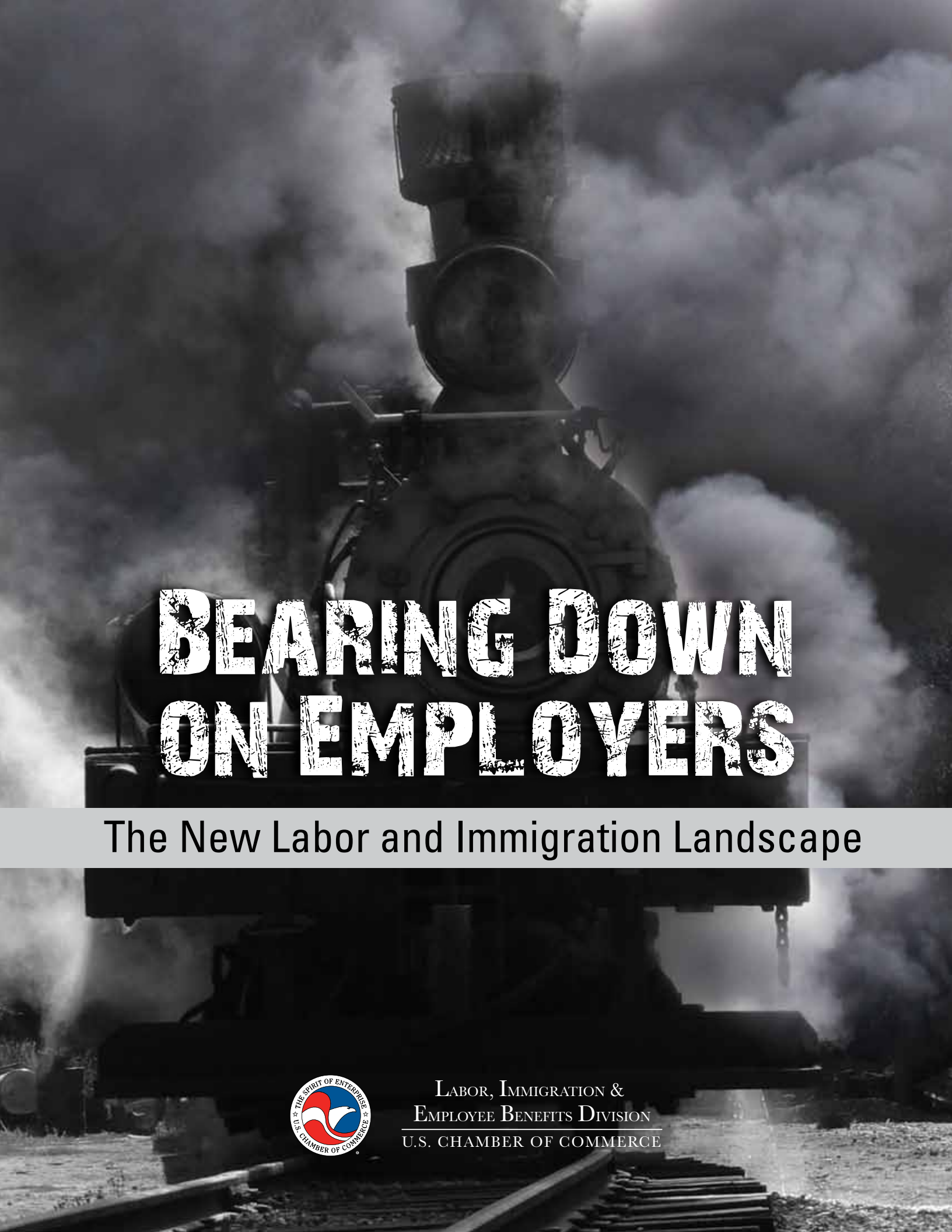

Bearing Down on Employers

The New Labor and Immigration Landscape

Labor, Immigration &
Employee Benefits Division
U.S. Chamber of Commerce

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

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Introduction

On July 14, 2010, the Chamber issued an open letter to the President, the Congress, and the American people titled *Jobs for America*, which outlined impediments to job growth in this country. The letter described the breadth of pending legislative and regulatory proposals impacting the business community and the resulting uncertainty which has inhibited economic growth. The letter specifically stated:

> Uncertainty is the enemy of growth, investment, and job creation. Through their legislative and regulatory proposals – some passed, some pending, and others simply talked about – the congressional majority and the administration have injected tremendous uncertainty into economic decision making and business planning. This is why banks are reluctant to lend and why American corporations are sitting on well over a trillion dollars. It is why America's small businesses and entrepreneurs, the engines of innovation and job creation, are starving for capital and are either struggling to survive or unable to expand.

The letter addressed many areas of concern, including the regulatory arena:

> There must be a recognition by the administration and Congress that the regulatory burden they have imposed on the U.S. economy has reached a tipping point. Unless the cumulative impact of existing regulations, newly mandated regulations, and proposed regulations is seriously addressed, the economy will not create the jobs Americans need. We will lose even more jobs. They will simply disappear or be sent offshore.

The purpose of this book is to add to this debate through setting out in stark detail the enormity of what is pending in the employment area – legislatively, regulatory and sub-regulatory – only one part of the universe of compliance burdens facing the business community. While the employment law area has frequently been contentious and emotionally driven, the current level of changes proposed to our nation's employment laws is virtually unprecedented. It also needs to be emphasized that these proposals are being levied upon a base of existing law that is already extremely complex, incorporated through numerous statutes, thousands of pages of fine print regulations intertwined with ambiguities, and tens of thousands of pages of case law.[1] Unfortunately, one could search diligently throughout these proposals and find little that would help limit frivolous litigation, provide educational assistance, or ease compliance burdens on employers. Rather, more mandates and increased damages and litigation overlaid by the heavy hand of agency enforcement, are the common

[1] One treatise on employer obligations under equal opportunity laws alone runs over 3,500 pages. *See* Lindemann, B.T. & Grossman, P. (2007), *Employment Discrimination Law (4th ed.)*, Chicago, IL (BNA Books).

threads. That these developments are occurring in an economy struggling to recover is particularly alarming and ominous to the business community.

For those who may doubt the challenges to an employer under this reality, read a few pages of the existing Code of Federal Regulations, or randomly select one of the many court decisions interpreting existing law. Then picture yourself as a small business person or the head of human resources now faced with numerous other changes in a maze of already confusing and daunting compliance obligations.

Not every proposal mentioned in this book is necessarily objectionable, but we thought it important to include a broad overview to depict in totality what new requirements employers may be facing in the workplace. While there may be a benefit to these requirements, there will also be costs, and costs cannot be ignored.

We hope that you will find this review of interest and that it will help illustrate the scope of challenges employers face.

Overview of Labor and Immigration Legislation in the 111th Congress

At the start of 2009, with bolstered Democratic majorities in Congress and a new President in the White House, lawmakers made a quick start to advance their aggressive labor agenda. This strategy was evident by the swift introduction and passage of the Lilly Ledbetter Fair Pay Act.[2] As one of the first major bills debated and voted on in the 111th Congress, the Ledbetter bill was introduced in the House on a Tuesday and voted on that Friday, a move made without very little consideration for regular order. Many observers believed the speed in which the Ledbetter bill was moved out of the House would be commonplace with this Congress. The business community braced for the worst.

In the months that followed, a flurry of bills straight off of organized labor's wish list were introduced, including: the Employee Free Choice Act[3]; Patriot Employers Act[4]; Healthy Families Act[5]; Forewarn Act[6]; various OSHA reform bills[7]; the WAGES Act[8]; and many more.

At the top of organized labor's list was EFCA, which despite the all-out push to pass the bill, was displaced by other issues such as healthcare, the economy and the environment. While EFCA supporters still predict passage of the bill,[9] moderate members of Congress have all but abandoned the notion of supporting the bill in the 111th Congress.

Nonetheless, several of organized labor's top priorities in this Congress are still pending. This section, however, is only the tip of the iceberg. For a broader, more detailed list of adverse labor/employment bills introduced this Congress; see the attached chart following this chapter and the Appendix starting on page 21. The bills most likely to be acted on this year include the following:

- **Robert C. Byrd Miner Safety and Health Act of 2010, H.R. 5663 –** In response to the tragic mining accident at the Upper Big Branch Mine in West Virginia, Rep. George Miller

[2] S. 181, 111th Cong., 123 Stat. 5 (2009).
[3] S. 560/ H.R. 1409, 111th Cong. (1st Sess. 2009).
[4] S. 829/ H.R. 989, 111th Cong. (1st Sess. 2009).
[5] S. 1152/ H.R. 2460, 111th Cong. (1st Sess. 2009).
[6] S. 1374/ H.R. 3042, 111th Cong. (1st Sess. 2009).
[7] *E.g.*, Worker Protection Against Combustible Dust Explosion and Fires Act, H.R. 849, 111th Cong. (1st Sess. 2009); Ensuring Worker Safety Act, H.R. 4864, 111th Cong. (1st Sess. 2009); Corporate Injury, Illness and Fatality Report Act, H.R. 2113, 111th Cong. (1st Sess. 2009).
[8] H.R. 2570, 111th Cong. (1st Sess. 2009).
[9] *See, e.g.*, "The union leader [Richard Trumka, President, AFL-CIO] was bullish on its [EFCA's] chances of passage, saying there will be a vote on the bill this year and it will pass." Kevin Bogardus, *Trumka says Dems' aggressive posture helps election chances*, THE HILL (Washington, D.C.), May 4, 2010, *available at*: http://thehill.com/homenews/campaign/95789-trumka-says-dems-aggressive-posture-helps-election-chances.

(D-CA), Chairman of the House Education and Labor Committee, introduced the Miner Safety and Health Act on July 1, 2010. Miller's bill purports to address the perceived problems that caused the explosion at the Upper Big Branch mine, despite no official report on the cause of the accident has been released.

Just as troubling, Rep. Miller has used the bill as a vehicle to introduce the most sweeping changes to the Occupational Safety and Health Act since its inception in 1970. Specifically, the bill: expands employee whistleblower rights, which will lead to an increase in the number of lawsuits against employers; requires mandatory abatement of violations and restricts an employer's due process rights, which will force employers to immediately begin correcting problems upon receipt of a serious, willful or repeated citation; and increases civil and criminal penalties as well as attaches liability to officers or directors of the company who may not have been aware of any of the alleged violations.

On July 13, the House Education and Labor Committee held a hearing on H.R. 5663, where Department of Labor ("DOL") officials testified in support of the bill, including OSHA Administrator David Michaels, and Solicitor Patricia Smith. The committee favorably voted the bill out on July 21, 2010 on a party line vote, but it was not brought to the House floor before the August recess reportedly because of concern from moderate House members.

- **Paycheck Fairness Act, S. 182/ H.R. 12** – As one of the first votes of the 111th Congress, the House passed the Paycheck Fairness Act ("PFA").[10] The Chamber supports the Equal Pay Act and the principle of equal pay for equal work. However, the PFA would significantly amend the Equal Pay Act by, among other things, limiting employer defenses and thus making it very difficult for employers to justify legitimate pay differences, by making unlimited compensatory and punitive damages available, and by changing class action rules to make it easier to create large classes of plaintiffs. Since the House swiftly passed the bill last year, it still awaits consideration in the Senate despite full support from the Obama administration.

  However, proponents continue to advocate for Senate action. Efforts include: an April 28, 2009 Joint Economic Committee hearing on the "gender pay gap"; May 21, 2009 press conference by Sen. Chris Dodd (D-CT) and Rep. Rosa DeLauro (D-CT), claiming the bill will pass before the end of the year; June 24, 2009 *New York Times* editorial

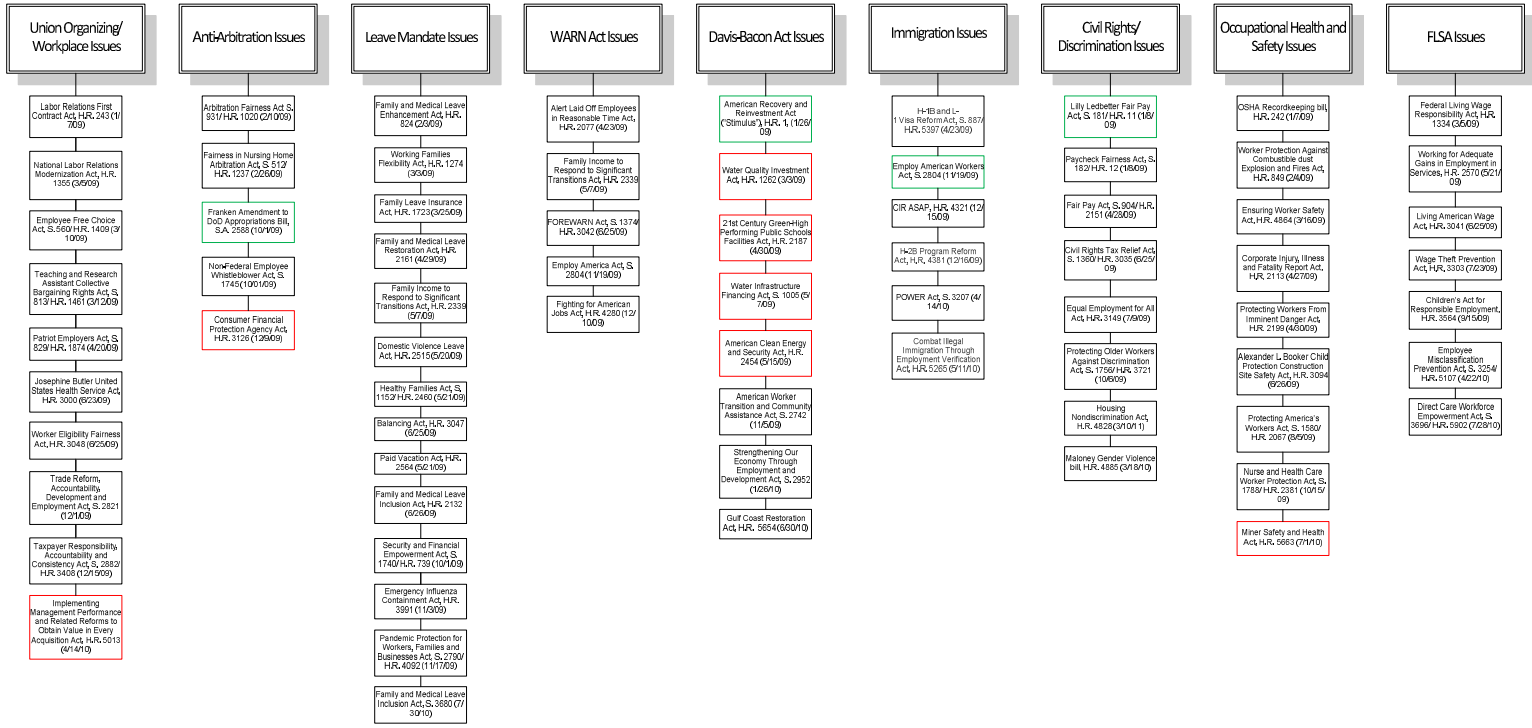
[10] 155 Cong. Rec. H137 (2009) (Roll Call Vote No. 8).

advocating quick passage of the bill;[11] Senate HELP hearing on March 11, 2010 titled, "A Fair Share for All: Pay Equity in the New American Workplace"; another *New York Times* editorial supporting the Act on May 30, 2010;[12] June 10, 2010 statement from President Obama, advocating passage of bill;[13] and a July 20, 2010, White House Middle Class Task Force report pressing for Senate passage. Time will tell whether the constant drumbeat by the White House and advocates will result in passage this Congress.

The Chamber continues to actively educate members of Congress to impart the message of the business community – to not enact bills driven by superficial rhetoric that would create unfair new workplace rules that place an undue cost on employers. Congressional leaders will no doubt continue to look for ways to move any number of the bills, or portions thereof, including as attached to larger legislative vehicles or through appropriations.

[11] Editorial, *Paycheck Fairness*, N.Y. TIMES, June 24, 2009, at A28.
[12] Editorial, *A Problem Easily Fixed*, N.Y. TIMES, May 30, 2010, at A18.
[13] Press Release, The White House, Office of the Press Secretary, Statement by President on the Anniversary of the Equal Pay Act (June 20, 2010).

Overview of Labor and Immigration Legislation in the 111th Congress



*Key: Green = signed into law; Red = committee markup/ report issued.

Regulatory Initiatives: the New Battleground

With the slowing of the labor/employment agenda on Capitol Hill, the administration is utilizing the regulatory agencies to implement its agenda. While much of the Department of Labor ("DOL") regulatory agenda is driven by proposals that are identical to recommendations the AFL-CIO made to the Obama Transition team,[14] other regulatory initiatives are simply reversals of rules finalized during the Bush administration, with no real substantive reason for the change in policy; while still other proposals represent the DOL's new enforcement strategy entitled "Plan, Prevent, Protect." Below this regulatory activity is that activity at the sub-regulatory level, less visible but still important, which is discussed in the next section.

At other federal agencies where rulemaking power has historically been used only on rare occasions, unions and their allies are pressuring political appointees to promulgate controversial new rules. The National Labor Relations Board ("NLRB") is in the early stages of planning for electronic voting for union elections.[15] In another example, the National Mediations Board ("NMB") reversed a 75-year precedent by changing union election processes for entities regulated by the Railway Labor Act ("RLA") to make it easier for unions to claim a majority in elections.[16] In both cases, the initiatives were undertaken after union-supported appointees took their seats on their respective boards. We anticipate future rulemakings will occur, particularly as the congressional labor agenda slows.

The regulatory route is often desirable because the administration and its political appointees have the ability to draft the proposed regulation as they wish. Of course, the Administrative Procedure Act ("APA") emphasizes the importance of public notice and comment to provide those who will be regulated an opportunity to participate. However, the procedure heavily favors the agencies, and conclusions can only be reversed through expensive litigation which is typically difficult to win as the agency action must typically be "arbitrary and capricious" or unauthorized under the law, a high burden.

While this section provides an overview of some of the pending and anticipated regulatory initiatives in the labor/employment field, for more analysis see the Appendix starting on page 31.

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[14] *See AFL-CIO Recommendations for the Obama Administration*, Change.gov, the Office of the President-Elect, http://change.gov/open_government/entry/afl_cio_turn_around_america/.

[15] Request For Information, *Secure Electronic Voting Service*, National Labor Relations Board, June 9, 2010, *available at*: https://www.fbo.gov/index?s=opportunity&mode=form&id=6783a7abb80efc44eff9609c5d225742&tab=core&_cview=0.

[16] Representation Election Procedure, 75 Fed. Reg. 32,273 (June 8, 2010).

DOL

While organized labor is advancing its regulatory agenda through many different federal departments, the bulk of their efforts are naturally focused on DOL, with key political appointees coming straight from the ranks of organized labor and its allies.

Ironically, while DOL is on the record as implementing new requirements on employers, it has steadily worked to roll back union disclosure rules achieved to protect union members. The main targets are regulations under the jurisdiction of the Office of Labor-Management Standards ("OLMS").

OLMS decided to roll-back union financial disclosure rules in several phases. The first phase, which was finalized on October 13, 2009, rescinded the enhancements made to Form LM-2 at the end of the last administration.[17] These rules required increased reporting on compensation amounts of union leaders, identifying the buyers and sellers of union assets, and expanding on the reporting of cash receipts. The new rule also revoked the simplified filing privilege reserved for smaller unions if they had been deficient in filing past forms. The Obama administration rescinded the previous rule claiming it did not properly balance the need of transparency for union members against protecting union autonomy.[18]

The second phase of the roll-back of union financial disclosure rules makes it easier for union trusts to evade reporting requirements because they are not "wholly owned" subsidiaries of an international union. Trusts that are union controlled or dominated would be excluded from disclosure rules, simply because they are not "wholly owned" by the union. This new rule would create a dangerous loophole for union trusts to evade disclosing to its members how their dues are spent. This proposed rule would exempt over 2,000 union trusts. We anticipate further proposals to roll back union financial disclosure regulations.

On the other hand, OLMS has moved to significantly increase employer reporting. Under existing law, employers must report arrangements with labor "persuaders"—commonly thought of as third party consultants hired to persuade the workforce during a union campaign. Currently, legal advice is exempt from the reporting requirements. However, OLMS is expected to significantly narrow the advice exception and force employers to report information on standard legal arrangements with their lawyers. It will also force the lawyers to disclose

[17] The form LM-2 is an annual report that unions must file, disclosing it assets, liabilities, investments, cash receipts and disbursements, outstanding loans, sales of investments and fixed assets, and compensation of union leadership.

[18] Daily Labor Report, *DOL Rescinds LM-2/ LM-3 Rule, Citing Burden on Small Unions and Need for More Review*, Oct. 13, 2009, *available at*: http://news.bna.com/dlln/DLLNWB/split_display.adp?fedfid=15414902&vname=dlrnotallissues&wsn=515450000&searchid=12090130&doctypeid=1&type=date&mode=doc&split=0&scm=DLLNWB&pg=0.

information about their clients that they have provided labor relations advice to, whether or not persuader activities were conducted for that client as long as they engaged in some persuader activity for another client. If implemented, these expanded requirements, long supported by the unions, will impair an employer's ability to exercise its free speech rights through creating a barrier to retention of legal counsel.

Another regulation promulgated by OLMS, in response to Executive Order 13,496, requires government contractors or sub-contractors to post notices of employee labor law rights in the workplace. The rule forces employers, working on federal contracts, to post notices that describe an employee's rights to join a union. While the final regulation is much improved from the proposal, it is still unbalanced. For example, it does not describe an employee's rights to refuse to pay union dues or fees collected for political purposes, long established by the Supreme Court.

DOL has also moved to implement Executive Order 13,495, which requires successor contractors on contracts covered by the Service Contract Act to offer any jobs on the contract first to employees of the predecessor contractor. The proposed regulation contains many unrealistic expectations and if not addressed it will be very difficult for successor contractors to rebut the presumption that the predecessor contractor's employees are qualified.

Another theme of DOL's regulatory agenda announced in April 2010 is called "Plan, Prevent, Protect." This new strategy will force employers, as specified by regulations, to follow a three step plan to ensure compliance: create a plan to fix problem; implement the plan to prevent a problem; and ensure the implementation is actually protecting employees. While seeming harmless on its face, the strategy will empower DOL to determine <u>how</u> an employer plans to achieve compliance with the law, as distinguished from <u>whether</u> the employer has achieved compliance, all of which could be second guessed by DOL investigators. Employers would be required to draft compliance plans with the input of their employees, then fully and completely implement those plans, and finally apparently turn over those plans to their employees to monitor compliance. The plans could clearly be questioned by the Department and compliance would be "non-negotiable." If an employer does not have a compliance plan, or does not fully implement the plan, the Department could consider it to be *prima facie* evidence of noncompliance with the law or regulation in question. Some number of employees, dissatisfied with their work situation for whatever reasons, can be expected to take their compliance plans to plaintiff's trial lawyers or to unions, in addition to filing complaints with DOL, or find areas of disagreement in a complex area of the law in which even experts give conflicting advice.

One of the first regulatory initiatives that will use the "Plan, Prevent, Protect" scheme is the Wage and Hour Division's ("WHD") anticipated rule that would greatly expand

recordkeeping requirements under the Fair Labor Standards Act ("FLSA") by requiring employers to disclose how a worker's pay is computed and complete a written "classification analysis" for each worker who is exempt or outside of the coverage of the FLSA. Such an analysis would be available on demand to the employee and WHD investigators thereby empowering unions and trial lawyers to attack employers for either not complying with the new recordkeeping requirement, or using the analysis against the employer in a lawsuit or as a tool in an organizing campaign.

Another agency that is pursuing a regulation as part of "Plan, Prevent, Protect" is the Occupational Safety and Health Administration ("OSHA"). OSHA is developing a regulation mandating that employers have a safety and health program, referred to as an Injury and Illness Prevention Program, or "I2P2." OSHA has held meetings around the country to gather input from stakeholders but has yet to release any details of what this regulation will require. Chief among the questions OSHA will have to resolve is how to accommodate employers who already have effective safety and health programs in place. Again, OSHA investigators will be free to substitute their judgment of the employer's plan on how to achieve compliance and whether some "injury" in the workplace should have been addressed in some way even if it was not regulated under a specific standard, or did not amount to a "significant risk" as required under the OSH Act.

OSHA is also developing a regulation which would require employers to analyze every employee discomfort to determine if it is a work related recordable musculoskeletal disorder ("MSD") (the type of injuries associated with ergonomics). Such a requirement will force employers to rely on a definition for MSDs which is not supported by the medical community, and could result in many more injuries having to be recorded, or employers being fined for not recording them. This regulation would also set the stage for OSHA to revive the controversial ergonomics standards, which has remained high on the union agenda. OSHA proposed this regulation in late January 2010 and a final regulation is expected in the fall of 2010.

Beyond their regulatory efforts, OSHA has also implemented new penalty policies designed to increase the amount of penalties employers pay, and at the same time make it more difficult for employers to settle cases. For a fuller discussion on the effort to increase penalties, see the following chapter on sub-regulatory action.

NMB

In agencies tasked with monitoring union elections, the general theme of the administration's regulatory agenda is to make it easier for unions to organize. An example occurred at the National Mediation Board, the agency that oversees labor-management relationships for industries covered under the Railway Labor Act ("RLA") – railways and airlines.

As a nod to organized labor, President Obama appointed to the board, former president of the Association of Flight Attendants union, Linda Puchala. One of the first major acts of the new board was to issue a proposed rule that would change the way tens of thousands of airline and railway employees vote for union representation, and tilting it heavily in favor of organized labor. The NMB decided to do away with 75-year old precedent by changing the procedure so a union could win an election with a majority of votes cast supporting the union. Under the previous, time endured voting method, the majority of all eligible employees needed to vote in favor of joining a union. The standard was justified in part because airline and railroad workers operate all over the country in diverse settings making it more important to ensure that a union actually has a majority support before compelling the employer to bargain. Not surprisingly, in issuing the rule, the NMB refused to adopt the same rule for decertification, leaving in place the law that heavily favors incumbent unions.

On May 11, 2010, the NMB the rule became final and effective on June 30, 2010.

NLRB

The NLRB is a prime example of an agency that rarely uses its rulemaking power. In fact, the board waited 54 years after its creation to first use notice and comment rulemaking in 1989.[19] As with the NMB, President Obama nominated two very pro-union individuals to serve on the board, including former Associate General Counsel for the Services International Employees Union ("SEIU"), Craig Becker. Shortly after Becker and the other nominees were seated (Becker was given a recess appointment, while Brian Hayes and Mark Pearce were confirmed for full 5 year terms),[20] the board began a process that most believe will lead to notice and comment rulemaking. On June 9, 2010 the board published a Request for Information seeking "industry solutions regarding the capacity, availability, methodology, and interest of industry sources for procuring and implementing secure electronic voting services for both remote and on-site elections."[21]

The language of the RFI suggests that the NLRB not only is looking at electronic voting methods for union representation elections, but also, and more dangerous, possibly permitting remote voting via phone or the internet.

[19] We refer here to substantive notice and comment rulemaking, not to rulemaking on procedural matters.
[20] The other Republican appointed board member, Peter Schaumber's term ended on August 27, 2010 and Republican appointed General Counsel, Ron Meisburg resigned in June 2010, two months prior to the expiration of his term. Meisburg was replaced on an acting basis with Lafe Solomon.
[21] FedBizOpps.gov, *Secure Electronic Voting Service*, RFI-NLRB-01, June 9, 2010, *available at*: https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=107db4b6d2c97f65c56c4f00f72c704c&_cview=1.

While this is the first move by the board to initiate the rulemaking process, it is not likely to be the last. Proposals like electronic voting, while seemingly benign, will have detrimental effects on the election process limiting an employer's ability to exercise its long established free speech rights to communicate its concerns regarding unionization and increasing a union's ability to coerce employees.

Also pending before the NLRB is a petition to initiate rulemaking to mandate that employers bargain with unions that only represent a minority of employees. This "members-only" bargaining could wreck havoc as employers would be forced to grapple with multitudes of mini-unions with competing agendas all in the same workforce. Other topics the NLRB may address through rulemaking are methods to significantly shorten the time period for union campaigns and processes to ensure that employees are informed of their rights to organize and bargain collectively.

EEOC

The Equal Employment Opportunity Commission ("EEOC") also has several significant regulations that it is considering that could have a significant adverse impact on employers. For example, it is considering amending its regulations under age discrimination laws to significantly limit defenses available to employers to justify legitimate job actions. If implemented, the proposal would place onerous burdens on employers conducting personnel actions, such as reductions in force and would effectively grant the EEOC and plaintiffs' lawyers carte blanche to second guess economic business decisions.

The EEOC has also proposed regulations implementing the ADA ("Americans With Disabilities Act") Amendments Act of 2008. While the 2008 amendments were the result of a compromise, some important provisions of the regulations are not consistent with the compromise, such as the apparent inclusion of a *per se* list of disabilities, significant changes to the factors utilized in determining whether an individual is substantially limited in a major life activity, changes to the definition of the major life activity of working, and a very broad interpretation of what it means to be regarded as disabled.

The EEOC is also considering regulations implementing the Genetic Information Nondiscrimination Act ("GINA"). As proposed, these regulations would significantly interfere with employers' use of wellness plans and the ability of health care professionals to consider family history in such plans, among other things.

FAR Council

At the FAR ("Federal Acquisition Regulation") Council, the administration continues to advance regulatory changes that would give unionized government contractors a significant advantage in bidding for federal contracts, against their non-unionized competitors.

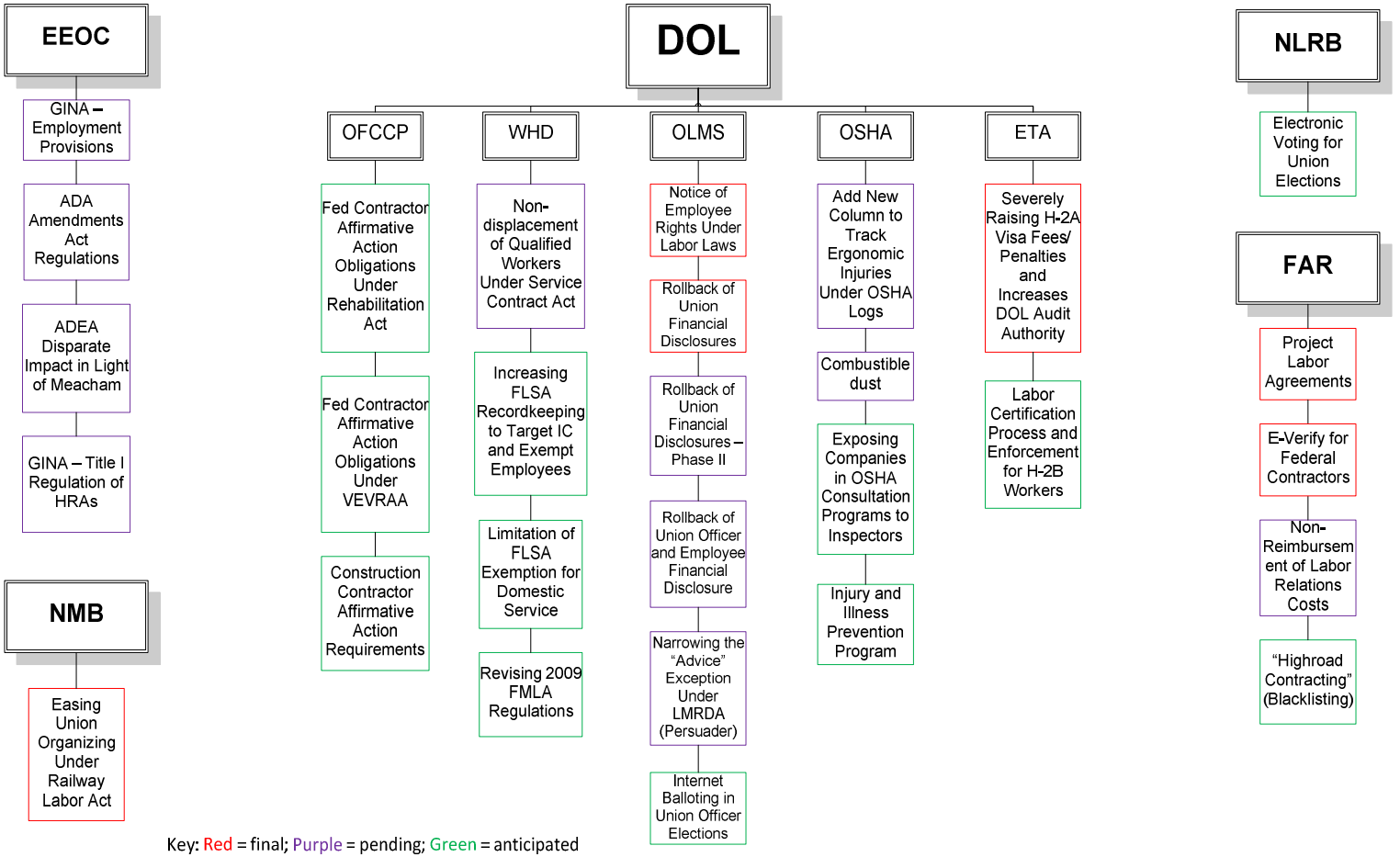
Already, the FAR Council has made final a new rule that "promotes" the use of Project Labor Agreements ("PLA") in large scale construction projects costing more than $25 million. The use of PLAs on government contracts would, as a practical matter, heavily favor unionized government contractors in the procurement process because PLAs require employers to enter into an agreement with a union that typically requires utilizing union labor and requires the employer to make contributions to union pension and benefit funds, among other things.

Another FAR Council regulation, stemming from Executive Order 13,494, would prohibit federal contractors from seeking reimbursement of certain costs related to labor relations. This would have the effect of making it more difficult for employers to exercise their free speech rights during an organizing campaign. Despite the already full regulatory agenda of the FAR Council, an even more sweeping proposed regulation is being considered. The policy, sometimes referred to as "high road contracting" would link the awards of federal contracts to certain labor practices. For example, DOL would score every federal contractor based on its human resource policies, assigning scores for the payment of higher wages, particular health or pension benefits, or paid time off. Some have even suggested points would be awarded for remaining neutral in union organizing drives. <u>These criteria would apply to a contractor's entire workforce, not just those employees involved in the federal contract.</u> While this may seem like a reasonable initiative at first blush, increased prices on projects will all be paid for by the taxpayer, as contracting costs rise without any new or greater efficiencies that will benefit the public and will exclude smaller (likely non-union) contractors unable to meet these new, expensive benchmarks. It may also discourage certain contractors from bidding at all, who may in fact be the most qualified contractor for that project, to the detriment of the taxpayer. This proposal may also include blacklisting provisions that could block companies from being eligible to bid on contracts if they have violated tax, labor, environmental or other laws or regulations, no matter how technical or minor.

The regulatory theme at the FAR Council and other federal agencies is clear: giving unions an advantage that they cannot otherwise achieve in the marketplace.

Regulatory Initiatives: the New Battleground

In addition to the labor/employment legislative agenda on Capitol Hill, the Obama Administration has ramped up an already active regulatory agenda.



Key: Red = final; Purple = pending; Green = anticipated

Sub-Regulatory Initiatives: Substantive Changes Without Accountability

Perhaps the least understood category in the labor/employment landscape is sub-regulatory initiatives. These are actions and policies created and implemented without any public vetting. Nor, are the majority of these initiatives carried out with direct congressional authority. Often these initiatives begin as campaigns to "educate" workers about their rights or employers about their duties under existing law, but result in greater enforcement, increased litigation and higher penalties against employers. Of course, regardless of the merits of the underlying challenge, employers must spend thousands of dollars in defending themselves. Many of these initiatives result in substantive changes to how a law is carried out, raising serious questions about whether they should have been produced through a traditional rulemaking, or even a legislative change.

Due to the non-public process in creating these initiatives, many employers, as well as the general public, do not find out about them until a federal investigator shows up at their door. Unlike regulations or laws, sub-regulatory initiatives do not have future effective dates to allow those being regulated an opportunity to comply. In essence, sub-regulatory initiatives are measures that impact employers but without the checks and balances provided by the normal regulatory process.

While discussing sub-regulatory activities, it is important to highlight the individuals who are tasked with creating and implementing these initiatives. Each federal agency has individuals (i.e. political appointees) who serve as part of the administration, but most do not go through the public vetting of a Senate confirmation. Accordingly, each administration looks to its supporters to fill these ranks. In the Obama DOL, many political appointees both confirmed and non-confirmed, come from the unions or pro-union special interest groups. Several of the political appointees, while not confirmed, hold leadership roles and help set policy at DOL.

There may be hundreds of sub-regulatory initiatives being developed or already implemented in the labor/employment arena, this section only skims the surface and provides a summary of a few of most obvious, but for a more broader list see the chart at the end of this section and the Appendix starting on page 36.

"We Can Help"

DOL launched a new initiative called "We Can Help" to educate workers and workers' rights groups (such as, Interfaith Worker Justice, National Day Labor Organizing Network, and the National Employment Law Project) on their rights under various labor laws including the

Fair Labor Standards Act ("FLSA"), Family Medical Leave Act ("FMLA") and Davis-Bacon Act. The ostensible goal of the nationwide initiative is to connect workers with various DOL agencies in which they may lodge a complaint against their employer. Further, "We Can Help" will target its message to specific industries and worker categories such as, independent contractors, construction, hospitality, and home health care. While, DOL is quick to note that the new initiative does not create any new law or regulation, the initiative will undoubtedly generate an increase of filings of charges by DOL or through private litigation in court, yet we see nothing in this initiative that will help screen for frivolous charges.

"We Can Help" is eerily similar to a New York state program called "New York Wage Watch," which was created by current DOL Solicitor Patricia Smith, during her tenure as New York State Commissioner of Labor. Under the New York program, the state department of labor formed formal relationships with "community groups" (i.e. unions, and employee and immigrant rights groups) to enforce state labor laws. Specifically, these "deputized" community groups would seek out labor law violations and report them to state wage and hour investigators. Even the state officials described its NYWW partners as "enforcers," dispelling any notion that this was merely an educational program. While this enforcement component has yet to come out under "We Can Help," employers should we aware of New York's experience.

Administrator's Interpretations

Despite lacking an administrator, the Wage and Hour Division ("WHD") has begun issuing a new type of guidance entitled "Administrator's Interpretation" ("AI"). These AIs are troubling for several reasons, but most importantly because they replace the opinion letter process, which relied on fact-specific requests, submitted by the stakeholders. AI's on the other hand, are not issued in response to a fact specific request, but rather based on a unilateral decision by WHD staff. That decision could be based on various outside factors such as: litigation or enforcement trends; requests from Congress or the administration; news events; or pressure from special interest groups.

Equally troublesome, AIs will apply industry or occupation wide, based on a "typical" job description. For example, the first AI issued by WHD held that the "typical" mortgage loan officer was not exempt from overtime as an administrative employee. In creating its own definition of a "typical" mortgage loan officer, DOL has effectively set its own, narrower standard of which employees are exempt. The result is employers are forced to prove that their employees do not fit within the "typical" standard, rather than being able to determine the job descriptions and duties of an employee as it best fits their business model. FLSA regulations are clear that the actual duties an employee performs as part of his or her job determines what provisions of the law may apply, not merely the job description. Creating a

"typical" job description on which the AIs are based, function dangerously close to a regulation issued without the protections of notice and comment rulemaking.

The decision to eliminate opinion letters and replace them with AIs was made without any input from stakeholders who would have been able to highlight the logistical and legal problems in creating such a broad interpretive process.

Lastly, under the previous system, opinion letters were not issued if the requestor was involved in litigation or subject of a WHD investigation. This was to ensure that requestors were not able to seek favorable interpretations in the midst of litigation or an investigation. AIs, however, do not contain that same disclaimer. WHD could issue an AI in order to influence ongoing litigation or a WHD investigation, and has already issued one such AI touching on issues which are the subject of ongoing litigation.

"Neufeld" Memo

On January 8, 2010 the United States Citizenship and Immigration Services ("USCIS") released a memo that significantly altered the agency's definition of the employer-employee relationship as it relates to third-party worksite placements in the context of H-1B petitions. The "Neufeld" memo, authored by Donald Neufeld, Associate Director, Service Center Operations, adds significant hurdles to utilizing the H1-B program and has the potential to reach other aspects of employment-based immigration as well.

The USCIS requires an employer-employee relationship in order for an H-1B specialty occupation visa to be issued. The Neufeld memo departs from long-standing precedent and creates a new set of guidelines which will lead to visa denials, delays, and lengthily "request for evidence" documents for employees and employers who otherwise would have been approved for an H-1B visa. The memo outlines a set of factors the agency will now use to determine whether such a relationship exists. While the agency purports that the guidance memo does not change the underlying requirements for an H-1B petition, it has already lead to a greater number of denials and increased investigations.

In attempting to provide "guidance" to USCIS stakeholders, the memo amends the Adjudicator's Field Manual, which is the authority on USCIS adjudications and petitions policy and procedure. This substantive change to USCIS policy makes it increasingly harder for employers to obtain H-1B visas. Employers now must ensure they meet the new, narrower definition of the employer-employee relationship, due to guidance that fell outside of the regulatory process.

Increased OSHA Penalties

In the absence of statutory changes, OSHA has implemented a series of policy changes designed to increase the amount of penalties levied against employers, and to make it less likely that employers will be able to settle their cases.

One of these initiatives which increases penalties is the Severe Violator Enforcement Program ("SVEP") which replaced the Enhanced Enforcement Program which focused on employers with a fatality and one or more willful or repeated (serious any gravity) violations related to the death. Under SVEP, employers will now be subject to the increased scrutiny if they have a fatality with one or more willful or repeated citations or failure-to-abate notice based on a serious violation (any gravity) related to a death of an employee or three or more hospitalizations. OSHA is thus expanding coverage by including employers with failure to abate notices, reducing the severity of hazards covered, and including three hospitalizations in addition to a fatality. These employers will be subject to mandatory follow-up inspections of a workplace found in violation and inspections of other worksites of the same company where similar hazards or deficiencies may be present.

While employers who endanger their employees deserve attention, some of the details of the SVEP raise questions about fairness and how employers are expected to respond, and whether this new approach would have been better handled through a process allowing for public comment. For instance, the range of hazards has been expanded to include combustible dust, for which there is no OSHA standard (or a defined hazard), and even recordkeeping violations. In addition, questions remain as to whether the preceding enforcement scheme was flawed, and whether more penalties necessarily means better workplace safety. These are exactly the type of issues rulemakings are designed to resolve by developing a record and taking input from various stakeholders.

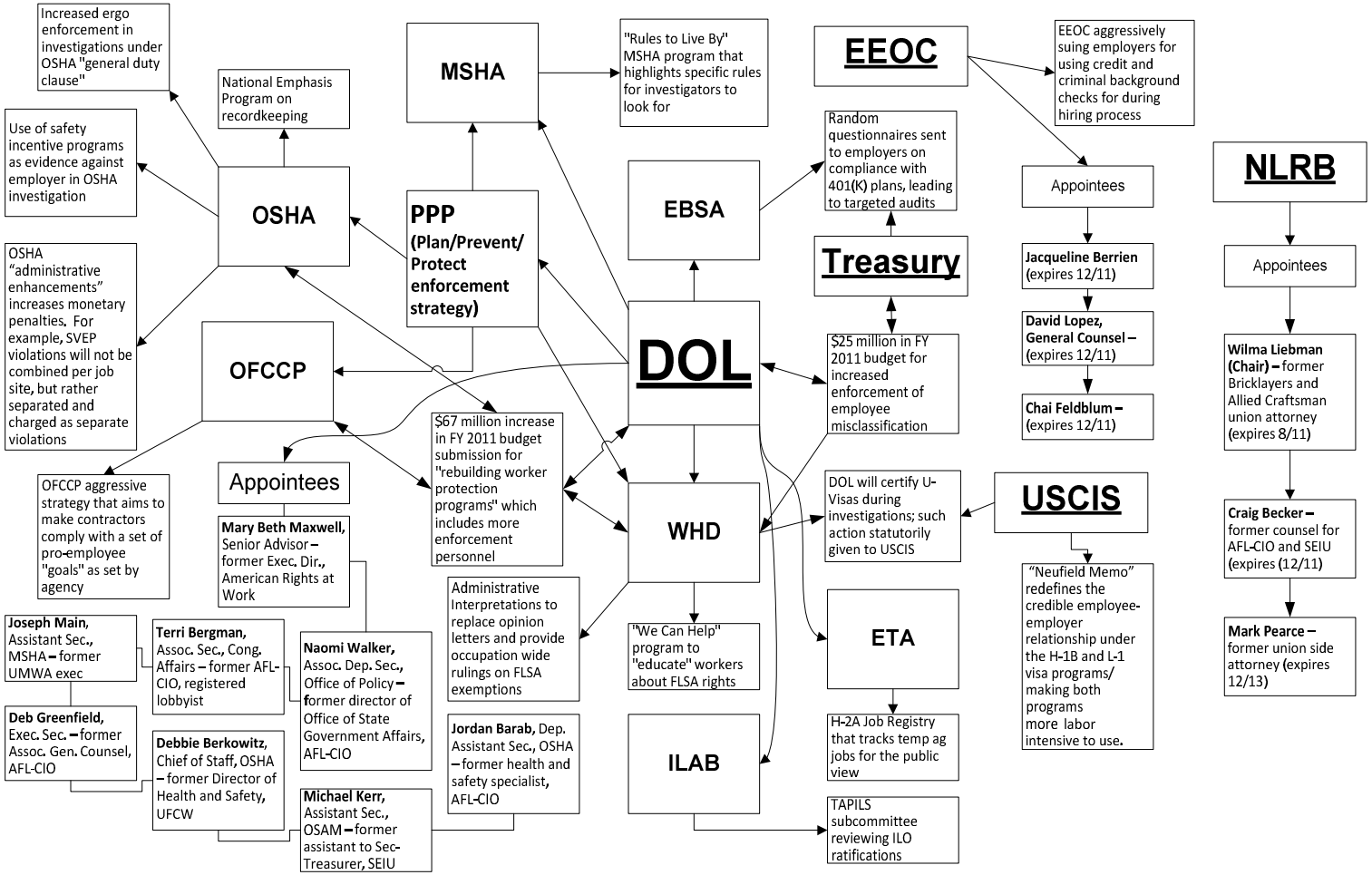
Beyond the SVEP, OSHA has also revised its penalty setting policies in various ways to increase the amount of penalties OSHA will levy on employers. These revisions were the product of a working group that was never announced to the public, and only referenced briefly in the final memo announcing the changes. Among the changes is an increase in the "look back" period from three to five years meaning that an employer will have to have a clean record longer to get a discount, and will similarly be vulnerable to being cited for repeat violations within a five year period rather than the previous three years. Other changes include eliminating a 10% reduction if an employer was in a Strategic Partnership Program. Additionally, this memo announced that under the SVEP program, Area Directors would now have the discretion to cite employers for per-employee level violations instead of grouping violations together for hazards listed under the SVEP. For instance, instead of one violation for exposing employees to a fall hazard, the employer could be cited for each employee that was exposed, thus substantially increasing the amount of the penalty.

OSHA has also looked to use other initiatives to forward their agenda even if there is no regulation to guide them. Under the National Emphasis Program on Recordkeeping where OSHA conducted extensive audits of employers to determine if they were recording injuries appropriately, when determining how to cite an employer for recordkeeping issues, the inspectors were instructed to "take into account the existence of incentive or disciplinary programs that potentially affect the recording of injuries and illnesses," thus making incentive programs part of the citation calculation, and assuming them to have a negative impact on employee reporting, where there is no prohibition on them.

The full impact of these new penalty policies includes not just forcing employers to pay more for violations but making it more likely that employers will challenge their citations thus absorbing more OSHA and DOL resources and delaying resolution of these cases. If there are hazards that need abating, these delays mean more exposure to hazards for employees.

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.



Appendix – Overview of Labor and Immigration Legislation in the 111th Congress

Union and Organizing/Workplace Issues

***Labor Relations First Contract Negotiations Act*, H.R. 243, Rep. Gene Green (D-TX) –** Requires initial contract negotiation disputes to be arbitrated. Under the bill, if an employer and union cannot agree on a first contract within 60 days after certification, the employer and representative of the union must select a "mediator" to resolve any outstanding disputes and if after 30 days after the selection of the mediator, the parties are still unable to agree on the outstanding issues, either party could request the matter be arbitrated by the Federal Mediation and Conciliation Services (FMCS).

***National Labor Relations Modernization Act*, H.R. 1355, Rep. Joe Sestak (D-PA) –** Increases penalties on employers and imposes binding interest arbitration similar to EFCA, but with a small business exemption and longer periods to reach a first contract. The bill also provides for union access to employer premises "to campaign in favor of recognition of the representative, including the opportunity to hold an equal number of meetings with individual employees or groups or employees, and an opportunity to make announcements, display signs, and distribute literature, under the same terms and conditions that the employer engages in such activities."

***Employee Free Choice Act*, S. 560/ H.R. 1409, Sen. Edward Kennedy (D-MA)/ Rep. George Miller (D-CA) –** Requires union recognition if a majority of employees in a bargaining unit sign authorization cards, effectively eliminating NLRB supervised secret ballot election. In addition, and equally problematic, the bill forces first contract negotiations into binding arbitration (by a federally appointed arbitration panel) if the parties fail to reach an agreement within 120 days. Lastly, the bill would increase penalties on employers only.

The bill has 222 original co-sponsors in the House and 39 original co-sponsors in the Senate. Twenty-five House co-sponsors of EFCA in the 110th Congress did not co-sponsor the bill in the 111th, including two Republicans, Rep. Peter King (NY) and Rep. Steve LaTourette (OH). In the Senate, 11 of the 18 Democratic Senators that did not co-sponsor the bill previously co-sponsored the bill in the 110th Congress. They are: Sen. Max Baucus (MT); Sen. Evan Bayh (IN); Sen. Jeff Bingaman (NM); Sen. Kent Conrad (ND); Sen. Byron Dorgan (ND); Sen. Dianne Feinstein (CA); Sen. Herb Kohl (WI); Sen. Mary Landrieu (LA); Sen. Claire McCaskill (MO); Sen. Jon Tester (MT); and Sen. Jim Webb (VA).

***Teaching and Research Assistant Collective Bargaining Rights Act*, S. 813/ H.R. 1461, Sen. Sherrod Brown (D-OH)/ Rep. George Miller (D-CA) –** Overturns the NLRB decision in *Brown University*, 342 NLRB 483 (2004) in which the Board held that graduate student assistants have a predominantly academic, rather than economic, relationship with their school, and thus are not employees under the NLRA. The bill establishes a new definition of employee under the NLRA to include a "student enrolled at an institution of higher education who is performing work for remuneration at the direction of the institution, whether or not the work relates to the student's course of study."

***Patriot Employers Act*, S. 829, Sen. Dick Durbin (D-IL) –** Designates certain companies as "patriot employers" and makes them eligible for preferential tax treatment. "Patriot employers" would "pay at least 60 percent of each employee's health care premiums"; have a position of "neutrality in employee organizing drives"; "maintain or increase the number of full-time workers in the United States relative to the number of full-time workers outside the United States"; pay a salary to each employee "not less than an amount equal to the federal poverty level"; and provide a pension plan.

***Patriot Corporations of America Act*, H.R. 1874, Rep. Janice Schakowsky (D-IL) –** Provides for both contracting and tax preferences for employers that produce at least 90 percent of their goods and do at least 50 percent of their research and development in the United States. In addition, the bill would limit top management's compensation to no greater than 100 times that of their lowest-compensated full-time workers. In order to qualify for

preferential treatment, "patriot corporations" would contribute at least five percent of wages to a portable pension fund, pay at least seventy percent of the cost of a standardized health insurance plan; have a position of neutrality in employee organizing drives; provide for full differential salary and insurance benefits for all National Guard and Reserve employees who are called to active duty; and demonstrate that the entity is not in violation of appropriate federal labor, environmental and consumer regulations.

***Josephine Butler United States Health Service Act*, H.R. 3000, Rep. Barbara Lee (D-CA)** – Creates a United States Health Service, among other things. A provision of the bill specifically mandates neutrality and card check procedures for National Health Service employees; eliminates the distinction between professional and non-professional employees; provides for binding arbitration in certain matters; and ensures that National Health Service employees have a right to strike.

***Worker Eligibility Fairness Act*, H.R. 3048, Rep. Joe Baca (D-CA)** – Removes the food stamp ineligibility of individuals who participate in a strike under the Food & Nutrition Act of 2008.

***Trade Reform, Accountability, Development and Employment Act*, S. 2821, Sen. Brown (D-OH) –** Requires that trade agreements adhere to core labor standards defined by reference to International Labor Organization conventions. The legislation requires that: countries in trade agreements within the United States have in force adequate labor and environmental laws and regulations, have devoted sufficient resources to implementing such laws and regulations and have an adequate record of enforcement of such laws and regulations; a country that is party to a trade agreement with the United States adopt and maintain the core labor standards as part of its domestic laws and regulations and enforce laws directly related to those standards; enforces acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health; and conduct a study of current and pending trade deals to check for compliance with the labor standards provisions.

***Taxpayer Responsibility, Accountability, and Consistency Act*, S. 2882/ H.R. 3408, Sen. John Kerry (D-MA)/ Rep. Jim McDermott (D-WA) –** Effectively eliminates the employer safe harbor provisions for using independent contractors under Section 530 of the Internal Revenue Code. Under this bill, in order for an employer to claim the safe harbor provision, he or she would need to have previous certification from the government that the position is properly classified as an independent contractor. In other words, the new restrictive standard would dictate some form of government involvement in classifying a worker as an independent contractor. The bill would also permit employees to challenge their employment classification, and substantially increase penalties on employers.

***Implementing Management for Performance and Related Reforms to Obtain Value in Every Acquisition Act*, H.R. 5013, Rep. Phil Hare (D-IL) –** Expresses a non-binding Sense of Congress that the Department of Defense should not procure items from any manufacturers in the United States that have violated labor standards as defined under federal law.

Anti-Arbitration

***Arbitration Fairness Act*, S. 931/ H.R. 1020, Sen. Russ Feingold (D-WI)/ Rep. Henry "Hank" Johnson (D-GA) –** Reverses the Supreme Court decision in *Circuit City Stores Inc v. Adams*, which upheld employer policies requiring pre-dispute binding arbitration agreements as a condition of employment. The bill amends the Federal Arbitration Act to make pre-dispute arbitration agreements for employment, consumer, franchise, or civil rights disputes unenforceable.

***Fairness in Nursing Home Arbitration Act*, S. 512/ H.R. 1237, Sen. Mel Martinez (R-FL)/ Rep. Linda Sanchez (D-CA) –** Prohibits pre-dispute arbitration agreements between a long-term care facility and a patient or anyone acting on the patient's behalf.

***Amendment to Defense Appropriations Bill*, S.A. 2588, Sen. Al Franken (D-MN)** – Amendment to the Defense Appropriations bill that forces federal contractors (at any tier) who receive funding through the Defense Appropriations Bill to abandon policies regarding binding arbitration as a condition of employment. The amendment specifically provides that funds appropriated or made available under the Act may not be used for a

contract "if the contractor or a subcontractor at any tier requires that an employee or independent contractor, as a condition of employment, sign a contract that mandates that the employee or independent contractor performing work under the contract or subcontract resolve through arbitration any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention." The Senate passed the amendment by a vote of 68-30 and the bill by a vote of 93-7. On December 19, 2009, President Obama signed the bill containing the Franken Amendment into law.

***Non-Federal Employee Whistleblower Protection Act*, S. 1745, Sen. Claire McCaskill (D-MO)** – Makes any pre-dispute arbitration involving whistleblower protections between federal contractors or those organizations that receive funds from the federal government and their employees' invalid, except those agreed to in the course of collective bargaining.

***Consumer Financial Protection Agency Act*, H.R. 3126, Rep. Barney Frank (D-MA) –**Includes a provision which would give the proposed Consumer Financial Protection Agency the authority to limit or ban pre-dispute arbitration clauses in consumer financial services agreements. The House Financial Services Committee and the House Energy and Commerce Committee approved the bill. The bill was included in the larger Dodd-Frank Wall Street Reform and Consumer Protection Act, which was signed into law on July 21, 2010.

Leave Mandate Issues

***Family and Medical Leave Enhancement Act*, H.R. 824, Rep. Carolyn Maloney (D-NY) –** Lowers the threshold of companies covered by the FMLA from 50 to 25 employees. In addition, the bill also provides up to 24 hours of unpaid leave during any 12-month period, for parents or grandparents to attend parent-teacher conferences or take their children, grandchildren or other family members to a routine medical or dental appointment. Eligible employees would be allowed up to four hours of such leave during any 30-day period.

***Working Families Flexibility Act*, H.R. 1274, Rep. Carolyn Maloney (D-NY) –** Permits an employee to request a change in working conditions, and if an employer denies that request, the employee may pursue a series of meetings, inquiries led by the federal government, administrative law hearings, and ultimately a federal court challenge. At each of these stages, the employee would be afforded legal or union representation. The bill applies to employers with 15 or more employees.

***Family Leave Insurance Act*, H.R. 1723, Rep. Pete Stark (D-CA) –** Creates a federal insurance fund, similar to unemployment insurance, to provide eight weeks of paid FMLA leave to public and private employees who take time off for reasons permitted under the law. Under the bill, the standard for paid leave is "qualifying exigencies." The bill also covers domestic partners, and most importantly, applies to any employer who employs two or more individuals for more than 20 workweeks. Employees would be eligible for paid leave after six months of employment.

***Family and Medical Leave Restoration Act*, H.R. 2161, Rep. Carol Shea-Porter (D-NH)** – Repeals key regulatory changes made to the FMLA promulgated by the Bush Administration. Specifically, the bill eliminates the right of employers to require an employee to use an hour of leave for intermittent FMLA leave; restores the restriction on employers for denying attendance bonuses as a consequence for taking FMLA leave; prohibits an employer from approving or denying FMLA leave based on compliance or noncompliance with employer leave request policies; requires review and approval by DOL or the courts before an employee may voluntary waive his or her FMLA rights; prohibits an employer from directly contacting an employee's medical provider; and restores restrictive "fitness-for-duty" certification rules for employees who take intermittent leave.

***Family Income to Respond to Significant Transitions Act*, H.R. 2339, Rep. Lynn Woolsey (D-CA) –** Directs the Secretary of Labor to make up to six, one year grants to state or local governments to assist families by providing wage replacement for eligible individuals responding to family care giving needs, especially those related to the birth or adoption of a child.

***Domestic Violence Leave Act*, H.R. 2515, Rep. Lynn Woolsey (D-CA) –** Guarantees leave related to domestic violence under the Family and Medical Leave Act (FMLA). The bill allows leave for medical assistance; legal assistance, including the right to attend court proceedings; psychological counseling; or safety planning exercises, related to domestic violence.

The bill also sets up a certification process, where employers would have to rely on written certification from police or court records, documentation provided by a shelter worker, attorney, clergy, or medical or other professional assisting the victim; and/or other corroborating evidence "from any other individual with knowledge of the circumstances which provide basis for the claim," or physical evidence such as photographs or torn or bloody clothes. Where the leave lacks documentation, an employer would have to accept "a written statement describing the domestic violence, sexual assault, or stalking and their effects" as proof of certification.

***Healthy Families Act*, S. 1152/ H.R. 2460, Sen. Edward Kennedy (D-MA)/ Rep. Rosa DeLauro (D-CT) –** Requires employers with 15 or more employees to provide one hour of paid sick leave for every 30 hours worked, up to a maximum of 56 hours (seven days) per year to care for themselves and their family's medical needs. Workers begin accruing sick leave on their first day of employment, and they become eligible to use the accrued time after 60 days. Employers with existing sick-leave policies that are equivalent to the requirements of the bill would not be required to permit an employee to earn additional paid sick time. The leave could be used for an employee's sickness or sickness of a child, parent, family member or any "other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship," as well as needs related to domestic violence.

***Paid Vacation Act*, H.R. 2564, Rep. Alan Grayson (D-FL) –** Requires all companies with at least 100 employees to provide at least one week of paid vacation each year after one year of employment. The bill applies to all full-time and part-time employees who work at least 25 hours a week. Three years after enactment, companies with 100 or more employees would have to offer their employees two weeks of paid vacation, and employers with at least 50 employees would be required to provide one week off.

***Balancing Act*, H.R. 3047, Rep. Lynn Woolsey (D-CA) –** Combines bills previously introduced including the "Family Leave Insurance Act of 2009"; the "Family and Medical Leave Enhancement Act of 2009"; the "Domestic Violence Leave Act"; and the "Healthy Families Act."

***Family and Medical Leave Inclusion Act*, S. 3680/H.R. 2132, Sen. Richard Durbin (D-IL)/ Rep. Carolyn Maloney (D-NY) –** Amends the FMLA by expanding coverage to include same-sex spouses, domestic partners, a child of a domestic partner, parents-in-law, adult child, sibling or a grandparent who has a serious health condition.

***Security and Financial Empowerment Act*, S. 1740, Sen. Patty Murray (D-WA) –** Guarantees an employee's time off from work under the FMLA or other available leave to obtain legal assistance and to attend court proceedings related to domestic violence. The bill also provides assurance that an employee who is forced to leave a job due to abuse would be eligible for unemployment compensation, and would prohibit employers and insurance providers from basing decisions on an individual's history as a victim of abuse.

***Emergency Influenza Containment Act*, H.R. 3991, Rep. George Miller (D-CA) –** Requires employers with 15 or more full or part-time employees to provide five paid sick days in a 12-month period if the "employer instructs or advises the employee" not to return to work if they "believe that the employee has symptoms of a contagious illness, or has been in close contact with an individual who has symptoms of a contagious illness." Under the bill, an employer is prohibited from discharging, disciplining, or discriminating against any employee who complies with the employer's discretionary judgment, or files any complaint against the employer.

***Pandemic Protection for Workers, Families, and Businesses Act*, S. 2790/ H.R. 4092, Sen. Christopher Dodd (D-CT)/ Rep. Rosa DeLauro (D-CT) –** Mandates that employers provide up to seven days of sick leave for employees affected by the H1N1 epidemic. Employees are eligible for leave if they had the virus, or if their children had the virus, or if their child's school was closed because of H1N1. The bill offers a safe harbor for employers that provide

this level of leave for similar purposes, although questions remain about exactly what type of leave an employer would have to provide to qualify.

Worker Adjustment and Retraining Notification (WARN) Act Expansion

***Alert Laid Off Employees in Reasonable Time Act*, H.R. 2077, Rep. Luis Gutierrez (D-IL) –**Expands the definition of "mass layoff" under the WARN Act to incorporate actions taken by an employer at multiple locations, rather than at a single site of employment, and would also provide double damages.

***Family Income to Respond to Significant Transitions Act*, H.R. 2339, Rep. Lynn Woolsey (D-CA) –** *See discussion under Leave Mandates Issues*.

***Forewarn Act*, S. 1374/ H.R. 3042, Sen. Sherrod Brown (D-OH)/ Rep. George Miller (D-CA) –** Amends the WARN Act in several important ways, including lowering the threshold so that more small businesses are covered depending upon the action taken, changing the definition of "mass layoff" and "plant closing" to incorporate many more personnel actions, increasing the notice period from 60 to 90 days, doubling existing damages, and providing for government enforcement.

***Employ America Act*, S. 2804, Sen. Bernie Sanders (I-VT)** – *See discussion under Immigration Issues*.

***Fighting for American Jobs Act*, H.R. 4280, Rep. Peter Visclosky (D-IL)** – Imposes a new recordkeeping requirement that would require employers receiving "contracts, grants, loans or loan guarantees" from a federal agency to report on the "number of individuals employed by the business enterprise in the United States; the number of individuals employed by the business enterprise outside the United States; and a description of the wages and benefits being provided to the employees of the business enterprise in the United States." Beginning one year after the date of enactment, the employer also has to provide a written certification that includes "the percentage of the workforce of the business enterprise employed in the United States that has been laid off or induced to resign, and the percentage of the total workforce of the business enterprise that has been laid off or induced to resign." If the percentage of the total workforce in the United States that has been laid off or induced to resign is greater than the rest of the workforce, the employer would be blacklisted from receiving any federal grants, loans, etc.

Davis-Bacon Act

***American Recovery and Reinvestment Act ("Stimulus")*, S. 336/ H.R. 1, Sen. Daniel Inouye (D-HI)/ Rep. David Obey (D-WI) –** Requires prevailing wage rates for: green energy project loans; discretionary grants for surface transportation projects; capital assistance for high speed rail projects; green retrofit investments; projects financed with the proceeds of any qualified bond under the Act; and all other stimulus project sites. On February 17, 2009, President Obama signed the Stimulus bill into law.

***Water Quality Investment Act*, H.R. 1262, Rep. James Oberstar (D-MN) –** Extends the Davis-Bacon prevailing wage requirement to state and local projects receiving grants or loans through the Clean Water State Revolving Fund. On March 12, 2009, the House passed the bill.

***21st Century Green-High Performing Public School Facilities Act*, H.R. 2187, Rep. Ben Chandler (D-KY) –** Applies Davis-Bacon Act prevailing wage to projects covered under the bill. On May 14, 2009, the House passed the bill.

***Water Infrastructure Financing Act*, S. 1005, Sen. Ben Cardin (D-MD) –** An amendment offered by Sen. Cardin requires workers be paid prevailing wages on projects financed by the bill by way of "a grant, loan, loan guarantee, refinancing, or any form of financial assistance provided under this Act." The bill was approved by committee vote.

***American Clean Energy and Security Act*, H.R. 2454, Rep. John Dingell (D-MI) –** Contains an amendment expanding the existing Department of Energy loan guarantees programs, and requires projects financed in whole or part by those loans to Davis-Bacon prevailing wage requirements. The House Energy and Commerce Committee

also approved an amendment introduced by Rep. Betty Sutton (D-OH) that would broadly require prevailing wage rates be paid to construction workers on all federally assisted construction projects related to the bill, but would provide exemptions for all residential projects.

The manager's amendment to H.R. 2454 also contains a provision that would apply Davis-Bacon Act protections to manufacturing, energy production, and construction projects that receive emission allowances or funding with an exception for homes and apartment buildings.

***American Worker Transition and Community Assistance Act*, S. 2742, Sen. Bob Casey (D-PA) –** Requires all work for projects under the bill to be paid Davis-Bacon prevailing wages. The bill provides job training/re-training and job search assistance for workers adversely affected by Federal climate change policy.

***Strengthening Our Economy Through Employment and Development (SEED) Act*, S. 2952, Sen. Al Franken (D-MN) –** Creates a "Public Sector Energy Efficiency Promotion Fund" to make grants available to states, localities, and tribes to hire workers to retrofit public housing, public buildings, schools, and libraries to increase energy efficiency. Also requires Davis-Bacon prevailing wages to be baid for all projects under this bill.

***Gulf Coast Restoration Act*, H.R. 5654, Rep. Jim McDermott (D-WA) –** In response to the oil spill in the gulf coast, this bill requires that states receiving federal assistance after an environmental disaster, must provide reasonable assurances that employees and contractors employed on projects for which the assistance is provided, are paid Davis-Bacon prevailing wages.

Immigration Issues

***H-1B and L-1 Visa Reform Act*, S. 887/ H.R. 5397, Sen. Dick Durbin (D-IL)/ Rep. Bill Pascrell, Jr. (D-NJ) –** Makes obtaining an H-1B or L-1 Visa much more difficult for employers by adding new requirements, fees, and penalties to the program. Specifically, the bill eliminates entry-level wage classifications for H-1B workers by forcing employers to pay Wage Level II for any H-1B worker and applies H-1B dependent requirements to all H-1B employers, attestation to non-displacement of U.S. workers 180 days before and after filing an H-1B petition, and elimination of non-displacement exception for H-1B workers with a Master's degree or paid more than $60,000 per year. The bill prohibits the placement of an H-1B employee at the worksite of another employer, unless the Department of Labor issues a waiver.

Lastly, the bill prohibits placement of an L-1 employee at the worksite of another employer for a period of more than 1 year (cumulative), unless the Department of Homeland Security issues a waiver. A number of new and/or increased fines together with new or enhanced enforcement mechanisms for both visa categories are part of this legislation.

***Employ America Act*, S. 2804, Sen. Bernard Sanders (I-VT) –** Prohibits the Secretary of Homeland Security from approving an employer petition for any employment visa unless the employer has certified to the Secretary of Labor that the employer: has not provided a notice of a mass layoff during the 12-month period immediately preceding the alien's scheduled hiring date; and does not intend to provide a notice of a mass layoff after receiving visas.

If an employer provides a notice of a mass layoff after the approval of a visa, any visas approved during the most recent 12-month period for such employer shall expire 60 days after the date on which such notice is provided and shall not be subject to judicial review.

***Comprehensive Immigration Reform for America's Security and Prosperity Act*, H.R. 4321, Rep. Solomon Ortiz (D-TX) –** Establishes a commission to arbitrarily set future visa levels while not providing a program to allow business to access the workers they need. CIR ASAP increases fees on business, while increasing business enforcement actions.

***H-2B Program Reform Act,* H.R. 4381, Rep. Zoe Lofgren (D-CA) –** Amends the Immigration and Nationality Act to make any alien seeking to enter the country as an H-2B visa (nonagricultural temporary/seasonal worker)

inadmissible unless the Secretary of Labor certifies to the Secretary of State and the Secretary of Homeland Security that: there are insufficient U.S. workers to perform temporary labor or services; and such aliens' employment will not adversely affect similarly-employed U.S. workers' wages and working conditions. The bill requires an employer to pay a $100 application fee and a $100 per-worker fee.

***POWER (Protect Our Workers from Exploitation and Retaliation) Act*, S. 3207, Sen. Robert Menendez (D-NJ) –** Expands the application of the "U visas" (for victims of certain crimes) to minor civil violations and, in most cases, removes DHS discretion to override the recommendation of either DOL or the NLRB. The bill allows people in deportation hearings to bring minimal workforce claims, even in bad faith, and receive a "U visa" avoiding deportation.

***Combat Illegal Immigration Through Employment Verification Act*, H.R. 5265, Rep. Leonard Boswell (D-IA)** – Mandates the use of Electronic Employment Verification Systems by employers with harsh penalties and sanctions. The bill also changes the standard of liability for employers from "knowing" to "reckless" and allows employers to be held liable for their subcontractors' violations.

Civil Rights and Discrimination Issues

***Lilly Ledbetter Fair Pay Act*, S. 181/ H.R. 11, Sen. Barbara Mikulski (D-MD)/ Rep. George Miller (D-CA) –** Effectively abolishes the statutes of limitation for many types of pay discrimination claims under the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967. The bill codifies the "paycheck rule" where claims may be filed years after the alleged act of discrimination, centered on the theory that each paycheck re-starts the statute of limitations. The bill was original introduced to overturn the decision in to *Ledbetter v. Goodyear Tire and Rubber Co*., 550 U.S. 618 (2007).

On January 22, 2009, the Senate passed the bill, and on January 27, 2009, the House also passed it. As his first major bill signing, President Obama signed the bill into law on January 29, 2009.

***Paycheck Fairness Act*, S. 182/ H.R. 12, Sen. Hillary Clinton (D-NY)/ Rep. Rosa DeLauro (D-CT) –** Significantly limits employer defenses to Equal Pay Act claims; permits unlimited punitive and compensatory damages for strict liability violations of the law; and makes it easier to bring class action suits by using an opt-out method (as opposed to the current opt-in method). The bill provides that employers asserting that a pay differential between male and female employees is "based on factors other than sex" must prove those factors are "job-related" and "consistent with business necessity." The House passed the bill on January 9, 2009.

***Fair Pay Act*, S. 904/ H.R. 2151, Sen. Tom Harkin (D-IA)/ Del. Eleanor Holmes Norton (D-DC) –** Requires employers to provide equal pay for unequal jobs that involve comparable skill, effort, responsibility, and working conditions.

***Civil Rights Tax Relief Act*, S. 1360/ H.R. 3035, Rep. John Lewis (D-GA)/ Sen. Jeff Bingaman (D-NM) –** Eliminates the taxation of noneconomic damages and permits income averaging for back pay received in a lump sum for those who were subject to discrimination in the workplace or other workplace violations.

***Equal Employment For All Act*, H.R. 3149, Rep. Steven Cohen (D-TN) –** Prohibits the use of consumer credit checks by employers as part of the hiring or firing process, unless the job involves national security, Federal Deposit Insurance Corporation clearance, or positions of "significant financial responsibility," such as bank manager, loan officer, or financial manager. The bill also prohibits employers from asking applicants to voluntarily submit to credit checks.

***Protecting Older Workers Against Discrimination Act*, S. 1756/ H.R. 3721, Sen. Tom Harkin/ D-IA)/ Rep. George Miller (D-CA) –** Amends the Age Discrimination in Employment Act to create a mixed motive claim. The bill also specifies that plaintiffs may use the evidentiary framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to prove a violation of the Act. Similar to Title VII, the bill establishes a defense so that damages are significantly limited if an employer can demonstrate that it would have taken the same action regardless of the improper motive. The legislation was introduced in response to *Gross v. FBL Financial*, 129 S. Ct. 2343 (2009). In

that decision, the Supreme Court clarified that under the ADEA, plaintiffs claiming disparate treatment must show that age was the determining factor in the alleged discrimination, rather than just one of several factors.

***Housing Non-discrimination Act*, H.R. 4828, Rep. Edolphus Towns (D-NY) –** Amends Title VII of the Civil Rights Act to prohibit discrimination based on sexual orientation or gender identity in public accommodations or facilities.

***Gender Violence Bill*, H.R. 4885, Rep. Carolyn Maloney (D-NY) –** Requires that if an employer's negligent conduct results in a person's committing a crime of violence motivated by gender against another person on premises that the employer controlled, the employer would be liable for the "recovery of compensatory and punitive damages, injunctive and declaratory relief." In order for an employer to be held liable for such a negligent act, the crime would have to be proven "by a preponderance of the evidence, to be motivated by gender."

Occupational Safety and Health Administration (OSHA) Issues

***Record-Keeping*, H.R. 242, Rep. Gene Green (D-TX) –** Directs the "Secretary of Labor to revise regulations concerning the recording and reporting of occupational injuries and illnesses under the Occupational Safety and Health Act of 1970." The bill also requires "site-controlling employers to keep a site log for all recordable injuries and illnesses occurring among all employees on the particular site, whether such employees are employed directly by the site-controlling employer or are employed by contractors or temporary help or employee leasing services."

***Worker Protection Against Combustible Dust Explosion and Fires Act*, H.R. 849, Rep. George Miller (D-CA) –** Requires OSHA to bypass regular notice and comment rulemaking procedures and issue an interim final standard on combustible dust within 90 days of enactment, followed by a final standard within 18 months. The interim final standard would apply to manufacturing, processing, blending, conveying, repackaging, and handling of combustible particulate solids and their dusts, including organic dusts (such as sugar, candy, paper, soap, and dried blood), plastics, sulfur, wood, rubber, furniture, textiles, pesticides, pharmaceuticals, fibers, dyes, coal, metals (such as aluminum, chromium, iron, magnesium, and zinc), fossil fuels, and others determined by the Secretary, but would not apply to processes already covered by OSHA's standard on grain facilities (29 C.F.R. 1910.272).

The bill mandates: a hazard assessment; written programs that include hazardous dust inspection, testing, housekeeping, and control; engineering, administrative, and operating procedures for control of fugitive dust emission, and ignition sources; housekeeping controls for accumulation of combustible dust; building design; explosion protection; employee participation in hazard assessment, development of and compliance with the written program, and other elements of hazard management; and written safety and health information and training for employees. The legislation also requires the agency to revise its hazard communication standard within six months to include combustible dust hazards.

***Ensuring Worker Safety Act*, H.R. 4864, Rep. Dina Titus (D-NV) –** Provides the Secretary of Labor with greater oversight over state-based OSHA plans, and requires the Comptroller General to complete a review of state-based OSHA plans every five years to evaluate those plans. The legislation was introduced in response to accidents in Nevada, where the state-based OSHA was found to be not properly performing its duties.

***Corporate Injury, Illness and Fatality Report Act*, H.R. 2113, Rep. Phil Hare (D-IL) –** Requires employers with more than one establishment and more than 500 employees to maintain record on "the number and rates of work-related deaths, injuries, and illnesses and compliance data" and "the total number of violations and any citations issued as a result of such violations." The records must be updated annually.

***Protecting Workers from Imminent Dangers Act*, H.R. 2199, Rep. Tim Bishop (D-NY) –** Empowers OSHA to immediately halt work under extreme conditions if workers are found to be in imminent danger. "Imminent danger" is defined as a risk "to safety or health that could reasonably be expected to cause death, serious physical harm, or permanent impairment of health or functional capacity of employees if not addressed immediately."

***Alexander L. Booker Child Protection Construction Site Safety Act*, H.R. 3094, Rep. Donna Edwards (D-MD) –** Mandates OSHA regulations to require that signs and symbols be on prominent display and in plain language when

a hazard exists, even when work is not being performed. Further, employers must maintain adequate and sufficient barricades to prevent access to dangerous worksites.

***Protecting America's Workers Act*, S. 1580/ H.R. 2067, Sen. Edward Kennedy (D-MA)/ Rep. Lynn Woolsey (D-CA) –** Extends OSHA protections to federal, state and local government employees and others not currently covered. The bill also increases civil and criminal penalties and adjusts those amounts for inflation, expands whistleblower protections, creates a right for employees and workplace accident victims to be heard during an investigation, and removes the requirement for a workplace death before criminal penalties can attach.

***Robert C. Byrd Miner Safety and Health Act*, H.R. 5663, Rep. George Miller (D-CA) –** Reforms OSHA and MSHA, including provisions previously inserted in the discussion draft version of the "Protecting America's Workers Act" such as increased civil and criminal penalties, enhanced whistleblower protections, expanded rights of family members of injured workers to participate in settlement negotiations, and the abatement of hazardous conditions during the contest period for serious violations. This bill would also reduce the intent necessary for criminal penalties from "willful" to "knowing" and make officers and directors of companies personally accountable for criminal penalties. The bill was approved by the House Education and Labor Committee on July 21, 2010.

***Nurse and Health Care Worker Protection Act*, S. 1788/ H.R. 2381, Rep. John Conyers (D-MI)/ Sen. Al Franken (D-MN) –** Directs the Secretary of Labor to issue a new ergonomics regulation as it relates to nurses and medical lifting and in particular, mandating the use of mechanical lifts for patients, and allows an employee to refuse an assignment if they believe that the employer has not complied with the standards required in the bill.

The bill also creates a right of private action allowing employees to sue their employer if they have been "discharged, discriminated or retaliated against" for asserting rights described in the bill.

Fair Labor Standards Act (FLSA) Issues

***Federal Living Wage Responsibility Act*, H.R. 1334, Rep. Luis Gutierrez (D-IL) –** Requires any employer receiving a federal contract exceeding $10,000 to pay their full-time workers an hourly wage of not less than the amount of the federal poverty level for a family of four, plus a locality adjustment determined by the Secretary of Labor to cover fringe benefits (e.g., medical and health insurance, retirement contributions, life and disability insurance, and paid time off) not provided by the employer

If an employer violates this Act, his or her contract may be canceled, held liable for restitution and a five year ban from federal contracts.

***WAGES (Working for Adequate Gains for Employment in Services) Act*, H.R. 2570, Rep. Donna Edwards (D-MD) –** Establishes a base minimum wage for tipped employees. The bill amends the FLSA to increase the minimum wage tip credit from 50 percent of the minimum wage as of August 20, 1996 (or $2.13 per hour) to $3.75 per hour. The bill also proposes indexing the trip credit to 70 percent of the minimum wage by 2012.

***LAW (Living American Law) Act*, H.R. 3041, Rep. Al Green (D-TX) –** Amends the FLSA to provide for the calculation of the minimum wage based on the federal poverty threshold for a family of two (one adult and one child). The bill indexes the minimum wage to 15 percent above the poverty line for a full-time worker, or approximately $8.20 per hour. The minimum wage would increase every four years to remain at least 15 percent above the poverty threshold.

***Wage Theft Prevention Act*, H.R. 3303, Rep. George Miller (D-CA) –** Suspends the statute of limitations for cases being investigated by the Department of Labor. The statute of limitations is suspended from the date an employer is informed of an investigation until the agency notifies the employer that the investigation has concluded.

***Children's Act for Responsible Employment*, H.R. 3564, Rep. Lucille Roybal-Allard (D-CA) –** Increases civil penalties for child labor law violations to no less than $500 and no more than $15,000 per violation, and imposes new penalty requirements of no less than $15,000 and no more than $50,000 for each violation that "causes the serious injury, serious illness, or death of any employee under the age of 18 years." The bill also doubles penalties

for willful violations, and adds a criminal penalty of up to five years in jail if the willful violation results in death or permanent disability.

Under the bill, agricultural employers are required to report a work-related serious injury, illness, or work-related death, five days after the incident. Failure to report any of these events may result in a civil fine of up to $7,000 per violation. The legislation requires the Secretary of Labor to issue final rules within 180 days of the date of enactment, and would take effect no later than 30 days after the date on which the final rules are published in the *Federal Register*.

***Employee Misclassification Prevention Act*, S. 3254/ H.R. 5107, Sen. Sherrod Brown (D-OH)/ Rep. Lynn Woolsey (D-CA) –** Expands current FLSA recordkeeping requirements to all workers, including non-employees. The bill also mandates employers to keep records that detail the accurate employment status of each worker, and provide written notification to each worker of such status. Any violation of the recordkeeping requirements, including when an employer misclassifies an employee would result in increased penalties on employers. The bill creates a presumption that an individual is an employee, not an independent contractor if the employer has not complied with FLSA recordkeeping requirements. The employer may rebut the presumption with "clear and convincing evidence."

The bill also requires states to investigate and audit employers who may be misclassifying employees, in order for those states to continue to receive federal unemployment insurance grants.

***Direct Care Workforce Empowerment Act*, S. 3696/ H.R. 5902, Sen. Bob Casey (D-PA)/ Rep. Linda Sanchez (D-CA) –** Narrows the FLSA to essentially exclude home health care providers from being covered under the companionship exemption. Specifically, the FLSA would now require the employee in a domestic service employment to do such work on a casual basis (like the current babysitter exemption). In effect, the bill excludes from overtime exemptions, home health care workers who perform such work irregularly or intermittently or whose vocation is home health care.

Appendix- Regulatory Initiatives: the New Battleground

EEOC

Genetic Information Nondiscrimination – Employment Provisions

On March 2, 2009, the EEOC published proposed regulations to implement Title II (the employment title) of the Genetic Information Nondiscrimination Act. While generally consistent with the law, the EEOC's proposal needs further clarification with respect to exceptions such as permitting employers to operate voluntary wellness programs and with respect to when family medical history received by an employer is inadvertently acquired.

The Chamber, working with a coalition of employer associations, filed joint comments on May 1, 2009, focusing on these issues.

The EEOC sent its final rule to OMB for interagency review on August 7, 2009. However, issues related to wellness programs held up approval of the final regulation. OMB released the final rule on April 8, 2010. It is likely that the rule will again need approval from the EEOC before it can be published in the Federal Register.

ADA Amendments Act

On September 25, 2008, the ADA Amendments Act was signed into law. After failing to approve a proposed rule at its meeting on December 11, 2008, the EEOC approved a modified proposed rule at its meeting on June 17, 2009, and sent it to OMB for interagency review on June 18. The proposal was published in the Federal Register on September 23, 2009.

The Chamber filed comments on the NPRM on November 23, 2009 noting where the proposal was consistent with the compromise legislation and where it was not, offering several suggestions for improvement.

The EEOC had anticipated finalizing the amendments to the regulations in July, 2010, which did not happen.

ADEA Disparate Impact in Light of Meacham

In March, 2008, the EEOC published an NPRM on the issue of disparate impact burdens of proof under the Age Discrimination in Employment Act in light of the Supreme Court's decision in *Smith v. City of Jackson*. Before it could issue its final rule, the Supreme Court again addressed the issue in *Meacham v. Knolls Atomic Power Laboratories*. On February 18, 2010 the EEOC published an NPRM on the issue. The Chamber filed comments opposing the EEOC's approach on April 19, 2010. The EEOC's regulations could make it easier for plaintiffs to bring disparate impact cases and make it tougher for employers to defend illegitimate claims.

The EEOC has announced that it anticipates finalizing the regulations in January, 2011.

FAR

Project Labor Agreements

On April 13, 2010, the FAR Councils finalized regulations implementing Executive Order 13,502, which encourages the use of project labor agreements ("PLA") on large scale federal construction projects greater than $25 million. The new regulations are largely a recitation of the Executive Order and do not provide much guidance to employers, especially non-union employers, who may wish to bid on a project that could be covered by a PLA.

The FAR Councils issued their proposal on July 14, 2009. The Chamber filed comments on August 13, 2009 suggesting improvements to the regulations and sharply critical of the FAR Councils' failure to adhere to regulatory requirements, such as the Regulatory Flexibility Act.

E-Verify for Federal Contractors

Despite two delays by the Obama administration, the E-verify rule is in full effect. This is the third time the implementation has been postponed. The Chamber is challenging the use of an Executive Order to circumvent Congress to make E-Verify use mandatory for qualified federal contractors and subcontractors. The federal government earlier agreed to the Chamber's request to delay the January 15, 2009 implementation date of the rule until February 20, 2009 in order to accommodate the Chamber's lawsuit challenging the rule. A federal district court then stayed the case until May 21, 2009. *Chamber of Commerce of the United States of America, et al. v. Napolitano*.

Non-Reimbursement of Labor Relations Costs

On January 30, 2009, President Obama signed Executive Order 13,497 that prohibits federal contractors from seeking reimbursement for certain labor relations costs, for example, communicating with employees during a union organizing campaign. The FAR Councils proposed regulations on April 14, 2010 to implement the Executive Order. The Chamber filed comments opposing the Executive Order and proposed regulation on June 14, 2010 focusing on the lack of legal authority for this policy that would have a chilling effect on employers exercising federally-protected free speech rights.

"Highroad" Contracting

While not officially introduced, it is widely believed the FAR Council will promulgate rules that will establish a system designed to award federal contracts to contractors who adopt certain labor policies as determined by the government. Among the factors under consideration include payment of a "living wage" to a contractor's entire workforce, affordable health insurance, an employer-funded retirement plan, and paid sick days. Such a regulation would give the administration a mechanism to favor contractors that meet its high road conditions with the DOL in charge of scoring every contractor on these metrics. Another possible provision would require each agency add a "labor standards advocate."

NMB

Easing Union Organizing under the Railway Labor Act

On May 11, 2009, the National Mediation Board (NMB) published a final rule that will make union organizing significantly easier under the Railway Labor Act (which applies to the railroad and airline industries). At the core of this proposal is changing the requirement that a majority of the workers in the craft or class of workers vote for unionization to simply a majority of those who cast votes. The rule change does not include a recommendation by the Chamber that any such proposal also include mirror image processes to decertify a union.

The NMB published its proposal on November 3, 2009. On December 7, it held a public meeting on the proposal in which the Chamber participated. The Chamber filed comments opposing the proposal on January 4, 2010. The National Chamber Litigation Center (NCLC) has decided to join a legal challenge to the rule and filed a motion to intervene in a lawsuit brought by the Air Transport Association on May 24, 2010. On June 25, the District Court denied our attempt to block the rule. The decision is now on appeal before the D.C. Circuit Court of Appeals.

DOL

WHD

Non-displacement of Qualified Workers Under the Service Contract Act

On January 30, 2009, President Obama signed Executive Order 13,495 that requires contractors under the Service Contract Act to offer the employees of a contractor that they displace the right of first refusal for employment. On March 19, 2010, DOL issued a Notice of Proposed Rulemaking. On May 18, the Chamber submitted comments critical of several provisions of the regulations and offering suggestions for improvement.

Revising Recently Issued FMLA Regulations

Regulations implementing amendments to the FMLA to make specific types of leave available to military personnel, as well as other changes intended to give employees and employers greater clarity and help restore balance to the implementation of the FMLA were published November 17, 2008, and took effect January 16, 2009. The Department has indicated that it is reviewing the implementation of these new military family leave amendments and other revisions of the current regulations with a proposal scheduled for November, 2010. Former Bush DOL personnel have warned that the Obama DOL is intent on reversing some of the beneficial regulatory changes achieved in the last administration.

"Enhancing" Transparency of FLSA Recordkeeping

Another anticipated proposed rule from the Wage and Hour Division will seek to greatly tighten 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, including independent contractors. Employers would be forced to provide such analysis to employees and WHD investigators. Similar OSHA and OFCCP initiatives will also require employers to produce reports of a workers' employment status.

Eliminating the FLSA Companionship Exemption

The Wage and Hour Division plans to "examine" the companionship services exemption as it pertains to domestic service. The Division claims that due to a major shift in the home health care industry, it is necessary for DOL to update the law. While DOL has not specifically detailed what type of updates to the law are planned, federal legislation was introduced that would require any in-home, health care worker to be providing services on a "casual basis," in order to receive the exemption (similar to the babysitting exemption). Adding the "casual basis" requirement would exclude every professional home health care worker.

DOL projects the regulation will be released during the Fall of 2011.

OLMS

Notice of Employee Rights under Labor Laws

On May 20, 2010, DOL published regulations implementing Executive Order 13,496, which requires federal contractors to post a notice of employee rights under labor laws. The Department had issued its proposed rules on August 3, 2009.

While the Department's initial rules would have required contractors to post a heavily biased notice, the final proposal responded to several of our concerns and included several significant clarifications and improvements. For example, the Department made it clear that it does not intend to enforce the substantive rights listed on the poster and that enforcement will continue to remain within the province of the National Labor Relations Board. Unfortunately, the rule also includes many provisions with which we strongly disagree, such as its application to small contractors and to contactors producing commercial items.

Rollback of Union Financial Disclosure Regulations—Phase I

On October 13, 2009, DOL finalized its withdrawal of enhancements that were made to union financial disclosure rules late in the Bush Administration. The enhanced disclosure rules would have created additional disclosures under the LM-2 form and would have created a process to revoke a small labor organizations ability to use simplified disclosure forms after it had been found in noncompliance with disclosure requirements.

DOL proposed the withdrawal on April 21, 2009. The Chamber filed comments opposing the regulations on June 22, 2009.

Rollback of Union Financial Disclosure Regulations—Phase II

On February 2, 2010, DOL issued an NPRM that would continue the rollback of union financial disclosure regulations. The proposal would make it easier for nearly 2,000 union trusts to evade reporting requirements because, although they are union controlled or union dominated, they are not "wholly owned" subsidiaries. The Chamber filed comments in opposition to the proposal on April 5, 2010.

Reconsideration of Union Officer and Employee Financial Disclosure Regulations

DOL indicated in its 2009 semi-annual regulatory agenda that it plans to issue an NPRM reviewing changes that were made to the LM-30 disclosure reports for union officers and employees. On September 1, 2009 the DOL announced that it was seeking approval from OMB for union officers and employees to submit the old forms instead of the new forms pending completion of its anticipated rulemaking. It has missed its August 2009 projected date for publication of the NPRM, but sent a proposed rule for interagency review on April 21, 2010.

Employer and Consultant Reporting Under the LMRDA's Persuader Regulations

DOL 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. The Chamber submitted a short statement at the meeting.

The administration will likely propose a very narrow interpretation of advice, similar to what was attempted at the end of the Clinton Administration, that 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 problematical for employers and chill exercise of free speech rights.

DOL has announced that it plans on issuing the NPRM in November, 2010.

OSHA

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. Such a regulation would help generate data that could be used to support some future effort on ergonomics. A public meeting was held on March 9, 2010. The Chamber leads the employer coalition responding to this issue and filed comments opposing the proposal on March 30.

Exposing Companies in OSHA Consultation Programs to Inspections

OSHA operates several programs to assist employers in identifying and correcting workplace safety issues. To entice employers into these programs, there has been a firewall between the consultation services and OSHA's enforcement activities, or employers were granted exemptions from inspections (except in the cases of accidents, injuries, or fatalities) if they met certain standards. To follow up on their strong enforcement-focused rhetoric, the Obama OSHA has announced its intention to revise the regulations covering their On-site Consultation Program to allow sites under going consultation to be referred to inspection officers for enforcement. Furthermore, they intend to revise the regulations governing the Safety and Health Achievement Recognition Program (SHARP)—a program that provides "incentives and support to small employers to develop, implement, and continuously improve effective safety and health programs at their workplaces"—so that companies participating in it will be subject to inspections regardless of whether they meet SHARP criteria. Such changes will likely result in these

programs losing participants and therefore justifying less resources in the future. The Obama OSHA had announced that this regulation would be proposed in February, 2010 and in effect by October, 2010.

ETA

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. 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.

OFCCP

Federal Contractor Affirmative Action Obligations under the Rehabilitation Act

On July 23, 2010, DOL published an advanced notice of proposed rulemaking 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 solicits comments from the public on 18 separate questions. The Chamber plans to file comments in response to the ANPRM by the September 21 deadline. It is possible that the Department could propose changes to the regulations that will significantly complicate employer compliance. On the other hand, there may be things that DOL could do to improve implementation with section 503 that do not impose substantial burdens. The Chamber intends to provide comments that will assist the Department in developing a proposal that is more towards the latter approach than the former.

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

DOL has announced that it plans to publish an advanced notice of proposed rulemaking in December 2010 that will seek to strengthen affirmative action requirements by requiring federal contractors to conduct more substantive analyses of recruitment and placement actions under the VEVRAA and the use of numerical targets to measure effectiveness. However, on July 2, 2010, the Department sent a proposed rule for interagency review. At this time, it is not clear why the Department appears to have changed its plan to first issue an advanced notice of proposed rulemaking.

Construction Contractor Affirmative Action Requirements

DOL has announced that it intends to issue an NPRM in January, 2011, to update affirmative action requirements applicable to federal construction contractors.

Appendix- Sub-Regulatory Initiatives: Substantive Changes Without Accountability

"We Can Help" (DOL) – Secretary Solis kicked off a nation-wide campaign called "We Can Help" that seeks to "educate" workers and workers' groups about their rights under various federal labor laws including the Fair Labor Standards Act ("FLSA"), Family Medical Leave Act ("FMLA") and the Davis-Bacon Act. The ostensible goal of such a major program is to increase enforcement against employers by giving employees the tools and information to report alleged violations. So far, "We Can Help" has not created new procedure or rules, but the details of the program stemmed from stakeholder meetings with unions, employee rights groups and the plaintiff's attorney groups.

FY 2011 Budget for Worker Protection (DOL) – As part of President Obama's FY 2011 budget request, DOL seeks a $67 million increase for "rebuilding worker protection programs." This money will be used specifically to protect the "health, safety, wages, working conditions, and retirement security" of workers. A sizeable portion of this request will likely fund more enforcement personnel and future regulatory efforts targeting employers.

FY 2011 Budget for Misclassification Enforcement (DOL) – Another request in Obama's FY 2011 budget targets employee misclassification. DOL requested an additional $25 million for a joint enforcement program with the Treasury Department to target the use of independent contractors. Specifically, the joint program includes 100 new enforcement personnel, as well as competitive grants to states to crack down on independent contractors.

Workers' Rights Agreement with Mexico (DOL) – Secretary Solis signed a "Workers' Rights Joint Declaration" with the Ambassador of Mexico, pledging joint cooperation in "educating" Mexican workers of their labor rights while working in the U.S. The joint declaration forms a partnership between DOL and the Mexican Ministry of Foreign Affairs. Solis noted that since 2004, OSHA and WHD have worked closely with their Mexican counterparts. Solis remarked, "By signing this joint declaration we reaffirm our commitment to ensure that the rights of all Mexican workers in the United States are respected; that employers comply with workplace laws and regulations; and that workers know about these laws that protect them." This joint declaration could certainly lead to increased enforcement when information is shared between the two countries.

Additionally, on June 1, WHD Deputy Administrator, Nancy Leppink and OSHA Administrator, David Michaels, signed Letters of Agreement with the Mexican Ambassador to "solidify" the partnership between DOL and Mexico to educate Mexican workers on their labor rights in the U.S. As part of the agreement, the Mexican Embassy will work with WHD to help locate Mexican workers who are owed back wages, and to provide information from workers that will lead to WHD and possibly criminal cases being brought against employers.

Credit and Criminal History Background Checks (EEOC) – The 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 is believed to be an area of increased enforcement by the new chair of the EEOC. The EEOC may decide to target nation-wide employers under this same theory.

TAPILS (ILAB) – The President's Committee on the International Labor Organization ("ILO") formulates and coordinates U.S. policy towards the ILO. The committee consists of the Secretaries of Labor, State and Commerce, the President's special assistants on national security and economic policy, the president of the AFL-CIO, and the president of the U.S. Council on International Business ("USCIB"). A subcommittee, the Tripartite Advisory Panel on International Labor Standards ("TAPILS") is an advisory committee that is reviewing ILO Conventions to determine if any are appropriate for ratification, beginning with the Convention 111 on discrimination in employment and the Maritime Labor Convention ("MLC").

Electronic Voting RFI (NLRB) – The Board released a Request for Information on June 9, 2010 that asks vendors for information on industry solutions regarding secure electronic voting services for both remote and on-site elections. This notice was *not* a proposed rule. The RFI is the likely first step in the Board's rulemaking process. One concern with the subject of the RFI, electronic voting, is how it limits the free speech of employers during a union campaign, because similar to mail balloting, an employer would not be able to campaign once the electronic voting becomes active, which could be weeks prior to the actual vote.

Aggressive Strategic Plans (OFCCP) – The Director of OFCCP laid out an aggressive "strategic plan" that increases the burden on employers to demonstrate compliance with OFCCP guidelines. For example, one of the targeted outcomes of the goals is to "increase workers' incomes and narrow wage and income inequality." In achieving this goal, contractors will likely face increased scrutiny on compensation by race and gender. Another strategic goal under the new plan is to "assure fair and high-quality work-life environments" that "break down barriers to fair and diverse workplaces so that every worker's contribution is respected." In achieving this goal, OFCCP may be working very closely with EEOC and WHD to share information.

Anti-Safety Incentive Program Directive (OSHA) – Part of the Directive for the National Emphasis Program on Recordkeeping states that when determining the classification of the citation, an investigator shall consider incentive or disciplinary programs that would discourage the recording or reporting of injuries or illnesses. Thus, incentive or disciplinary programs intended to reward good safety practices will be used as evidence against an employer in a citation.

Expansion of General Duty Clause (OSHA) – During a web-chat, OSHA Assistant Secretary David Michaels stated that ergonomics violation enforcement will increase under OSHA's use of the general duty clause. OSHA enforcement personnel will be looking for ergonomic hazards during the course of their investigations, with support from the national office. Not only will this lead to greater enforcement of ergonomic hazards, which are not defined, but other hazards as well. Jordan Barab noted that OSHA will be looking to make the process of enforcing general duty clause violations "more effective."

Administrative Penalty Enhancements (OSHA) – On April 22, Assistant Secretary Michaels issued a memo highlighting various "administrative enhancements" to OSHA's penalty policies. Several of the "enhancements" effectively increase the monetary penalty on businesses. For example, under the Severe Violator Enforcement Program (SVEP) Violations, penalties for serious violations will not be grouped or combined per job site, but rather separated and charged as separate violations. Thus, an employer could receive numerous individual penalties that will add up to more than if combined into one citation.

Local Building Inspector Partnership (OSHA) – A new partnership was established with local building inspectors in 11 cities to "help" reduce workplace injuries and fatalities. The partnership will force building inspectors to report unsafe working conditions that they witness during their routine inspections. Once the report is made, OSHA will dispatch investigators to the scene. This will lead to greater enforcement of OSHA violations at constructions sites. As Assistant Secretary Michaels said, "this initiative allows us to expand our eyes and ears."

***Neufeld Memo (*USCIS)** – USCIS issued a memo that establishes a variety of factors with which to determine whether an employer is eligible to sponsor an H-1B specialty occupation visa. The USCIS requires an employer-employee relationship in order for an H-1B specialty occupation visa to be issued. The Neufeld memo outlines the set of factors the agency will now use to determine whether such a relationship exists. While the USCIS pointed out that the guidance memo does not change the underlying requirements for an H-1B petition, it has lead to a greater number of denials and increased investigations, under the new specific factors that USCIS is using to determine what a violation is. The memo also limits the scope of employers eligible to apply for H-1B visas because of the narrower definition.

Administrator Interpretations (WHD) – WHD introduced the novel concept of Administrator Interpretations ("AI") that effectively replaces the opinion letter process. No longer may a party request an opinion from WHD based on specific facts surrounding his or her situation. An AI gives a broad interpretation of whether "typical" job duties or industry wide occupations are exempt under the Fair Labor Standards Act ("FLSA"). These broad interpretations

will help increase wage and hour enforcement against employers who, due to the specific facts of their situation, may have been previously able to prove they were exempt under the FLSA. AI's may also effectively eliminate the good faith defense that employers can rely on under the Portal to Portal Act.

Targeted Enforcement (WHD) – WHD began enforcement initiatives targeting specific industries in specific states. These initiatives will focus on FLSA overtime and minimum wage violations. WHD's initiative will lead to greater enforcement instead of addressing the needed change to the regulations that could add some clarity to the criteria.

- WHD launched their first initiative on Feb. 24, 2010 targeting only restaurants and construction sites in Utah.

- Another, well publicized initiative is the "crackdown" on employers that use unpaid interns in their workplace. Under federal law, internships must meet six criteria in order to be unpaid. In April, 2010, WHD published a new "fact sheet" detailing whether internships with private sector employers must be paid under the FLSA.

- In June, WHD announced a targeted enforcement initiative aimed at blueberry farms in Michigan. This effort will not only focus on FLSA rights, but also rights under the Migrant and Seasonal Worker Protection Act, child labor laws, H-2A provision, and OSHA provisions regarding field sanitation and temporary labor camps.

U-VISA Intrusion (WHD) – 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.