related amputation within 24 hours.

Because the conversion to the new system is not seamless, some industries and employers who currently are exempt from the recordkeeping requirement because of low injury numbers will now be covered by the recordkeeping requirement and conversely some who were previously covered will no longer be covered. Also, by requiring reporting for hospitalizations for every employee, instead of just when three or more are involved, the issue of work-relatedness is far less clear. There are also concerns about how an employer would have to respond if an employee who suffered an amputation is taken to the hospital which is very likely—under which time requirement would the employer have to report? Finally, the only method of reporting provided is by telephone, which ignores the various other technology options that are available and provide a record of the employer having reported.

The Chamber filed comments on October 28, 2011 and can be accessed here: https://www.uschamber.com/comment/comments-occupational-injury-and-illness-recording-and-reporting-requirements

On September 18, 2014, OSHA promulgated the final rule. The new rules went into effect on January 1, 2015. OSHA has stated that the reports will be posted online. This reporting was not mentioned in the proposal. Employers are now required to report to OSHA the hospitalization of any employee who is admitted overnight for care or treatment for any work-related injury or

reason. The reporting must be within 24 hours of the hospitalization or 24 hours of the employer finding out about the hospitalization. In addition, amputations and losses of an eye must also be reported within the same time frame. To report, employers must call an OSHA area office or a national toll-free number. An online web portal is still being developed.

OFCCP Scheduling Letter and Itemized Listing

On May 12, 2011, the OFCCP published a notice, which seeks to make significant changes to the "scheduling letter" and "itemized listing" that it uses at an initial stages of a compliance evaluation. On July 11, 2011, the Chamber submitted comments sharply critical of some of the proposed changes, in particular, the creation of a new government database of private compensation information, the burdens that would be imposed by the new recordkeeping and reporting obligations, and the invasion of privacy and threat to proprietary and confidential information. On September 28, 2011, the OFCCP sent a final version of the letter and itemized listing to OMB. The Chamber submitted comments on October 28, 2011.

The July 11, 2011, comments may be accessed here:
https://www.uschamber.com/comment/comments-proposed-extension-approval-information-collection-requirements

The October 28, 2011, comments may be accessed here:
https://www.uschamber.com/comment/comments-proposed-extension-approval-information-collection-requirements%E2%80%94non-construction

On September 30, 2014, the Office of Management and Budget published a Notice in the *Federal Register* announcing that OMB has approved changes to the "scheduling letter" and "itemized listing." The "scheduling letter" incorporates changes made by the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) regulations, and the "itemized listing" reflects the recent regulations under VEVRAA and Section 503 of the Rehabiliation Act. The new itemized listing also reflects the OFCCP's February 2013 rescission of its prior voluntary guidelines and compensation standards. The OMB-approved renewal for the "itemized listing" retains the prior requirement that contractors submit employment activity data by either group or job title and provide this data by sex. However, contractors will now submit race and ethnicity information using five specified categories instead of two broad categories (i.e., minority and nonminority). Furthermore, contractors will be required to submit individualized employee compensation data as of the date of the workforce analysis in their Affirmative Action programs, also noting the job title, job category, and EEO-1 Category. As proposed in 2011, the term, "compensation" has been revised to include consideration of hours worked, incentive pay, merit increases, locality pay, and overtime. The Notice indicates that OFCCP will require contractors to submit the required data electronically but only if the contractor maintains the data in an electronic format that is useable and readable.

FAR Regulation: Ending Trafficking in Persons

On September 26, 2013, the Department of Defense, General Services Administration and the National Auronautics and Space Administration published a proposed rule in the *Federal*

Register to amend the Federal Acquistion Regulation ("FAR") to among other things, prohibit federal contractors, contractor employees, subcontractors and subcontractor employees from engaging in any activities related to human trafficking, such as forced labor and prostitution. For contracts that are not solely for commercially off-the-shelf items and where a portion of the contract will be performed overseas, the contractor or successful offeror will be required to develop a compliance plan and issue a certification of compliance at the time the contract is awarded and annually thereafter. The requirements of a compliance plan and certification apply to all subcontracts where the value of the services provided and/or supplies acquired outside the United States exceeds $500,000.

The proposed rule mandates that the contractor compliance plans include "procedures to prevent agents and subcontractors at any tier from engaging in trafficking in persons, and to monitor, detect, and terminate any agents, subcontractors, or subcontractor employees that have engaged in such activities."

On November 21, 2013, the agencies extended the comment period until December 20, 2013.

On December 20, 2013, the Chamber filed joint comments with the Aerospace Industries Association, the American Council of Engineering Companies, the National Defense Industrial Association, the Professional Services Council, and TechAmerica.

On January 29, 2015, the FAR Council issued the final rule, which became effective March 2, 2015. The final rule sought comment on a recommendation by the Senior Policy Operating Group for the FAR Council to consider a new definition of the term, "recruitment fees" to supplement the regulation. On March 18, 2015, the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/comment/comments-gsa-draft-definition-recruitment-fees-supplement-far-case-2013-001

The Chamber is active in promoting best practices to avoid human trafficking and is working to root out both the cause and effects of human trafficking. However, the Chamber is concerned about the creation of potential contractor and subcontractor liability without regard to the realities of global supply chains and various other provisions that complicate employer recruitment processes without a tangible relationship to reducing human trafficking.

Rulemakings Underway

Adding New Column to Track Ergonomic Injuries Under OSHA Injury Logs

After the Clinton ergonomics regulation was struck down by Congress, the Bush OSHA withdrew a revision to the recordkeeping standard that would have added a column on the OSHA injury log to track work-related musculoskeletal disorders (WMSDs)—the kind of injuries associated with ergonomic risks. On January 29, 2010, OSHA proposed a new regulation reinstating such a column based on the definition for these injuries which was included in the 2001 recordkeeping standard. The Chamber leads the employer coalition responding to this issue and filed comments opposing the proposal on March 30, 2010.

The coalition comments may be accessed here:
https://www.uschamber.com/comment/comments-proposed-rule-occupational-injury-and-illness-recording-and-reporting-recordkeeping

A final regulation went to the Office of Management and Budget's Office of Information and Regulatory Analysis, on July 14, 2010. On July 21, 2010, the Chamber, with other groups, met with OIRA to reiterate our belief that OSHA's economic analysis was woefully inadequate. On January 25, 2011, OSHA announced that they were "temporarily" withdrawing the proposal from OMB review to solicit more input from small businesses. This is a tacit admission that they should have conducted a small business review panel before issuing the proposed regulation—a point we made in our comments.

The Department of Labor, in conjunction with the Small Business Administration's Office of Advocacy, held a series of three teleconferences in April, 2011 to reach out to the small business community for input.

The Consolidated Appropriations Act, 2012 (P.L. 112-74) included a defunding rider blocking the Department of Labor from using any funds to proceed with this regulation during FY 2012 (Oct. 2011-Oct. 2012). That rider, which had been extended under the succeeding Continuing Resolutions, expired on January 18, 2014, meaning that OSHA is now free to finalize this regulation.

Employer and Consultant Reporting Under the LMRDA's Persuader Regulations

On June 21, 2011, the Labor Department published a proposed rule, which will greatly narrow the interpretation of the "advice" exemption. The proposed rule will significantly increase regulation of law firms, trade associations, and others who communicate with employers regarding union issues. Narrowing of the employer exception of its own employees' activities could also prove extremely problematic for employers and chill exercise of free speech rights.

On September 21, 2011, the Chamber filed comments, opposing the proposal.

The Chamber's comments are available here:
https://www.uschamber.com/comment/comments-labor-department-new-proposed-%E2%80%9Cpersuader%E2%80%9D-regulations

The Labor Department held a public meeting on May 24, 2010, to solicit opinions regarding changes to employer reporting obligations under the LMRDA. The Department invited comments on three separate but related issues: narrowing the "advice" exception, narrowing the exception for activities of the employer's own employees, and requiring electronic submission of certain disclosure forms.

Genetic Information Nondiscrimination – Title I Regulation of Health Risk Assessments

On October 7, 2009, the Departments of Treasury, Labor, and Health and Human Services issued interim final regulations implementing certain provisions of Title I of the Genetic Information Nondiscrimination Act (GINA). Included in these regulations is a very broad interpretation of "underwriting" that effectively prohibits employers from offering incentives to employees who participate in health risk assessments (HRAs) if the HRA asks about family medical history. The interim final rules went into effect on December 7, 2009. The Chamber has joined with other business organizations in exploring strategies to address this important matter.

We also filed comments critical of the treatment of health risk assessments and related points on January 5, 2010, that may be accessed here:
https://www.uschamber.com/comment/comments-genetic-information-regulations-impacting-health-risk-assessments

Compensation Data Collection Tool

On August 10, 2011, the OFCCP published an Advance Notice of Proposed Rulemaking to develop a replacement for the EO survey to implement Executive Order 11246. The ANPRM solicits comments from the public on 15 separate questions. Perhaps most alarming, the agency in one of their questions has raised the possibility that businesses bidding on future Federal contracts will need to submit compensation data as part of the Request for Proposal process. OFCCP has also stated their intentions to use this type of compensation data for research, such as analyzing industry trends. On October 11, 2011, the Chamber submitted comments seeking withdrawal of the regulation.

The comments may be accessed here:
https://www.uschamber.com/comment/comments-non-discrimination-compensation-compensation-data-collection-tool-advanced-notice

On April 8, 2014, President Obama issued a Presidential Memorandum to instruct the Secretary of Labor to develop regulations within 120 days to require federal contractors and subcontractors to submit to the Department of Labor summary data on the compensation paid their employees, including data broken down by race and sex. On August 8, 2014, the Office of Federal Contract Compliance Programs promulgated a proposed rule, developing a compensation data collection tool. Under the proposal, companies that file EEO-1 reports with the federal government, and that have more than 100 employees and hold federal contracts or subcontracts worth $50,000 or more would have to submit summary pay data on their workforces broken out by race, sex and ethnicity to the OFCCP in an "Equal Pay Report." The report would require the submission of summary data on employee compensation by sex, race, ethnicity, specified job categories, and other relevant data points such as hours worked, and the number of employees. Comments were originally due by November 6, 2014. On October 31, 2014, OFCCP extended the public comment period until January 5, 2015.

On January 5, 2015, the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/comment/comments-ofccp-government-contractors-requirement-report-summary-data-employee-compensation

Treasury Department Acquisition Regulations Proposed Contracting Language for Minority and Women Inclusion under Dodd-Frank Act

On August 21, 2012, the Department of the Treasury proposed contracting language to implement the requirement in Section 342 of the Dodd-Frank Act that all contractors to agencies covered by the act commit to "ensure, to the maximum extent possible, consistent with applicable law, the fair inclusion of minorities and women in the workforce." This language will be inserted into all service contracts and subcontracts worth more than $150,000. If requested by the contracting officer, contractors would have to provide, within 10 days, extensive demographic and supporting information detailing their, and their subcontractors', good faith efforts to meet the requirements of the contract language. The Chamber submitted comments on October 22, 2012, which expressed concerns about some of the vague terms in the proposed language; the impact this language would have on subcontractors, many of whom will not have had to deal with similar requirements associated with other affirmative action requirements; the possibility of more involvement from DOL's Office of Federal Contract Compliance Programs than the Act permits; and the inadequacy of the Regulatory Flexibility Act analysis.

The comments may be accessed here: https://www.uschamber.com/comment/comments-dept-treasury-contract-clause-minority-and-women-inclusion-contractor-workforce

Worker Classification Survey

On January 11, 2013, the Wage and Hour Division (WHD) requested comments under the Paperwork Reduction Act review of the agency's proposal to collect information "about employment experiences and workers' knowledge of basic employment laws and rules so as to better understand employees' experience with worker misclassification." The survey is expected to support the Department's announced Right to Know under the Fair Labor Standards Act rulemaking as well as the ongoing Employee Misclassification Initiative. On March 1, 2013, the Chamber, submitted a request for extension for the comment period as the survey documents and instrument were not made available on the Internet. Due to the significant impact this survey will have on key WHD activities, the Chamber and other employer associations took the unusual step on March 12, 2013, of submitting comments to the Paperwork Reduction Act review of the instrument and the process for conducting it.

The comments may be accessed here: https://www.uschamber.com/comment/comments-department-labor-information-collection-request-worker-classification-survey

On November 4, 2013, the Department of Labor submitted the Wage and Hour Division "Worker Classification Survey" information collection request to the Office of Management and Budget for review and approval for use in accordance with the Paperwork Reduction Act. On December 9, 2013, the Chamber submitted comments.

OSHA Revised Silica Standard

On February 14, 2011, OSHA submitted to OIRA for review a proposed revision to the respirable silica standard. On September 12, 2013, the proposed revised silica dust standard was published in the *Federal Register*. The proposed rule has two limits—one for the general industry and maritime sectors and one for construction. The proposed revised silica standard reduces the general industry and maritime Permissible Exposure Levels by half (to 50 µg/m ^{3} from 100 µg/m ^{3}) as well as adding an Action Level of 25 µg/m ^{3} that will trigger various other programmatic requirements such as exposure monitoring, providing medical exams to workers with high exposure, and training workers about silica hazards. The construction industry PEL is also reduced to 50 µg/m ^{3} from the current level of 250 µg/m ^{3}.

This rulemaking has attracted considerable attention from unions and other advocates who pushed OSHA and the administration to release this proposal. In reality, the level of silica related deaths and lung disease has plummeted over recent years and questions remain about whether remaining problems are due to a lack of compliance with the current PEL, not the PEL itself. Further questions remain about whether the anticipated PEL and Action Level are below the level of detection, raising issues about whether this is a technologically feasible rule.

If this revised standard is issued, it will mean that all construction sites and other locations where silica exposure occurs will immediately be out of compliance. A key industry impacted by this rulemaking will be the hydraulic fracturing gas and oil industry (fracking). In its initial submission to OIRA, OSHA did not include fracking in its economic analysis. This was added during the time the proposal was under review at OIRA.

The Chamber's comments were submitted on February 11, 2014 and the administrative hearings began on March 18, 2014. The Chamber's comments strongly opposed the proposal and urged OSHA to withdraw it. In particular, the Chamber argued that the silica proposal is neither technologically nor economically feasible; that OSHA has not established that a new standard is necessary since there is still considerable non-compliance with the current threshold; and OSHA has not established a significant risk necessary for this rulemaking since silica mortality rates have declined 93% since 1968. The Chamber suggested that OSHA instead focus on improving compliance rates and support the use of modern personal protective equipment that has been shown to be effective and much less expensive than the engineering controls mandated by the proposal under OSHA's "hierachal of control" policy.

The Chamber also participated in the hearings presenting 10 medical, technological, and economic experts to rebut OSHA's arguments. Unfortunately, the hearings were marred by OSHA and the administrative law judge restricting the Chamber's counsel from throroughly cross examining OSHA's technical experts, but conversely subjecting the Chamber witnesses to multiple rounds of questions from audience members and unlimited questions from OSHA. The Chamber submitted extensive post hearing comments and objected to the way the hearings were conducted.

A final regulation is expected near the end of the Obama administration.

The Chamber's comments may be accessed here:
https://www.uschamber.com/sites/default/files/documents/files/USCC%20Comments%20on%20OSHA%20Silica%20Proposed%20Rule%20final.pdf

OSHA Proposed Injury and Illness Reporting Regulation

On November 8, 2013, OSHA published a proposed rule to amend its current recordkeeping regulations to add requirements for the electronic submission of illness and injury records employers are required to keep under Part 1904. Under the proposal, businesses with 250 or more employees would be required to electronically submit the records to OSHA on a quarterly basis and establishments with 20 or more employees, in certain industries with high injuries and illness rates would have to submit electronically their summaries of work-related injuries and illnesses once a year. In the rulemaking, OSHA has announced that they intend to post the data online. This will permit unions and any other outside party to use this information as part of a corporate campaign to mischaracterize employers as having unsafe workplaces. On January 9, 2014, the Chamber participated in a public hearing held at the Department of Labor presenting strong legal and policy arguments against the proposed regulation.

This proposal takes on new meaning when combined with the rulemaking to add a column to the OSHA logs to capture MSDs. If both of these regulations are implemented, employers will then be submitting MSD specific information to OSHA who will then post it on the Internet unfiltered. This will be used by OSHA to support using General Duty Clause citations to go after MSD issues. Employers will likely end up spending considerably more resources to determine whether an MSD is in fact work-related.

On March 10, 2014, the Chamber submitted comments opposing the proposal and asking the rule be withdrawn, which may be accessed here:
https://www.uschamber.com/sites/default/files/documents/files/USCC%20Comments%20on%20OSHA%20Injury%20and%20Illness%20Electronic%20Reporting%20Rulemaking%20%28FINAL%29.pdf

On August 14, 2014, OSHA published a supplemental notice of proposed rulemaking to explore adding provisions that will make it a violation for an employer to discourage employee reporting. The supplemental would upend the statutory whistleblower protection provisions of Section 11(c) by giving OSHA the ability to issue citations against employers without an employee complaint, i.e. no whistleblower.

On October 14, 2014, the Chamber submitted comments, calling for the supplemental to be withdrawn, which may be accessed here:
https://www.uschamber.com/comment/comments-osha-rulemaking-improve-tracking-and-workplace-injuries-and-illnesses

Chemical Management and Permissible Exposure Limits

On October 10, 2014, OSHA issued a request for information (RFI), stating that the agency wants to explore other possible approaches that may be relevant to future strategies to reduce and

control exposure to chemicals in the workplace; and inform the public and obtain public input on the best methods to advance the development and implementation of approaches to reduce or eliminate harmful chemical exposures in the workplace. Comments are due by October 9, 2015.

Sex Discrimination Guidelines for Federal Contractors

On January 30, 2015, OFCCP issued a proposed rule to update its guidelines to reflect the current state of law regarding sex discrimination. The proposed rule would clarify that adverse employment actions based on sex-based stereotypes related to family caretaking responsibilities or to gender norms and expectations are forms of sex bias, as is discrimination based on an individual's gender identity. The proposal also would confirm that contractors must provide workplace accommodations, and in certain situations health or disability insurance, for workers "affected by pregnancy, childbirth, or related medical conditions." In addition, the proposed rule would clarify that sex-based compensation discrimination can result from "job segregation or classification on the basis of gender, not just unequal pay for equal work"; confirm that contractors "must provide equal benefits and equal contributions for male and female employees participating in fringe-benefit plans"; and address the various forms of sexual harassment.

On April 14, 2015, the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/sites/default/files/us_chamber_ofccp_sex_discrimination_comments.pdf

Workplace Wellness Programs and Employment Discrimination

On May 8, 2013, the EEOC held a hearing to discuss the intersection between wellness programs and anti-discrimination laws. Following the hearing, the EEOC held the record open for submitted comments. On May 23, 2013, the Chamber submitted comments, urging the EEOC to refrain from issuing additional guidance.

The comments may be accessed here: https://www.uschamber.com/comment/wellness-programs-under-federal-equal-employment-opportunity-laws

On April 20, 2015, the EEOC released proposed regulations that describes how Title I of the American with Disabilities Act applies to workplace wellness programs that are part of group health plans and that include questions about employees' health (such as questions on health risk assessments) or medical examinations (such as screening for high cholesterol, high blood pressure, or blood glucose levels) for employee-only coverage. Comments are due by June 19, 2015.

Anticipated Rulemakings

OSHA Injury and Illness Prevention Program (I2P2) Regulation

The Fall 2014 Regulatory Agenda, published on November 21, 2014, indicated that this rulemaking has been put on the Long-Term Action list, which means that the regulation will not

be acted upon this year and effectively signaling that this rulemaking will not happen during the Obama administration.

This rulemaking was to have required all employers to implement injury and illness prevention programs (I2P2) that meet requirements to be specified by OSHA and was previously identified as OSHA's highest priority. Employers would have been required to identify all hazards, including those that do not have specific standards, in their workplace and take corrective or protective measures; what OSHA was calling "find and fix." OSHA held public meetings around the country to take input on this concept, but many questions remained. Under this rulemaking, OSHA would have had to decide how to treat employers who already have effective programs in place, and whether employers will be vulnerable to double citations—once for a hazard discovered during an inspection, and once for having a faulty program that failed to identify and correct the hazard. OSHA was also expected to use this rulemaking to create a requirement for employers to assess their workplaces for ergonomic hazards which would have effectively imposed an ergonomics standard. OSHA would also have to figure out how to define a significant risk that this regulation will address to satisfy rulemaking requirements. The next step was going to be a small business review panel. Had OSHA convened the panel, it would have made public their draft regulation along with the draft economic analysis and would have provided interested parties an opportunity to see what OSHA was planning.

Construction Contractor Affirmative Action Requirements

The Labor Department announced that it had intended to issue an NPRM in September, 2015, to update affirmative action requirements applicable to federal construction contractors. As with the Rehabilitation Act and VEVRAA regulations, the details of this proposal will be very important in determining the extent to which the proposal will improve compliance or impose undue burdens.

"Right to Know" under the Fair Labor Standards Act

The Department of Labor's Wage and Hour Division wants to greatly expand recordkeeping requirements for employers under the FLSA. The proposal will not only require greater disclosure on how an employee's pay is computed, thus inviting increased scrutiny of an employer's payroll, but will also force employers to produce a "classification analysis" for each worker that they exclude from FLSA coverage or deem ineligible for overtime. These would include administrative or professional employees and independent contractors. OSHA and OFCCP initiatives will also review employer records on employee FLSA status. Employers would be forced to provide this "classification" analysis to employees and WHD investigators. In addition, this regulation is expected to exacerbate the current litigation trends against employers alleging FLSA overtime violations. To support this rulemaking, the DOL is preparing to go out with a survey to gauge employee awareness of classification issues. Because of the impact this survey will have, the Chamber and other concerned employer associations submitted comments to the DOL in conjunction with the review of the survey instrument under the Paperwork Reduction Act process, raising concerns about survey design and implementation.

This rulemaking is now listed under the Long Term Action list in the Fall 2014 Regulatory Agenda which effectively means it will not take place. However, the anticipated rulemaking to change the overtime exemption regulations could include elements from this.

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Professionals

The Wage and Hour Division is preparing a new rulemaking to implement the President's memo instructing the Secretary of Labor to "modernize the FLSA." The proposed regulations went to OIRA for clearance on May 5 and could be published soon. (See discussion under Presidential Memoranda for more details.)

Significant Non-Regulatory Activities

Department of Labor

Proposed Interpretation of "Feasible" Under OSHA's Noise Exposure Standard

On October 19, 2010, OSHA published in the *Federal Register* a proposed new interpretation of the term "feasible" as it applies to administrative and engineering controls under the General Industry and Construction Noise Exposure standards. OSHA's enforcement policy gives employers considerable latitude to rely on personal protective equipment (PPE--such as ear plugs or ear muffs) when noise protection is required rather than forcing employers to exhaust the opportunities for administrative (such as schedule rotations), or engineering (such as sound dampening or other technology) controls. Under the new interpretation, administrative and engineering controls would have been considered economically feasible if "implementing such controls will not threaten the employer's ability to remain in business, or if such a threat to viability results from the employer's failure to meet industry" standards.

On January 19, 2011, OSHA announced the withdrawal of this proposal. The Chamber submitted preliminary comments objecting to this action as imposing unnecessary costs on employers who are already protecting their employees appropriately from noise hazards just before the announcement of withdrawal. An independent economic analysis concluded that the potential impact of this proposal on employers would be more than $1 billion.

The Chamber's comments can be accessed here:
https://www.uschamber.com/comment/comments-interpretation-osha%E2%80%99s-provisions-feasible-administrative-or-engineering-controls

OSHA Memo on Whistleblowers and Employer Safety Incentive Programs

On March 12, 2012, OSHA issued a memorandum to regional administrators that outlines four scenarios that OSHA believes would constitute violations of the whistleblower protections under Section 11(c). Among the scenarios is one where employers implement an incentive program that rewards employees for low injury rates or remaining injury free for a period of time. Incentive programs are not mentioned anywhere else in the statute or regulations. OSHA has

thus created a consequence for employers who have them without any authority or providing any supporting data or evidence.

OSHA Letter of Interpretation Permitting Union Representatives to Accompany an OSHA Inspector at Non-Union Workplaces

On February 21, 2013, OSHA issued a letter of interpretation responding to a request from the United Steel Workers that said a union representative is permitted to accompany an OSHA inspector during a walk-around inspection at a *non-union* workplace. Current regulations make clear that any employee representative "shall be" an employee of the company. Therefore a non-union workplace would not have a union representative. This is a dramatic reversal of policy and clearly aligns OSHA with union attempts to use OSHA inspections as organizing tools against non-union employers. Furthermore, it was done as a letter of interpretation, not a rulemaking so there was no opportunity for those who will be impacted to provide input, or requirement for OSHA to justify its action. More importantly, there is no clear way to challenge this or overturn it. On June 12, 2013, the Coalition for Workplace Safety sent a letter to the Department of Labor, requesting withdrawal of the interpretation letter.

Changes to Strategic Partnership Programs

On November 6, 2013, OSHA issued Directive CSP 03-02-003, which makes changes to the Strategic Partnership Program. According to the directive, OSHA will now require partnership agreements to address worker involvement and safety and health management systems as part of each agreement's 13 core elements. Under the previous directive, management systems were not an option. The directive also provides that new or renewed strategic partnership agreements may not include programmed inspections deferrals or deletions that go beyond what OSHA allows for any employer who is inspected. The prior directive offered partnership members up to a six-month deferral from programmed inspections. During that deferral period, members were expected to make workplace safety and health improvements or seek compliance assistance.

In addition, OSHA no longer offers an additional 10 percent "good faith" penalty reduction for partnership members that have established safety and health management systems. Companies in the program still qualify for penalty reductions available to all employers.

informACTION App Challenge (WHD and OSHA)

On July 12, 2011, the Department of Labor announced a contest, the "informACTION app" challenge, which requires developers to use compliance data from the Occupational Safety and Health Administration and the Wage and Hour Division to provide information to workers and the general public targeting the hotel, motel, restaurant, and retail industries. In designing the app, the Department is "encouraging developers to combine DOL data with other publicly accessible data feeds from around the web." If a developer uses an outside data set, the accuracy or veracity of the data being provided is not clear. The informACTION challenge is meant to target "bad actors" in the employer community, but may actually damage an employer's reputation and good standing in the community if the information conveyed is incomplete, or inaccurate.

Persuader Reporting Orientation Program (OLMS)

The Department of Labor initiated the Persuader Reporting Orientation Program (PROP) in January 2011 to "provide compliance assistance to employers and labor relations consultants who are likely to enter reportable agreements or arrangements pursuant to Section 203 of the Labor-Management Reporting and Disclosure Act." PROP should be viewed in conjunction with the proposed "persuader" regulation, narrowing the "advice" exception which was promulgated on June 21, 2011.

Under PROP, DOL will examine union election petitions filed with the NLRB and send information via a letter to employers and their representatives informing them of their persuader reporting obligations under Section 203 of the Labor-Management Reporting and Disclosure Act. This letter makes scant reference to the "advice" exception, and includes references to LM-10 reporting obligations that cover certain payments to and arrangements with unions or union officials.

U-VISA Determinations (WHD)

On March 15, 2010, the Secretary of Labor announced that DOL would begin to certify U-Visas for victims of employment based crimes. Traditionally, U-Visas are granted to undocumented individuals who are victims of violent crimes such as assault, rape, kidnapping, trafficking, etc. Under a U-Visa, an individual may remain in the U.S. for up to four years. The WHD will be tasked with certifying U-Visa requests during the course of their wage and hour investigations.

Memorandum of Understanding for Employee Misclassification Initiative (WHD)

On September 19, 2011, the Wage and Hour Division, the Internal Revenue Service, and the labor commissioners and other agency leaders of the states of Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Utah, and Washington announced that they have entered into a memorandum of understanding to curb the practice of employee misclassification. The Department of Labor has also entered into similar agreements with the states of California, Colorado, Hawaii, Illinois, Iowa, Louisiana, New York, and Montana.

The Wage and Hour Division has revamped the agency's complaint process to focus on industries that "employ particularly vulnerable workers who don't complain." The agency has announced initiatives focusing on Tennessee hotels and motels, North Carolina residential care facilities, Florida and Mississippi agriculture, New Jersey gas stations, Tampa. Fl. restaurants, Connecticut and Rhode Island construction sites, grocery stores in Alabama and Mississippi, and child labor violations in the movie theater industry.

In addition, the Wage and Hour Division has announced an enforcement initiative to combat misclassification of independent contractors at nail salons in the Seattle metropolitan area.

Aggressive Strategic Plans (OFCCP)

The Director of the Office of Federal Contract Compliance Programs (OFCCP) laid out an aggressive "strategic plan." For example, one of the targeted goals is to "increase workers' incomes and narrow wage and income inequality," while another is to "ensure fair and high quality work life environments." OFFCP will not only enforce systemic discrimination claims, but also claims of individual discrimination. OFCCP will further broaden enforcement efforts through more use of corporate-wide multi-establishment reviews and industry-specific reviews.

Guidance on the Applicability of the Worker Adjustment and Retraining Notification Act to layoffs that may occur among Federal Contractors, including in the Defense Industry as a Result of Sequestration (ETA)

On July 30, 2012, the Assistant Secretary of the Employment and Training Administration sent guidance to state workforce agencies and administrators, indicating that due to the "unforeseeable circumstance" test, it would be inappropriate for federal contractors, including those in the defense industry to notify their employees about layoffs that could result from federal budget cuts due to sequestration that may occur in January 2013.

On September 28, 2012, the Office of Management and Budget issued a memorandum stating that if an agency terminates or modifies a contract, and the contractor must close a plant or lay off workers en masse, the company could treat employee compensation costs for WARN Act liability, attorney's fees and other litigation costs as allowable costs to be covered by the contracting agency so long as the contractor has followed a course of action consistent with the Labor Department's guidance.

Complying with Nondiscrimination Provisions: Criminal Record Restrictions (OFCCP)

On January 29, 2013, OFCCP issued Directive No. 306, advising federal contractors and subcontractors about potential discriminatory liability that could result from using criminal records as a screening device.

OFCCP Procedures for Reviewing Contractor Compensation Systems and Practices (OFCCP)

On February 26, 2013, OFCCP issued Directive 307 on "Procedures for Reviewing Contractor Compensation Systems and Practices." This was issued in conjunction with OFCCP's rescission of its compensation standards and voluntary guidelines. Now, instead of using standard analytical procedures in pursuing compensation discrimination claims, Directive 307 states that the OFCCP will pursue these claims on a case-by-case basis. Directive 307 will give OFCCP more flexibility, which it will likely use to its advantage as part of its aggressive enforcement agenda.

Calculating Back Pay as Part of Make-Whole Relief for Victims of Employment Discrimination (OFCCP)

On July 17, 2013, OFCCP issued Directive 310 on "Calculating Back Pay as a Part of Make-Whole Relief for Victims of Employment Discrimination." Directive 310, effective immediately, provides guidance to its compliance officers regarding the methodology for the calculation of back pay awards to federal contractor applicants and employees allegedly subject to discrimination.

Agricultural Workers (WHD)

On May 9, 2013, the Wage and Hour Division launched an initiative in Illinois and Missouri that places an emphasis on enforcement and education for growers, farm labor contractors, agricultural brokers, and processors which help these parties comply with the Fair Labor Standards Act, the H-2A program, the Migrant and Seasonal Agricultural Worker Protection Act, and the Occupational Safety and Health Act's field sanitation standards.

OFCCP Directive on Bias Based on Gender Identity or Sexual Orientation (OFCCP)

On February 26, 2013, OFCCP issued Directive 2014-2, "Providing Guidance to OFCCP Staff or Federal Contractors on Enforcement and Compliance Policy or Procedures." The new directive clarifies that the OFCCP will follow the Equal Employment Opportunity Commission's ruling in *Macy v. Holder*, EEOC, No. 0120120821, 4/20/12, in which the Commission recognized bias based on gender identity as cognizable sex discrimination under Title VII of the 1964 Civil Rights Act.

Memo on Implementation of the President's Executive Order on Fair Pay and Safe Workplaces

On March 5, 2015, OMB and the Department of Labor issued a joint memorandum to Executive federal agencies directing agencies to start hiring Labor Compliance Advisors within 90 days. The memo also declares that Labor Compliance Advisors will "have responsibilities assisting contracting officers in implementing Executive Order 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts."

Equal Employment Opportunity Commission

Credit and Criminal History Background Checks

The Equal Employment Opportunity Commission (EEOC) issued a complaint against an employer stemming from the alleged disparate impact of using credit and criminal history background checks as part of their hiring process. EEOC's target of background checks by employers has become a prominent focus of the previous chair of the EEOC, with the EEOC holding a hearing to examine the issue of using credit history on October 20, 2010 and a hearing examining criminal history background checks on July 26, 2011. If successful in its complaint,

the EEOC could use the same approach to target nation-wide employers who use background checks in their hiring process.

On April 25, 2012, the EEOC voted 4-1 to approve new enforcement guidance related to consideration of arrest and conviction records in employment decisions.

In June 2013, the EEOC issued two additional complaints against employer regarding their use of criminal background checks.

On March 10, 2014, the EEOC in conjunction with the Federal Trade Commission jointly published two technical assistance documents that explain how the federal laws enforced by the respective agencies apply to background checks performed for employment purposes: "Background Checks: What Employers Need to Know" and "Background Checks What Job Applicants and Employees Should Know."

Religious Garb and Grooming in the Workplace

On March 6, 2014, the EEOC published technical assistance publications, including a Frequently Asked Questions (FAQ) document, which explains how Title VII's religious discrimination provision is applicable to workplace scenarios.

Enforcement Guidance on Pregnancy and Related Issues

On July 14, 2014, the EEOC published enforcement guidance on pregnancy and related issues, and technical assistance publications including a Frequently Asked Questions (FAQ) document and Fact Sheet, which requires employers to provide a reasonable accommodation as required by the ADA to all limitations related to pregnancy.

National Labor Relations Board

Protected Concerted Activity Website

The National Labor Relations Board has launched a webpage that provides case examples of protected concerted activity, the right of employees to act together for their mutual aid and protection, even if they are not in a union.

Memorandum of Understanding with Justice Department

On July 9, 2013, the National Labor Relations Board entered into a memorandum of understanding with the Justice Department's Civil Rights Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices to share information, refer matters to each other and coordinate investigations when deemed appropriate.

Letter of Agreement Between The Office of General Counsel and the Ministry of Foreign Affairs of Mexico

On August 1, 2013, the Office of General Counsel announced that on behalf of the Board, he has signed a letter of agreement with the Mexican Foreign Ministry to provide for cooperative efforts to provide Mexican workers in the United States, and their employers information, guidance, and access to education regarding their rights and responsibilities under the National Labor Relations Act.

Immigration Regulatory Activity

Completed Rulemakings

H-2B Program Rule and Wage Methodology

The Employment and Training Administration (ETA) decided to reengineer the H-2B program, which is used to hire temporary nonagricultural workers, by finalizing a new regulatory system to address what the agency believes is insufficient worker protections in the current H-2B operational and enforcement guidelines and by finalizing a new wage methodology regulation. The two regulations, one being a general program rule (final rule published February 21, 2012) and the other a wage rule (final rule published January 19, 2011), are intertwined both in policy substance and procedural challenges, and both have been the subject of ongoing litigation as well as action by Congress in the appropriations process. For an excellent summary of the procedural and legal history of this ongoing battle, please read the comment of the H-2B Workforce Coalition, where the Chamber sits on the Steering Committee, regarding a recent effort of the DOL to issue a "declaratory order" attempting to establish the agency's authority in the H-2B space. See February 2, 2015, leter: https://www.uschamber.com/comment/coalition-comments-department-labor-their-notice-intent-issue-declaratory-order

In addition to our coalition comments, the Chamber filed its own comment regarding the Secretary of Labor's intent to issue a "declaratory order," which can be accessed here: https://www.uschamber.com/comment/comments-department-labor-their-notice-intent-issue-declaratory-order

On March 5, 2015, a federal judge in Florida ruled that the Department of Labor does not have the authority to issue regulations governing the H-2B visa program. At that time, DOL and DHS suspended processing H-2B petitions to determine how to respond to the ruling from the court. On March 18, 2015, DOL requested that the judge issue a temporary stay on the injunction until April 15, 2016, so that the program can continue operating while the Department of Labor and the Department of Homeland Security promulgate replacement regulations. The judge granted DOL's request to stay the enforcement of the injunction. On March 23, 2015, the Employment and Training Administration Office of Foreign Labor Certification issued Frequently Asked Questions (FAQs) to assist employers during the stay. On April 29, 2015, DOL and DHS jointly issued an interim final rule to govern the operation of the H-2B program and a final rule on wage determinations for the H-2B program.

- Wage Rule Summary:

On January 19, 2011, ETA published a final rule regarding a new wage methodology for all temporary nonagricultural H-2B workers. The new rule would have established that employers were obligated to pay the greater of the Service Contract Act, the Davis-Bacon Act, or mean occupational wages, regardless of whether the employer was working on a federal contract. The effective date was changed various times and was ultimately blocked from being implemented by Congress for fiscal years 2012, 2013, and 2014, expiring January 17, 2014. The Final Wage

Rule that was published in the Federal Register on April 29, 2015 sets the prevailing wage as the mean wage for the occupation in the area of employment as derived from the Occupational Employment Statistics survey from the Bureau of Labor Statistics. The rule no longer permits wage determinations to be made using the Service Contract Act (SCA) or the Davis Bacon Act (DBA) as wage sources except for those employers subject to SCA and DBA and it establishes new requirements if businesses desire to use private wage surveys for their H-2B workers. The Chamber is considering various options to address the concerns with the new stringent requirements regarding the use of private wage surveys in the H-2B program.

The Chamber's comments on the H-2B wage rule proposal may be accessed here: https://www.uschamber.com/comment/comments-wage-methodology-temporary-non-agricultural-employment-h-2b-program-0 and here: https://www.uschamber.com/comment/comments-wage-methodology-temporary-non-agricultural-employment-h-2b-program

- Program Rule Summary:

On February 21, 2012, ETA published a final rule regarding large-scale revisions for the temporary nonagricultural employment of H-2B workers in the United States, which is virtually unchanged from the proposed rule. The new rule created a new concept of "corresponding employment," establishing that instead of similarly situated employees being similarly compensated, individuals working in "corresponding" jobs must be compensated the same even when the jobs do not have the same duties and minimum requirements. In addition, the new rule imposed a variety of cumbersome rules borrowed from the seasonal agricultural worker program, awarded the Wage and Hour Division new authority to investigate corresponding employment, and established that DOL has unlimited authority to require more advertising or recruitment beyond the parameters identified in the regulations. To date the implementation of this rule has been barred by a nationwide injunction obtained when Bayou Landscaping, a Florida landscaping firm, filed a lawsuit in in the Northern District of Florida. On April 29, 2015, DHS and DOL issued an Interim Final Rule (IFR) governing the program that, in their own words, is "virtually identical to the 2012 final rule that DOL developed…" The striking similarity between the provisions in the 2012 final rule with those contained in the 2015 IFR means that many of the same problems the Chamber identified in the 2012 rule exist in the 2015 IFR e.g. corresponding employment issues, unchecked authority to require additional recruitment by employers, etc. The Chamber will file a public comment on the IFR that highlights the concerns brought about by the new burdens being placed on H-2B employers and the effect these burdens will have on the American economy.

The Chamber's comments on the H-2B program rule proposal may be accessed here: http://www.uschamber.com/issues/comments/2011/comment-temporary-non-agricultural-employment-h-2b-aliens

I-9 Employment Eligibility Verification

DHS' U.S. Citizenship and Immigration Services (USCIS) published a finalized new Form I-9 on March 8, 2013, changing the one pager to a two page data collection form, which is now in effect as of May 8, 2013.

The Chamber's comments on the development of the new Form I-9, which went through a one year, regulatory process, may be accessed here:
https://www.uschamber.com/comment/comment-uscis-form-i-9-employment-eligibility-verification
and here:
https://www.uschamber.com/sites/default/files/documents/files/USCC%2520comment%2520on%2520I-9%2520form%2520to%2520OMB%252010-15-2012.pdf

Automation of Form I-94 Arrival/Departure Record

On March 27, 2013, the Department of Homeland Security's Custom and Border Protection (CBP) promulgated an interim final rule establishing automation of the Form I-94 Arrival/Departure Record to streamline the admissions process for individuals lawfully visiting the United States. Form I-94 provides international visitors evidence they have been lawfully admitted to the U.S. which is necessary to verify alien registration, immigration status, and employment authorization.

The automation means that affected visitors will no longer need to fill out a paper form when arriving to the U.S. by air or sea, improving procedures and reducing costs. Travelers wanting a hard copy or other evidence of admission will be directed to www.cbp.gov/I94 to print a copy of an I-94 based on the electronically submitted data, including the I-94 number from the form, to provide as necessary to employers, benefits providers or as evidence of lawful admission.

On August 11, 2014, the Department of Homeland Security proposed to update and reissue a current Department of Homeland Security systems of records, titled "Department of Homeland Security/U.S. Citizenship and Immigration Services—on E-Verify Program System of Records." The proposals will streamline the system and update the process so that a foreign passport number and country of issuance (COI) is used instead of the I-94 number in the E-Verify program. Comments were due by September 7, 2014.

CBP is in the process of rolling out the automation at all ports of entry. After a period of several years, it is expected that CBP will eliminate the arrival/departure record altogether, and use passport numbers to track foreign nationals entering the country.

H-4 Spousal Work Authorization

On May 12, 2014, the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) proposed amendments to its regulations by publishing a Notice of Proposed Rulemaking that would extend the availability of employment authorization to certain H-4 dependent spouses. H-4 spouses will be eligible for work authorization if the principal H-1B

visa holder is the beneficiary of an approved I-140 or has had his/her H-1B status extended under the provisions of the American Competitiveness in the 21st Century Act of 2000. USCIS believes that allowing the eligible class of H-4 dependent spouses to work encourages professionals with high demand skills to remain in the country and help spur the innovation and growth of U.S. companies, and thus allow the U.S. to remain a world leader in high technology. While at one point USCIS only wanted to propose H-4 work authorization where the H-1B principal worker had been waiting at least six years, the Chamber was pleased to see that the published NPRM allows any H-4 spouse request work authorization where the principal H-1B worker's employer has completed all steps in sponsorship and the H-1B worker is merely waiting for visa availability. The Chamber has advocated for the creation of employment authorization for H-4 dependent spouses of principal H-1B nonimmigrants being sponsored for permanent status.

On July 11, 2014 , the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/sites/default/files/documents/files/USCC%20H4%20comment%207-11-2014.pdf

On February 25, 2015, the Department of Homeland promulgated the final rule, which will be effective 90 days after the date of publication.

Rulemakings Underway

Updating Immigration Procedures for Consistency in E-3, H-1B1, CW-1, and EB-1 Processing

On May 12, 2014, the Department of Homeland Security's USCIS proposed to update the regulations regarding several employment-based immigration issues, primarily to make a change that would provide some degree of expanded flexibility in adjudicating outstanding professor and researcher cases and to address procedural irregularities since certain visa categories were created after the governing regulations were finalized and were thus not referenced.

USCIS proposes to expand the current list of evidentiary criteria for employment-based first preference (EB-1) outstanding professors and researchers to allow the submission of evidence comparable to the other forms of evidence already listed in the regulations. This proposal would harmonize the regulations for EB-1 outstanding professors and researchers with other employment-based immigrant categories that already allow for submission of comparable evidence.

The proposed new rule would also clarify that H-1B1 from Chile and Singapore and principal E-3 nonimmigrants from Australia are allowed to work without having to separately apply to DHS for employment authorization. In addition, E-3 and H-1B1 visa holders would be eligible for a 240 day extension of work authorization upon timely filing of an extension of stay petition. Similar provisions were proposed for the CW-1 category, that applies to work permits in the Commonwealth of the Northern Mariana Islands. These visa categories were created pursuant to Free Trade Agreements negotiated after the current regulations were finalized.

The Chamber's comment supports the proposed rule and asks the agency to update immigration procedures in other areas as well. Specifically, the Chamber's comment requests that premium

processing be expanded to include all EAD and AP (advance parole travel authorization) requests, that a clarification be published confirming that L/E spouses are authorized to work incident to status as required by statute, and to modernize Reentry Permit processing so that requests do not require two trips to the United States for green card holders temporarily outside the country – all of which are procedures that can be updated through interpretive guidance or memo. The Chamber's comment also asks the agency to consider some other technical, procedural changes, that would require notice and comment rulemaking.

On July 11, 2014, the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/comment/enhancing-opportunities-h-1b1-cw-1-e-3-nonimmigrants-and-eb-1-immigrants

Labor Condition Application (ETA 9035) for H-1B Petitions

On July 9, 2012, the Department of Labor's Employment and Training Administration (ETA) published proposed significant revisions to ETA Form 9035, otherwise known as the Labor Condition Application (LCA) Form, and its instructions.

The proposed form revision, among other things, would limit the maximum number of workers who could be covered on a single LCA to no more than 10 and require that the intended worker(s) be identified by name on the LCA form prior to filing. Significant private information would be collected on the proposed new LCA, including data about the named employee, end clients of consulting firms, and information about the sponsoring employer (e.g., revenue).

The Chamber strongly opposes the collection of this private information and mounted a detailed challenge to several aspects of the revised form that appear to conflict with existing DOL regulations. The Chamber's position is that the proposed LCA revision is inconsistent with the Administrative Procedure Act, the Privacy Act, state privacy laws, EEOC rules, current regulations governing the LCA, and, in some circumstances, the federal statute governing the creation of the LCA obligation. On September 7, 2012, the Chamber submitted comments.

The entire LCA form, without exception and without redaction, is required by statute to be publicly available for review. Currently, any member of the public, including a representative of a competitor business, any employee of the petitioning employer, or a reporter, can request to see an employer's public access file. In addition, DOL makes certain information on the LCA form available on its website.

On January 24, 2013, DOL announced in a *Federal Register* notice that the agency would launch a searchable online registry of LCAs that would make employer sponsorship information more quickly and easily accessible to the public. While DOL already discloses some data on employers' LCAs, the agency plans to release this information in a variety of formats, including PDF copies of certified cases and a searchable database. The new registry has now been launched and includes LCAs certified since April 15, 2009.

DOL's launch of searchable index of LCA information highlights the importance of the Chamber's efforts to bar DOL from requiring an employer to include additional private

personally identifiable information on the LCA form. For now, DOL has been silent on if or when it will proceed with LCA reform.

The Chamber's comments on the DOL proposal to expand the nature of information collected through the LCA process may be accessed here: https://www.uschamber.com/comment/comments-dol-form-eta-9035-labor-condition-application-nonimmigrant-workers

Asia-Pacific Economic Cooperation (APEC) Business Travel Card

On May 13, 2014, the Department of Homeland Security's U.S. Customs and Border Protection promulgated an interim final rule, setting forth the eligibility requirements and the application procedures and fee for the APEC Business Travel Card. Pursuant to the APEC Business Travel Cards Act of 2011 and the APEC Business Travel Card Operating Framework, U.S. Customs and Border Protection is establishing the U.S. Asia-Pacific Economic Cooperation Business Travel Card Program. APEC is an economic forum whose primary goal is to support sustainable economic growth and prosperity in the Asia-Pacific region. APEC is comprised of 21 members, including the United States. One of APEC's initiatives is the APEC Business Travel Card Program. The U.S. APEC Business Travel Card Program will enable eligible persons access to fast-track immigration lanes at foreign APEC economies. Comments were due by June 12, 2014.

Notice of Request For Information

On December 30, 2014, the Department of State and Homeland Security issued a Notice of Request For Information (RFI) to inform the development of recommendations, pursuant to the President's memorandum issued on November 21, 2014, requesting recommendations to streamline and improve the Nation's immigration system.

On January 29, 2014, the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/comment/comments-department-homeland-security-visa-modernization

Anticipated Rulemakings

Expand STEM Practical Training for Students with Prior STEM Degrees

The Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) has announced that in May 2014, it expects to issue a NPRM by June, 2015, recognizing that the additional 17 month period of Optional Practical Training for F-1 STEM students should include F-1 students earning business or other degrees when their prior degree was in a STEM field.

Procedural and Technical Employment Verification (I-9) Violations

The Department of Homeland Security's Immigration and Customs Enforcement (ICE) has been indicating since early 2011 that it was prepared to issue a NPRM finally implementing the mandate of the 1996 immigration reform legislation (IIRIRA – the Illegal Immigration Reform

and Immigrant Responsibility Act) to distinguish between substantive failures to comply with the employment verification obligations (I-9) and technical or procedural failures. ICE has announced that it expects to move forward with proposed rulemaking. According to the Fall 2014 Semi-Annual Regulatory Agenda released on November 21, 2014, the agency is considering its next steps.

Nonimmigrant Classes: Temporary Visitors to the United States for Business or Pleasure

The Department of Homeland Security's Custom and Border Patrol (CBP) is beginning a rulemaking process to clarify when an individual's activities are appropriate for B-2 tourist or B-1 business visitor classification. A proposed rule is projected by August, 2015.

Implementation of Amendments Affecting Petitions for Employment Creation for Aliens

This rule amends the Department of Homeland Security regulations to implement changes made by the 21st Century Department of Justice Appropriations Authorization of 2001. This legislation made various changes to the EB-5 alien immigrant classification. This rule's impact is likely going to be minimal because it only governs the requirements and procedures for certain petitions that were approved after January 1, 1995, and before August 31, 1998, but the Chamber will monitor its progress moving forward. Final rule was projected March, 2015.

Significant Non-Regulatory Activities

Department of Homeland Security

L-1B Adjudication Policy (USCIS)

On March 24, 2015, USCIS published a proposed Policy Memorandum that would "provide guidance on the adjudication of the L-1B classification." The new guidance supersedes and rescinds all prior guidance on L-1Bs. Public feedback was accepted through May 8, 2015 regarding the proposed guidance, and it is not clear when the final Policy Memorandum will be issued. It is anticipated that the final L-1B Adjudications Policy will go into effect August 31, 2015. On May 7, 2015, the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/sites/default/files/uscis_l1b_proposed_guidance_5-7-2015.pdf