The last Congress saw the introduction of many pieces of legislation that would have radically transformed the employment laws of this country—and not in a good way. Through hard work (much of it by Chamber members—thank you!) and the education of policymakers, that agenda was derailed, with the Employee Free Choice Act (EFCA) as the most obvious example.

The fight has now shifted to the agencies. At issue are executive orders, regulations, case decisions, enforcement policies, and various sub-regulatory agency initiatives. When viewed individually, few of these appear to represent sweeping changes; collectively, they represent a threat to the employer community similar to that posed by the legislation introduced in the last Congress. Their very vagueness and complexity, however, create unique substantive and tactical challenges for us, which are much different than legislative battles.

The agencies pursuing this agenda include the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC), the National Labor Relations Board (NLRB or the Board), and the National Mediation Board. Their actions include dramatically easing union organizing through new persuader and “ambush” election regulations; redefining proper bargaining units and changing the government procurement process; burdening employers with mandated safety and health programs; and exposing employers to more penalties and lawsuits if they allegedly misclassify individuals as independent contractors or workers as exempt under the Fair Labor Standards Act.

The sub-regulatory level includes agency actions such as enforcement policies and regulatory interpretations. Again, we see numerous initiatives driven by supporters of the administration that present difficulties for employers, including the Office of Federal Contract Compliance Programs broadening the definition of “covered” subcontractors and changing compensation analysis rules, the Occupational Safety and Health Administration’s administratively increased monetary penalties, the United States Citizenship and Immigration Service’s “Neufeld” memo redefining the “acceptable” employee and employer relationships under temporary worker programs, and DOL’s collaboration with the American Bar Association on the “Bridge to Justice” referral program to the plaintiffs’ bar. (See the inside back cover for a chart providing guidance on these initiatives.) DOL has also introduced an overarching theme for its regulatory agenda called “plan, prevent, and protect,” which seeks to connect various agency regulations together under a common strategy, threatening to expose employers to new liabilities in a variety of ways.

In the wake of their inability to obtain passage of EFCA, unions have turned to the NLRB to provide them with similar assistance in making organizing easier. They are also using the Board to pursue their agendas against specific companies, most notably with the now-notorious complaint against The Boeing Company, which has the potential to severely limit how and where companies choose to
operate in order to remain competitive and survive. As outrageous as the Boeing complaint is, it is only the most obvious example of a trend at the NLRB as the current appointees chip away at employer and employee rights through enforcement directives issued by the general counsel’s office and decisions by the Board. Like the proverbial Chinese water torture, the erosion may be slow but the results, nevertheless, dramatic. With the term of union-friendly NLRB member Craig Becker set to expire later in 2011, the Board is expected to remain very active while it still has a functional quorum. In addition, EEOC continues to pursue an aggressive agenda, expanding grounds for bringing lawsuits and making it increasingly difficult for employers to defend legitimate employment practices.

Unfortunately, in none of the agency initiatives do we see any recognition of the need to limit potentially frivolous charges and complaints, whether in the context of corporate campaigns or agency enforcement generally.

Organized labor has also won concessions in the immigration area. For example, in January 2011, DOL finalized a new, unprecedented prevailing wage methodology for H-2B visa petitions that renders the program a hollow promise and completely unworkable. Undoubtedly, this regulation will serve as precedent for redefining prevailing wage rules under other programs.

With the economy still struggling to improve, the employer community will need to work together to ensure a favorable environment for continued economic and job growth. As always, the U.S. Chamber will take the lead in the crucial policy discussions that have the potential to impact employers.

Randel K. Johnson
Senior Vice President
Labor, Immigration & Employee Benefits Division
Traditional Labor Organizing Issues

Pro-Union NLRB Notice Requirement

On December 22, 2010, the National Labor Relations Board (NLRB or the Board) published a notice of proposed rulemaking that would require all employers covered by the National Labor Relations Act (the Act) to post a notice of employee union rights under the Act. For the Board, this is a rare foray into the rulemaking process, as it has only promulgated one other substantive rule in its 75-year history. The Chamber filed comments on the proposal on February 22, 2011. Aside from the fact that the required notice does not sufficiently inform employees of their rights to refrain from union activity, the Chamber’s position is that the Board has no statutory authority to require such a posting. Nonetheless, on August 30, 2011, the NLRB finalized these regulations. The rule was initially scheduled to go into effect on November 14, 2011. However, the NLRB announced that the effective date will be postponed until January 31, 2012. On September 19, 2011, the National Chamber Litigation Center, the Chamber’s public policy law firm, joined with the South Carolina Chamber of Commerce to file a federal lawsuit against the NLRB, challenging the regulation. Among other arguments, the lawsuit contends that the NLRB lacks the statutory authority to require employers to post this notice.


NLRB and DOL Restrictions on Employer Free Speech

With the Employee Free Choice Act (EFCA) defeated and no chance to enact similar legislation in the current Congress, union allies on the Board are attempting—through regulation—to limit employers’ opportunities to lawfully communicate with employees. A notice of proposed rulemaking issued on June 21, 2011, by NLRB would make radical changes to its current representation procedures by significantly shortening the time frame for an employer to respond to a union’s representation petition, thereby restricting an employer’s ability to communicate with its employees regarding unionization. On August 22, 2011, the Chamber filed comments with the NLRB. On September 6, 2011, the Chamber filed “reply comments” with the NLRB, which respond to arguments contained in the comments filed by the AFL-CIO and SEIU.

The Department of Labor (DOL) also issued its anticipated proposed rule regarding changes to employer reporting obligations under the Labor-Management Reporting and Disclosure Act (LMRDA) on “persuader” activity. Currently, employers must disclose arrangements with consultants where the object thereof is to persuade employees regarding their rights whether to choose to bargain collectively. However, employers do not have to disclose when the arrangement is limited to simply giving advice. DOL’s proposed rule narrows the scope of this “advice” exemption so that virtually all consultation with labor lawyers and consultants during a union campaign will be subject to the disclosure requirements. By limiting access to counsel and making disclosure more complicated and detailed, employers will be less likely to exercise their federally protected free speech rights.

The Boeing Complaint

In April 2011, NLRB issued a complaint against Boeing for allegedly retaliating against its unionized workforce in Washington by opening an airplane assembly line in South Carolina. Ignoring decades of precedent, the complaint is viewed by many in the business community as an effort by the Board to control where and how Boeing—and other employers—may operate. It is, therefore, no surprise that NLRB’s now-famous complaint against Boeing has resulted in a firestorm of criticism from employers.

The Chamber has assumed a leading role in the employer community in voicing concern with the Board’s dramatic overreach in the Boeing case. For example, days after the complaint was issued, the Board’s
acting general counsel, Lafe Solomon, responded to questions from Chamber members at the Chamber’s biannual Labor Relations Committee meeting. Additionally, the Chamber hosted a special meeting with South Carolina Republican Gov. Nikki Haley; Sens. Lindsey Graham (R-SC), Jim DeMint (R-SC), Lamar Alexander (R-TN), and Rand Paul (R-KY); and Rep. Joe Wilson (R-SC) to discuss potential responses to the NLRB’s Boeing complaint. On September 15, 2011, the House passed H.R. 2587, the Protecting Jobs From Government Interference Act. The bill would limit the general counsel’s ability to pursue certain remedies in the Boeing complaint.

Specialty Healthcare

On August 26, 2011, the Board issued its decision in Specialty Healthcare. In that case, it articulated a new standard for the determination of whether a union’s petitioned-for bargaining unit is appropriate. Essentially, the new standard will make it easier for unions to gerrymander bargaining units and will place a heavy burden on employers that challenge the unions’ description of the proposed unit. In practical terms, this change in policy will in all probability lead to the proliferation of “micro-units” within the workplace. Responding to an invitation from NLRB, the National Chamber Litigation Center (NCLC) filed an amicus brief with the Board warning that revising the bargaining unit standard would increase the likelihood of strikes, jurisdictional disputes, and other disruptions to business operations.

NLRB’s Increased Use of Extraordinary Remedies During Organizing Campaigns

The Board’s acting general counsel has issued several internal memoranda that will have a significant impact on employers who are subject to a union organizing campaign. For example, General Counsel Memorandum 10-07 directs the agency to seek preliminary injunctive relief and reinstatement for employees discharged during organizing campaigns.

General Counsel Memorandum 11-01 directs regional offices to consider using uncommon remedies with greater frequency, such as giving unions names and addresses of employees even without an election scheduled, requiring a “notice reading” where a company executive must read a notice about company violations to assembled employees, or providing access to company bulletin boards in instances where the employer may have interfered with union access to employees.

National Mediation Board and Union Organizing

On May 11, 2010, the National Mediation Board (NMB) published a final rule that will make union organizing significantly easier under the Railway Labor Act, the federal labor relations statute that applies to the railroad and airline industries. The new rule changed 75 years of NMB election rules and allows a union to be certified only upon a majority of those voting in an election, rather than a majority of all the employees in the bargaining unit. The rule change does not include a recommendation by the Chamber that any such proposal also include identical processes to decertify a union.

NMB issued its proposal in November 2009 and held a public meeting in which the Chamber participated. The Chamber also filed comments opposing the proposal on January 4, 2010. Further, NCLC joined a legal...
challenge to the rule based on alleged failures in the administrative process. On June 25, 2010, the District Court denied the Chamber’s attempt to block the rule. The case is now on appeal before the D.C. Circuit Court of Appeals.

On April 1, 2011, the House of Representatives passed H.R. 658, a bill that includes a provision to repeal the regulation promulgated by the NMB. An amendment to strike this provision, opposed by the Chamber, was defeated.

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In addition to the activities described earlier, NLRB has issued dozens of other important, but lower-profile, decisions. While these cases are largely technical and incremental, taken together they represent an important pro-union shift in labor policy and a chipping away of employer rights. For instance, the Board has made it easier to attack neutral employers by finding that large banners and inflatable rats are not confrontational and, therefore, not regulated like picketing. The Board has also made it more difficult to enforce workplace policies, ruling that an employer could not stop its employees from wearing prison T-shirts with the word “inmate” when they visit customer homes.

Wage, Hour, and Leave Issues

Right to Know and Employee Misclassification

DOL’s Wage and Hour Division seeks to “update the recordkeeping regulations under the Fair Labor Standards Act (FLSA) in order to enhance the transparency and disclosure to workers” through a regulation known as “FLSA Right to Know.” This means that employers would be required to provide classification analyses to those individuals classified as independent contractors, as well as those classified as exempt from FLSA coverage. Employers would be required to maintain this documentation for review by DOL officials. If issued, this regulation will likely create new opportunities for plaintiffs’ attorneys.

Occupational Safety and Health Issues

OSHA’s Injury and Illness Prevention Regulation

The Occupational Safety and Health Administration’s (OSHA’s) highest priority rulemaking
would require all employers to implement injury and illness prevention programs (I2P2) that meet requirements to be specified by the agency. Under I2P2, employers apparently would be required to identify all hazards—including those that do not have specific standards or those that would only be covered under the general duty clause—in their workplaces and take corrective or protective measures. OSHA has held public meetings around the country to solicit input on this concept. Some states, such as California, already have this type of standard. President Obama’s fiscal 2012 budget proposal requests $2.4 million to help develop and implement I2P2.

Under this rulemaking, OSHA would have to decide how to treat employers that already have effective programs in place and whether employers will be vulnerable to double citation—once for a hazard discovered during an inspection and once for having an allegedly faulty program that failed to identify and correct the hazard in the first place. Another issue of concern is whether OSHA would use this rulemaking to create a requirement for employers to assess their workplaces for ergonomic hazards, which would effectively impose an ergonomics standard, long sought by organized labor and long fought by the Chamber.

The agency will convene a small business review panel to take comments from small businesses on the potential impact of the proposed rule.

**OSHA Injury Logs and MSDs**

On January 29, 2010, OSHA proposed adding a column on the OSHA injury log to track work-related musculoskeletal disorders (MSDs)—the kind of injuries associated with ergonomic risks.

The Chamber filed comments, supported by 18 other associations, opposing the proposal. The final regulation went to the Office of Management and Budget’s (OMB’s) Office of Information and Regulatory Analysis (OIRA) on July 14, 2010, for clearance. One week later, the Chamber and other groups met with OIRA to emphasize that OSHA’s economic analysis of the proposed regulation was inadequate. On January 25, 2011, OSHA announced that it was “temporarily” withdrawing the proposal from OMB review to solicit more input from small businesses. OSHA then held three teleconferences in April 2011 for small businesses to provide their comments to the agency regarding the impact that they believe this proposal would have on their operations, leading to the expectation that this regulation will be reproposed in the future. Because record-keeping changes require at least a six-month lead time for adjustments to be made, and they always take effect on the next January 1, the soonest this could go into effect would be January 1, 2013.

**OSHA Noise Exposure Proposed Reinterpretation**

On October 19, 2010, OSHA published 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. Currently, OSHA’s enforcement policy gives employers considerable latitude to rely on personal protective equipment (PPE), such as ear plugs, when noise protection is required, instead of requiring
employers to exhaust their opportunities for administrative (e.g., schedule rotations) or engineering (e.g., sound dampening) controls.

Under the new interpretation, administrative and engineering controls will be 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.” This means that employers would be required to implement engineering and/or administrative controls even if their employees were adequately protected through the use of PPE.

On January 19, 2011, OSHA announced the withdrawal of this proposal, but the agency has committed to hold a public stakeholder meeting to solicit more input. The Chamber submitted preliminary comments objecting to this action as imposing unnecessary costs on employers that are already protecting their employees appropriately from noise hazards. An independent economic analysis concluded that the impact on employers would be more than $1 billion per year.

**Equal Employment Opportunity Issues**

*Regulations: The 2008 ADA Amendments Act*

On September 25, 2008, the ADA Amendments Act (the Act) was signed into law. The Act was intended to provide clarification because courts had interpreted the law too narrowly and were excluding more people from protection than Congress had intended. After several attempts to issue implementing regulations, a notice of proposed rulemaking was published by the Equal Employment Opportunity Commission (EEOC) on September 23, 2009. The Chamber filed comments on the notice of proposed rulemaking on November 23, 2009, offering several suggestions for improvement.

In late December 2010, EEOC voted to approve, in a bipartisan vote, final regulations implementing the Act. The regulations provide employers with clarification regarding the meaning of the term “disability.” The final regulations were published on March 24, 2011, and reflect many of the concerns expressed by the Chamber.
Administrative Reforms

Recognizing that legislative solutions are difficult, the U.S. Chamber is working administratively to promote regulatory improvements as well as policy reforms at the relevant federal executive agencies. We hope that these actions, while not replacing the need for comprehensive reform of the nation’s controlling immigration laws, will lead to real improvements in the immigration system.

Among other issues, the Chamber has been engaging with federal agencies on the following:

- Establishing and maintaining consistency in adjudications regarding the L-1B specialized knowledge worker visa category.
- Reducing burdensome Requests For Evidence in H-1B and L-1 petitions.
- Establishing an internal agency review process for nonimmigrant visa denials at consular posts so that visa rejections under the catchall category of 214(b) are subject to some safeguards for accuracy and fairness.
- Expanding premium processing so that it is available for all employer-sponsored petitions.
- Developing methods to train adjudicators concerning business models and industry practices.
- Enhancing the means for foreign entrepreneurs to obtain and retain lawful immigration status under existing law.

Immigration Reform

The U.S. Chamber has continued its long tradition of communicating the value of immigrants to the nation’s economy. In May 2011, it published the report *Immigration Myths and Facts*, dispelling seven common misconceptions about immigrants. Such inaccuracies have made it difficult to provide an impetus for legislative change.

In summer 2011, the Chamber, in cooperation with federation members and businesses, worked with the Partnership for a New American Economy (a coalition of mayors and business leaders) to make the business case for changing the current immigration system through a series of events.

On July 26, 2011, the Senate Immigration Subcommittee held a hearing on the economic imperative for immigration reform. The Chamber filed a statement for the hearing record, advocating the benefits provided by high-skilled immigrants and coupling education reform with immigration reform.

Complementing these efforts, an event was held at the U.S. Chamber on September 28, 2011, focusing on immigration and competitiveness, with a keynote speech by New York City Mayor Michael Bloomberg.

On October 5, 2011, the House Immigration Subcommittee held a hearing advocating the need for foreign students with STEM degrees (science, technology, engineering, and mathematics) to remain in the United States in order to support the U.S. economy.

President Barack Obama speaks at the U.S. Chamber about the need for the administration and the business community to work together on emerging issues.
States after graduation. The Chamber filed a statement for the hearing record. In addition, subcommittee members entered into the record some of the remarks made at the September 28, 2011, event, including Mayor Bloomberg’s.

In the coming months, the Chamber will publish a report on immigrant entrepreneurs, analyzing the role of immigrants in the formation of new businesses and job creation.

**Employment Verification**

**E-Verify**

The 112th Congress has seen several E-Verify bills introduced in the House and Senate to expand the use of the E-Verify system by making it mandatory and permanent and by requiring the current workforce to be confirmed by the system. In anticipation of legislative movement on this issue, the Chamber formed an E-Verify Taskforce with interested member companies and identified priorities for businesses to make the system work better.

The E-Verify Taskforce’s top concerns include (1) enhancing federal preemption so that employers do not have to navigate a patchwork of state and local laws governing the status verification of the workforce; (2) avoiding a mandate to apply E-Verify to the entire current workforce and instead create obligations focused on new hires; (3) establishing a safe harbor for good faith employers; (4) combining all employment verification obligations into one system so that Form I-9 is no longer a separate requirement but rather is integrated into E-Verify, with availability both electronically and by telephone; and (5) creating a phase-in of any E-Verify expansion, while recognizing the special status of production agriculture.

On June 14, 2011, Rep. Lamar Smith (R-TX), chairman of the House Judiciary Committee, introduced H.R. 2164, the Legal Workforce Act, later reintroduced as H.R. 2885. The legislation establishes the terms of a mandatory, permanent employment verification system to be used by all employers. The Chamber supports the Smith bill, which, among other provisions, provides strong preemption language, mirrors the existing Federal Acquisition Regulation rules with respect to federal contractor obligations to use E-Verify to check the status of the current workforce, and creates a clear safe harbor for employers that act in good faith. Under H.R. 2885, the entire current U.S. workforce is not subject to mandatory E-Verify. It would be very burdensome for employers to run E-Verify on all current staff, especially given that Form I-9 was required at the initial time of hire. All new hires would be subject to E-Verify after a phase-in of employers based on company size, with agricultural employers going last. The legislation also mandates an integrated I-9 and E-Verify system, available both electronically and via telephone.
This change in the law was made all the more compelling by the Supreme Court’s May 2011 decision in *Chamber of Commerce of the United States of America et al. v. Whiting et al.*, which indicates that states could investigate the hiring of unauthorized workers, mandate E-Verify, and have their own investigation and enforcement of the employment verification obligations. Under the Legal Workforce Act, states would still have the power to revoke business licenses of companies that don’t use the national verification system. However, as of the date of enactment of the Smith bill, states wouldn’t be able to investigate whether employers are knowingly hiring illegal aliens; mandate the use of E-Verify; or impose their own verification procedures. During this time when businesses are staggering under a massive burden of sometimes conflicting regulations, they need the certainty of a single national system.

**E-Verify Self-Check Program**

The Department of Homeland Security’s U.S. Citizenship and Immigration Services (USCIS) opened a new information collection on October 1, 2010, concerning the expansion of the E-Verify program to include an option for workers in the United States to use E-Verify to obtain a self-check certification confirming that they are authorized for employment.

On January 12, 2011, the Chamber filed comments on this important expansion of the electronic employment verification system. The E-Verify Self-Check program went into effect on March 18, 2011. The Chamber is following this pilot program to evaluate the rollout across the 50 states and the District of Columbia (initially, it was only available in 6 jurisdictions and in August 2011 was expanded to include 21 jurisdictions); its usefulness for employees attempting to confirm their identity and employment authorization documentation; and its long-term role in ensuring identity confirmation in the electronic employment verification system.

**Definition of Technical Versus Substantive Violations in I-9 Employment Verification**

The Department of Homeland Security’s (DHS’s) Immigration and Customs Enforcement (ICE) is expected in fiscal year 2012 to publish a proposed rulemaking to lay out regulatory definitions of technical versus substantive violations of an employer’s employment verification obligation on Form I-9. Meanwhile, USCIS is working on a “smart” I-9 for release in fiscal year 2012, with drop-down menus that would eliminate many technical errors. In addition, in May 2011, USCIS launched a new I-9 Central website to provide a comprehensive source of information for the public concerning Form I-9 compliance. The Chamber will continue to monitor DHS activity in this area.

**Temporary Worker Programs**

**H-2B Program Wages**

DOL’s Employment and Training Administration (ETA) issued a notice of proposed rulemaking on October 5, 2010, concerning the wage methodology used to determine prevailing wages for the H-2B visa program, which is used to hire temporary
nonagricultural workers. ETA’s proposed methodology would result in a mandate of significantly higher wage levels for employers seeking to utilize the H-2B visa category, often used to hire temporary staff in seasonal jobs.

The Chamber conducted a study titled The Economic Impact of H-2B Workers and subsequently filed comments to the proposed rulemaking. The comments challenge the economic and legal premises underlying ETA’s proposal and highlight the impact that the proposed rule would have on small businesses, which are regular users of the H-2B program.

On January 19, 2011, ETA published a final rule, exactly as proposed, ignoring the rule’s impact on small businesses and the comments submitted by the Chamber and the Small Business Administration’s Office of Advocacy, among others. While the effective date was slated for September 30, 2011, the wage methodology rule is being challenged in the courts. As a result, DOL has delayed implementation until at least November 30, 2011.

**Registration for Cap-Subject H-1B Petitioners**

USCIS proposed on March 3, 2011, an advance registration system for cap-subject H-1B employers through which USCIS could randomly select a sufficient number of H-1B petitioners. Only select petitioners, and the named beneficiaries in the petitioners’ registration, would be eligible to file petitions for cap-subject prospective beneficiary workers. The Chamber filed comments on May 2, 2011, and coordinated with other employer groups advocating for withdrawal of the proposed rule.

**Labor Certification and Enforcement for H-2B Program**

ETA has decided to reengineer the H-2B program by proposing on March 18, 2011, a new regulatory system to address what ETA believes is insufficient worker protections in the current H-2B operational and enforcement guidelines. The Chamber participates in the H-2B Workforce Coalition with trade associations whose industries regularly use the H-2B program. In response to the ETA proposal, the Chamber filed comments and signed on to the H-2B coalition’s comments as well. A final rule is expected to be published in December 2011.

**Employment-Based Visa Reform**

**STEM Extensions**

Certain foreign students on F-1 visas are authorized for an extension of post-degree Optional Practical Training (OPT) from the usual 12 months to 29 months. This extension is available under an interim final rule for students who have completed certain STEM degrees (science, technology, engineering, or mathematics) at U.S. institutions and accept
employment with an employer that participates in the E-Verify program. The Chamber has suggested an expansion of the qualifying fields that would allow for this extended period of employment authorization. On May 12, 2011, ICE issued an updated list of the STEM fields allowing students to receive the extended OPT under the interim final rule. The list for the 29-month OPT was expanded by more than 30 additional STEM fields.

**Elimination of Diversity Visas**

On January 5, 2011, Rep. Darrell Issa (R-CA) introduced H.R. 43, which would eliminate the diversity immigrant program and reallocate those visas, currently set at 50,000, to foreign graduates who, among other criteria, hold an advanced degree obtained in the United States and whose services in the sciences or medicine are sought by an employer in the United States.

Rep. Bob Goodlatte (R-VA) introduced H.R. 704, the Security and Fairness Enhancement for America Act of 2011 (SAFE for America Act), which would eliminate the immigration visa allocation for diversity visas without reallocating the 50,000 visas to any other preference category. The Immigration Subcommittee of the House Judiciary Committee held a hearing on H.R. 704 on April 5, 2011, with a focus on whether the diversity visa category has higher security risks than other immigrant visa categories. The House Judiciary Committee marked up the legislation on July 14, 2011.

**STAPLE Act**

On January 24, 2011, Rep. Jeff Flake (R-AZ) introduced H.R. 399, the Stopping Trained in America Ph.D.s From Leaving the Economy Act (the STAPLE Act) in the 112th Congress, a bill that he had sponsored in previous Congresses. The STAPLE measure would enable individuals who have earned a Ph.D. in a STEM field (science, technology, engineering, or mathematics) from a U.S. university and have a job offer from a U.S. employer to be exempt from the numerical limitation on permanent resident visas (green cards) and H-1B visas.

**StartUp Visa Act**

The StartUp Visa Act of 2011 was introduced in both the House and Senate in March 2011 (S. 565/H.R. 1114). The legislation is intended to help immigrant entrepreneurs obtain permanent resident status in the United States. While similar bills have previously been introduced, the new StartUp Visa bill focuses on professional workers and graduate students already being integrated into American business, research, and development efforts.

One option for permanent resident status under the StartUp Visa bill is to encourage immigrant entrepreneurs currently in the United States on an unexpired H-1B visa, or immigrant entrepreneurs currently in the United States who have certain graduate degrees, to start their own businesses if they demonstrate certain income or investment criteria. After two years, their businesses must have created at least three jobs in the United States and raised certain levels of revenue and investment in order
for that individual to be granted permanent resident status. The House Immigration Subcommittee held a hearing in September 2011 on immigrant investor issues generally, but it’s not clear if or when the StartUp Visa Act will move. The Chamber has sent letters supporting the bill to the sponsors and committee chairs.

REGULATORY REFORM

The regulatory assault on employers is not just relegated to the areas of labor, employment, and immigration law. In Executive Order 13563, issued on January 18, 2011, President Obama recognized that the expansion of the regulatory state threatens economic growth and job creation. To make matters worse, the current regulatory process allows agencies to craft regulations based more on ideology than on substantial factual and scientific evidence and leaves agencies effectively unaccountable to the public.

Accordingly, the Chamber has undertaken to lead the effort of reforming the regulatory process in general. In the coming years, the Chamber will work with business groups, associations, and relevant congressional committees to propose legislation that reforms the regulatory process to restore credibility and accountability.

Ideas under consideration include (1) creating a more stringent test for agencies to pass when defending a legal challenge to a regulation; (2) requiring agencies to consider indirect costs such as litigation, enforcement risk, and lost business opportunities, not just the direct impact of a regulation (i.e., cost of compliance) when promulgating rules; and (3) requiring Congress to approve all regulations and guidance above a certain threshold.

While obtaining enactment of any reforms will be difficult, there is more discussion about the regulatory process now than at any time since the late 1970s and early 1980s, a period that produced the Paperwork Reduction Act and the Regulatory Flexibility Act—two of the most important laws affecting the regulatory process since the Administrative Procedure Act was passed in 1946.

On September 22, 2011, Rep. Lamar Smith (R-TX) and Sen. Rob Portman (R-OH) introduced H.R. 3010 and S. 1606, the Regulatory Accountability Act of 2011. The legislation would make several key changes to the Administrative Procedure Act, improving the process by which regulations are issued and strengthening judicial review. The Chamber strongly supports this bill.
Sub-Regulatory Initiatives: Substantive Changes Without Accountability: Special Interest Political Appointees

The Department of Labor, along with other federal departments, has announced aggressive initiatives that have been developed outside the public rulemaking process. These initiatives will lead to greater enforcement against employers. In addition, many of the president’s top DOL appointees have long-standing ties to organized labor, raising significant questions about whether employers will receive fair and balanced consideration. For more information, go to: http://www.uschamber.com/issues/labor/sub-regulatory-actions

Key: Orange=Agency; Blue=Sub-agency; Red=Agency Action; Grey=Appointees

**DOL**
- Plan/Prevent/Protect Enforcement Strategy (OSHA, OFCCP, MSHA, WHD)
- "We Can Help" program to "educate" workers about FLSA rights
- "Bridge to Justice" ABA referral program

**OSHA**
- Increased ergonomics enforcement in investigations under OSHA "general duty clause"
- National Emphasis Program on record keeping

**OFCCP**
- OFCCP aggressive strategy that aims to make contractors comply with a set of pro-employee "goals" as set by agency
- Changes in audit procedures and compensation guidelines
- OFCCP broadening definition of "subcontractor"

**OLMS**
- Persuader Reporting Orientation Program

**MSHA**
- "Rules to live By" MSHA program that highlights specific rules for investigators to look for

**EBSA**
- Random questionnaires sent to employers on compliance with 401(k) plans, leading to targeted audits

**WHD**
- "We Can Help" program to "educate" workers about FLSA rights
- Administrative Interpretations to replace opinion letters and provide guidance on FLSA exemptions

**ETA**
- H-2A job registry that tracks temp ag jobs for the public

**Treasury**
- FY 2012 budget proposes increased enforcement of employee misclassification
- DOL will certify U-Visas during investigations; such action shareholders given to USCIS

**USCIS**
- "Neufeld Memo" redefines the credible employee-employer relationship under the H-1B and L-1 visa programs/making both programs more labor intensive to use
- TAFILs Subcommittee reviewing LIO ratifications

**EEOC**
- Jacqueline Berrien (Chair)
  - (expires 7/14)
- Chai Feldblum –
  - (expires 7/13)

**NLRB**
- Wilma Lieberman
  - (Former Chair)
  - (expires 8/27/11)

**ETA**
- Brian Hayes – (expires 12/12)
- Mark Pearce – (former union side attorney (expires 9/13)

**ILAB**
- Michael Kerr, Assistant Sec., ILAB - former UMWA exec.

**ILAB**
- Deb Greenfield
  - former Dep. Solicitor – AFL-CIO
  - former Gen. Counsel, AFL-CIO

**ILAB**
- Jordan Barab, Dep. Assistant Sec., OSHA – former health and safety specialist, AFL-CIO
- Mary Beth Maxwell, Senior Advisor – former Exec. Dir., American Rights at Work

**OSHA**
- Teri Bergman, Asst. Sec., OSHA – former AFL-CIO, registered lobbyist
- Joseph Main, Assistant Sec., OSHA – former USW council

**OSHA**
- Debbie Berkowitz, Chief of Staff, OSHA – former Director of Health and Safety, UFW
- Michael Kerr, Assistant Sec., OSHA – former USW

**OFCCP**
- Carla Francis, Dep. Assistant Sec., OFCCP – former AFL-CIO
- Deb Greenfield – former Dep. Solicitor – AFL-CIO
- Jordan Barab, Dep. Assistant Sec., OSHA – former AFL-CIO, registered lobbyist