Watching the Watchdogs: 
A Seminar Raising Awareness of Employment Law & Employee Benefits Monitoring and Enforcement

Wednesday, June 8, 2011
Minikahda Club, Minneapolis
Welcome + Opening Session

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SOCIAL MEDIA: OPPORTUNITIES AND RISKS FOR EMPLOYERS

1. Not Just Social, It’s Professional
   A. Can’t just post the occasional blog or friend a couple of people on Facebook
   B. Have to know how to respond to customers, clients, and manage your online image
   C. Social media is changing the game

2. Use of Social Media
   A. Preventing risk
   B. Avoiding pitfalls
   C. Useful tools
   D. Effective policies

3. Opportunities
   A. Social media helps companies be successful
      i. networking,
      ii. marketing,
      iii. communicating with clients and customers
      iv. quicker, easier, and for less money

4. Social Media Champs
   A. Fortune’s “Top Tweeters”
      i. Google – more than 3 million Twitter followers
      ii. Whole Foods – 1.9 million Twitter followers
      iii. Dell – 1.6 million Twitter followers
      iv. Coca Cola – 25 million Facebook fans
      v. Target Corporation – 4.3 million Facebook fans and 129,000 Twitter followers
5. Risks for Use of Social Media
   A. Complaints about employees wasting time instead of being productive
      i. 37% of companies allow employees unlimited access to social media on company network
      ii. 51% permit use of social media sites for business purposes

6. Security Concerns
   A. Heightened security concerns by network administrators
      i. Viruses
      ii. Data/information leaks
      iii. Intrusion risks
      iv. Trojan horses/malware
      v. Risks to privacy/user information

7. What is Social Media?
   A. Blogs
   B. Personal webpages
   C. Facebook
   D. Twitter
   E. LinkedIn
   F. MySpace
   G. YouTube

8. Employer’s Use of Social Media
   A. Recruiting Tool
      i. 56% of HR professionals use social networking sites to recruit
      ii. Most efficient in recruiting managerial positions
      iii. Use to identify “passive” job candidates who might not otherwise apply
      iv. 95% use LinkedIn,
      v. 58% use Facebook
      vi. 42% use Twitter
   B. Advertising
   C. Promoting a product or service
      i. Must follow truth in advertising rules
      ii. Must truthfully identify associate with the product
      a. SEC Regulations bans certain ads by registered investment advisers, including testimonials
iii. FINRA Rules - most ban "LinkedIn" recommendation

D. Recommendations for current or former employees
   1. Unauthorized person – “Just want to help.”
   3. How meaningful are they?

E. Testimonials
   1. Praise for fired employee may indicate the employer lied about the reason

F. May promote an active professional network
G. LinkedIn recommendation does not replace a professional reference check

9. Valuable Information about Employees?
   A. Not always accurate
      1. Google yourself

   B. Flurry of new recommendations can signal employee is looking for new job

10. Company’s Policies
    A. Apply legal reference policies
    B. Prohibit individual employees to provide reference or testimonial as a representative of the company

11. Former Employee Claims
    A. Discovery by employer defending harassment case (EEOC v. Simply Storage Management, S.D. Indiana)
       1. Employee alleged emotional distress, employer entitled to see employee’s private Facebook postings (like “journal”)
       2. Was the offensive conduct complained of in the lawsuit really “unwelcome” based on Facebook postings

12. Inherent Risks of Social Media
    A. “Amplified effect” – anyone can communicate with an audience, can be rebroadcast
       1. “Think B4 U Tweet”

13. Private vs. Public
    A. Individuals can designate sites as “private” but not really
B. Employers should not require access to private sites
C. Employers should not “fake friend” to obtain private information

14. Recent Famous Faux Pas
A. New Media Strategies – Chrysler Ad Agency
   i. Tweet from @ChryslerAutos account – “I find it ironic that Detroit is known as the #motor city and yet no one knows how to f****** drive.”
   ii. Meant to be posted on person’s private account, but instead went out on Chrysler brand account
   iii. Current ad campaign – “Imported from Detroit”
   iv. Employee fired, ad agency fired
   v. Interesting note: Chrysler said even if it had been posted to the individual’s private account, it violated Chrysler’s policy of texting while driving

B. AFLAC – Gilbert Gottfried
   i. Voice of the squawking duck in commercials
   ii. Posted several jokes to personal Twitter feed about Japanese earthquake and tsunami
   iii. Japanese market is 75% of AFLAC’s revenue
   iv. Gottfried fired, duck silenced
   v. Invoked “morals clause” in Gottfried’s contract

C. Congressman Christopher Lee, forced to resign after sending shirtless photo on Gawker
D. Congressman Anthony Weiner accused of sending lewd photo to Twitter follower

15. NLRB Restrictions on Written Policies
A. NLRA protects employees from “concerted protected activity”
B. Employer has legitimate right to restrict disparaging or offensive speech, but can’t prevent workers from criticizing employers or discussing working conditions
C. Overbroad internet policies – “illegally chill” worker communications
   i. Thomson Reuters – settled charge where fired employee called a supervisor a “scumbag” on Facebook
   ii. SEIU filed an NLRB charge because the employer’s policy “bans the use of electronic communication/social media in a manner that may offend, disparage, or harm customers or passengers
   iii. Complaint by NLRB against a luxury car dealership for firing an employee who criticized a company sales event on his personal Facebook page
16. Tips for Drafting Social Media Policies
   A. Don’t issue blanket prohibitions against use of social media
   B. Consider deleting existing policies that make an employee’s online comments or criticism of an employer a terminable offense
   C. Include provisions limiting use
      i. During working hours
      ii. False statements
      iii. Profanity, sexual or discriminatory comments
   D. Add disclaimer – “Nothing in the policy is intended to limit the employee’s labor rights.”

17. Guide for Personal Use of Social Media
   A. Don’t post anything that would embarrass you, your company, your customers, or colleagues
   B. Don’t disclose privileged or confidential information
   C. Respect laws and professional rules (copyright, trademark, insider information, unauthorized advertising, applicable human rights laws)
   D. Don’t post anonymous content or fake an identity
   E. Don’t imply that you are speaking for anyone but yourself
   F. Be professional

18. Monitoring
   A. Not expected to monitor 24/7
   B. Notice to employees that their use may be monitored
   C. Act on information when received
      i. Directly ask employee to remove
      ii. Go to social media site
      iii. Limited duty to report – child pornography, imminent threat of harm

19. Future of Social Media
   A. Fast-moving
   B. Constantly developing
   C. Little or no legal precedent
   D. Contradictory decisions in different jurisdictions
EMPLOYEE MISCLASSIFICATION UNDER FLSA
Employee Classification: Employee or Independent Contractor? Exempt or Non-Exempt?
Overtime Considerations and Avoiding Pitfalls

1. Introduction
   A. Employee classification, or misclassification.
      i. Whether people who are being treated as independent contractors are actually employees;
      ii. Whether employees who are treated as exempt from overtime pay are actually non-exempt employees.

2. Employee or Independent Contractor?
   How do you know if an employee is actually an “employee” or if she is an “independent contractor”?
   A. Minnesota Test
      i. The right to control the means and manner of performance (most important factor);
      ii. The mode of payment;
      iii. The furnishing of material or tools;
      iv. The control of the premises where the work is done; and
      v. The right of the employer to discharge.

B. Comparison Chart

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<tr>
<th>Factors</th>
<th>Employee</th>
<th>Independent Contractor “IC”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Behavioral Control</td>
<td>Company has the right to direct and control how work is done. Company provides instructions and training.</td>
<td>IC has control over how the work is done. IC usually provides its own training and instructions are generally not needed.</td>
</tr>
<tr>
<td>Financial Control</td>
<td>Company has right to direct and control financial aspects of work.</td>
<td>IC has significant investment, expenses, and opportunity for profit or loss.</td>
</tr>
<tr>
<td>Relationship of Parties</td>
<td>Benefits may be paid, but are not required for employee status.</td>
<td>IC generally does not have benefits. Written contract may be evidence of independent contractor status, but not determinative.</td>
</tr>
<tr>
<td>Tax Consequences and Workers’ Compensation</td>
<td>Company pays Social Security and Medicare. Company must withhold for federal and state</td>
<td>Company does not pay Social Security and Medicare. Company does not withhold taxes for the</td>
</tr>
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### Factors

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<td>taxes. Company must issue IRS Form W-2. Company must carry workers’ compensation insurance.</td>
<td>IC. Company must issue IRS Form 1099. Company does not carry workers’ compensation insurance for the IC.</td>
</tr>
<tr>
<td>Unemployment</td>
<td>Company must contribute to unemployment insurance fund and pay unemployment tax.</td>
<td>Company does not contribute to unemployment insurance fund or pay unemployment taxes.</td>
</tr>
<tr>
<td>Benefits</td>
<td>Benefits are not required, but company often provides vacation, leave, holidays, health insurance, etc.</td>
<td>Company does not provide benefit. IC usually carries its own benefits.</td>
</tr>
<tr>
<td>Government Regulations</td>
<td>Company must follow regulations and laws, such as overtime laws, protecting employees.</td>
<td>IC does not have to follow overtime laws, but some laws may still apply, such as discrimination laws.</td>
</tr>
<tr>
<td>Liability for Injury</td>
<td>If employee is hurt on the job, workers’ compensation may be triggered, employer’s negligence needs to be proven, and employee’s negligence is irrelevant.</td>
<td>If IC is hurt on the job, workers’ compensation is not triggered, IC must prove the company’s negligence, and IC’s contributory negligence is irrelevant.</td>
</tr>
<tr>
<td>Liability for Worker’s Conduct</td>
<td>Company is generally liable for employee’s negligence in course and scope of employment.</td>
<td>Company is generally not liable for IC’s negligence, but may be liable if IC is acting as company’s agent.</td>
</tr>
<tr>
<td>Ending Relationship</td>
<td>May be at-will.</td>
<td>May be subject to “cause” provisions in the contract.</td>
</tr>
</tbody>
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### C. IRS Guidelines

Internal Revenue Service Revenue Ruling 87-41

i. INSTRUCTIONS. A worker who is required to comply with other persons’ instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the RIGHT to require compliance with instructions.

ii. TRAINING. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.

iii. INTEGRATION. Integration of the worker’s services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends on an
appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

iv. SERVICES RENDERED PERSONALLY. If the Services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

v. HIRING, SUPERVISING, AND PAYING ASSISTANTS. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.

vi. CONTINUING RELATIONSHIP. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.

vii. SET HOURS OF WORK. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.

viii. FULL TIME REQUIRED. If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor on the other hand, is free to work when and for whom he or she chooses.

ix. DOING WORK ON EMPLOYER’S PREMISES. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer’s premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.
x. ORDER OR SEQUENCE SET. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker’s own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.

xi. ORAL OR WRITTEN REPORTS. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

xii. PAYMENT BY HOUR, WEEK, MONTH. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.

xiii. PAYMENT OF BUSINESS AND/OR TRAVELING EXPENSES. If the person or persons for whom the services are performed ordinarily pay the worker’s business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker’s business activities.

xiv. FURNISHING OF TOOLS AND MATERIALS. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

xv. SIGNIFICANT INVESTMENT. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship.

xvi. REALIZATION OF PROFIT OR LOSS. A worker who can realize a profit or suffer a loss as a result of the worker’s services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments.
to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

xvii. WORKING FOR MORE THAN ONE FIRM AT A TIME. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

xviii. MAKING SERVICE AVAILABLE TO GENERAL PUBLIC. The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.

xix. RIGHT TO DISCHARGE. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer’s instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

xx. RIGHT TO TERMINATE. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.

### Employer Risks - Misclassifying Employees As Independent Contractors

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<tr>
<th>Risk</th>
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<th>Legal Test</th>
<th>Possible Penalties</th>
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<tbody>
<tr>
<td>1. State and federal tax liability for failure to withhold payroll taxes on wages; pay social security or unemployment tax, or make State Disability Insurance payments</td>
<td>Internal Revenue Service (&quot;IRS&quot;)</td>
<td>IRS Test</td>
<td>Unpaid taxes</td>
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<td>Penalty: 5% per month (maximum 25%) penalty</td>
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<td>for failure to file a payroll tax return (IRC §§ 6651(a)(1)) Interest (IRC §§ 6601)</td>
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<tr>
<td>2. Employer may owe minimum wages/overtime to &quot;contractors&quot;</td>
<td>U.S. Department of Labor (&quot;DOL&quot;)</td>
<td>Economic Realities Test: Right-to-Control is one of six factors</td>
<td>Back wages</td>
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<td></td>
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<td></td>
<td>Liquidated damages $10,000 Fine, 6 months' imprisonment</td>
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<td>3. &quot;Employees&quot; (not independent contractors) may pursue employment</td>
<td>Equal Employment Opportunity Commission</td>
<td>Hybrid Test: Economic Realities Test with Emphasis</td>
<td>Back Pay</td>
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<td>- Front Pay</td>
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<td>- Equitable Relief</td>
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<td>discrimination charges</td>
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<td>on Right-to-Control Factors</td>
<td>- Attorneys' Fees</td>
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<td>- Compensatory Damages</td>
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<td>- Punitive Damages</td>
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<tr>
<td>4. “Employees” (not independent contractors) of federal contracts/subcontractors go into Affirmative Action Plans</td>
<td>Office of Federal Contract Compliance Programs (“OFCCP”)</td>
<td>Hybrid Test: Economic Realities Test with emphasis on Right-to-Control Factors</td>
<td>- Debarment</td>
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<tr>
<td>5. Employer may/must treat “employees” as part of the bargaining unit; not &quot;contractors&quot;</td>
<td>National Labor Relations Board (“NLRB”)</td>
<td>Common Law Test with emphasis on Right-to-Control Factors</td>
<td>- Reinstatement</td>
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<td>- Back Pay</td>
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<td>- Election</td>
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<td>- Cease-and-Desist Order</td>
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<td>- Bargaining Order</td>
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<td>- Expenses</td>
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<td>- Equitable Relief</td>
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<tr>
<td>6. Employer must complete 1-9 immigration forms for “employees” not for &quot;contractors&quot;</td>
<td>Immigration and Naturalization Service (“INS”)</td>
<td>IRS Test</td>
<td>- $100-$1,000 fine for each individual violation</td>
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<tr>
<td>7. Employer may fail to count faux &quot;contractors&quot; as employees when determining coverage under Work Adjustment and Retraining Notification Act (“WARN”); employer will not give nee employees and local government required 60 days' notice</td>
<td>Private Right of Action</td>
<td>Totality of circumstances</td>
<td>Failure to give notice to individual--up to 60 days' back pay and benefits; failure to give notice to local government--fines of up to $500 pr day</td>
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<tr>
<td>8. “Employees” may be eligible for pension and employee welfare benefits (such as medical insurance, vacations, sabbaticals and severance pay); contractors not eligible</td>
<td>Private Right of Action</td>
<td>Undecided</td>
<td>- Compensatory Damages</td>
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<td>- Benefits</td>
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3. Exempt or Non-Exempt

A. Introduction:

Overtime wages, the appropriate payment of those wages, and pitfalls to avoid that can get employers in trouble.

B. Sources and Authority:

i. Statutes

- The federal Fair Labor Standards Act (FLSA), passed in 1938, requires employers who fall within its reach to comply with several different “fair labor standards.”
- Required to pay workers one and one-half times their regular wage for hours worked above the customary “workweek” of 40 hours.
- All employees of certain enterprises having workers engaged in interstate commerce, producing goods for interstate commerce, or handling, selling, or otherwise working on goods or materials that have been moved in or produced for such commerce by any person, are covered by the FLSA.
  / A covered enterprise is the related activities performed through unified operation or common control by any person or persons for a common business purpose; and
  / whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated); or
  / is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill who reside on the premises; a school for mentally or physically disabled or gifted children; a preschool, an elementary or secondary school, or an institution of higher education (whether operated for profit or not for profit); or
  / is an activity of a public agency.
- Employees of firms which are not covered enterprises under the FLSA still may be subject to its minimum wage, overtime pay, recordkeeping, and child labor provisions if they are individually engaged in interstate commerce or in the production of goods for interstate commerce, or in any closely-related process or occupation directly essential to such production.
  / Such employees include those who: work in communications or transportation; regularly use the mails, telephones, or telegraph for interstate communication, or keep records of interstate transactions; handle, ship, or receive goods moving in interstate commerce; regularly cross State lines in the course of employment; or work for
independent employers who contract to do clerical, custodial, maintenance, or other work for firms engaged in interstate commerce or in the production of goods for interstate commerce.

ii. Department of Labor regulations and overreaching/Other DOL decisions
   - The DOL has at times taken an aggressive approach in enforcing the FLSA.
   - “Plan/Prevent/Protect” system
   - The precise form and extent of the Wage and Hour Division's proposed regulatory scheme is unclear.

C. Exemptions:
   i. White Collar in general
      - 29 U.S.C. §213(a)(1) defines the exemptions for executive, administrative, professional, computer, and outside sales employees. These specific classifications are commonly referred to as the “white-collar exemptions” since they do not apply to blue-collar workers.
      - To qualify as an exempt executive employee, an employee must “customarily and regularly direct the work of at least two or more other employees,” have some authority concerning employee personnel decisions, have a primary duty of “management of the enterprise in which the employee is employed or of a customarily recognized department,” and receive a salary of at least $455 per week.
      - Exempt administrative employees must receive a salary of at least $455 per week and have a primary duty of office or non-manual work that is directly related to the general business operations or management of the employer, or the employer’s customers. Also, their primary duty must include “the exercise of discretion and independent judgment with respect to matters of significance.”
      - Highly compensated employees who customarily and regularly perform any of the exempt duties or responsibilities of an executive, administrative or professional employee and receive total annual compensation of at least $100,000 are deemed exempt.
   ii. Professional Exemption
      - To qualify for the learned professional employee exemption, all of the following tests must be met:
        (i) The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
        (ii) The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly
intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

(iii) The advanced knowledge must be in a field of science or learning; and

(iv) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

- To qualify for the creative professional employee exemption, both of the following tests must be met:
  
  (i) The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week; and

  (ii) The employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

iii. Outside Sales

- To qualify for the outside sales employee exemption, the following tests must be met:

  (i) The employee’s primary duty must be making sales (as defined by the FSLA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

  (ii) The employee must be customarily and regularly engaged away from the employer’s place or places of business.

iv. Computer Employees

- To qualify for the computer employee exemption, all of the following tests must be met:

  (i) The employee must be compensated either on a salary or fee basis at a rate not less than $455 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;

  (ii) The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
(iii) The employee's primary duty must consist of:

(a) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

(b) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(c) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(d) A combination of the aforementioned duties, the performance of which requires the same level of skills.

v. Blue Collar Workers

- The exemptions provided by FLSA Section 13(a)(1) apply only to “white collar” employees who meet the salary and duties tests set forth in the Part 541 regulations. The exemptions do not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be.

Where to Obtain Additional Information:

For additional information, visit the Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call the toll-free information and helpline, available 8:00 a.m. to 5:00 p.m. 1-866-4USWAGE (1-866-487-9243).

Links to specific state labor departments can be found at the same web page by clicking the “WHD Local Offices” box.
4. The Eight (8) Most Common Overtime Mistakes and How to Fix Them
   Mistake #1: Not paying for all of employees’ pre- and post-work activities.
   Mistake #2: Not paying employees who work through breaks.
   Mistake #3: Not paying employees for waiting time.
   Mistake #4: Not paying employees for travel time.
   Mistake #5: Not paying telecommuters for all hours worked.
   Mistake #6: Not combining hours for employees who work at different locations.
   Mistake #7: Averaging hours worked during different weeks in a pay period.
   Mistake #8: Miscalculating overtime pay.

5. Five (5) Tips for Compliance:
   1. Adopt a safe-harbor policy.
   2. If you reclassify an employee, do so with finesse.
   3. Fine-tune your record-keeping.
   4. If exempt status is in question, issue a ‘good-faith’ reply.
   5. And most importantly, if you have doubts about how to classify employees, consult counsel.
PROTECTING HUMAN CAPITAL: TIPS FOR USE OF NON-COMPETE AND NON-SOLICITATION AGREEMENTS IN MINNESOTA AND BEYOND

1. Are Restrictive Covenants Enforceable?
   A. The enforceability of restrictive covenants in Minnesota is governed by case law. Minnesota courts look upon restrictive covenants with disfavor and construe them narrowly, but will enforce restrictive covenants to the extent reasonably necessary to protect the employer’s legitimate business interests.
   B. Certain states such as California and North Dakota prohibit or severely limit an employer’s ability to enter into a restrictive covenant with employees.
   C. Certain states have statutes that address the extent to which restrictive covenants are enforceable.
      i. Wisconsin is an example of a state that has a somewhat general statute concerning restrictive covenants that leaves the details of enforceability for the courts to decide under common law: “A covenant by an assistant, servant, or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal.”
      ii. South Dakota is an example of a state that regulates the use of restrictive covenants with a more detailed statute that defines the length and geographic scope of permissible restrictions: “An employee may agree with an employer at the time of employment or at any time during his employment not to engage directly or indirectly in the same business or profession as that of his employer for any period not exceeding two years from the date of termination of the agreement and not to solicit existing customers of the employer within a specified county, city or other specified area for any period not exceeding two years from the date of termination of the agreement, if the employer continues to carry on a like business.”

2. Are there any employees who cannot be bound by non-compete agreements?
   A. Attorneys
      Enforcement of restrictive covenants would interfere with attorney-client relationships and courts have therefore refused to enforce such covenants on public policy grounds.
B. Physicians

There are no particular restrictions in Minnesota or the Upper Midwest on non-compete agreements with physicians, but a number of states do have statutes that prohibit the enforcement of restrictive covenants against physicians on the grounds that enforcement would interfere with a patient’s ability to obtain health care from a chosen physician.

C. Broadcasters

Another group that has fared well with respect to exemptions from the enforcement of restrictive covenants is broadcasters.

D. Miscellaneous occupations

There is also a hodge podge of industries and occupations that several states have exempted from the enforcement of restrictive covenants: security guards in Connecticut, mediators in Florida, automobile sales people in Louisiana, beauticians and cosmetologists in Vermont.

3. What consideration is necessary to support a restrictive covenant?

A. Minnesota is one of the states that closely scrutinizes the consideration provided to support a restrictive covenant. Under Minnesota law, the providing of new employment provides consideration to support a restrictive covenant. A restrictive covenant signed after the commencement of employment must be supported by independent consideration. Continued employment alone is not sufficient consideration. Continued employment may provide sufficient consideration if “the agreement is bargained for and provides the employee with real advantages.”

B. Some other states, including Iowa, recognize that continued employment is sufficient consideration.

4. Can a restrictive covenant apply regardless of whether the employee’s employment ends voluntarily or involuntarily?

A. Minnesota courts have not explicitly ruled on whether a restrictive covenant is enforceable against an employee who was involuntarily terminated but have cautioned that non-compete agreements will not be enforced when the employer has taken “undue advantage” of the employee.

B. It may be especially difficult for the employer to enforce a restrictive covenant if it has involuntarily terminated an employee in violation of some legal obligation such as a contract provision requiring good cause for termination. The Court may need to consider whether the employer’s breach was material and whether a non-material breach by the employer should invalidate the restrictive
covenant. For example, failure to give a contractually required notice may or may not be a material breach.

5. What is the scope of a permissible restriction concerning customers, i.e. can an employee be prohibited from working with any customers with whom the employer does business?
   
   A. Minnesota courts have suggested and Wisconsin courts have expressly stated that an employee may be restrained only from soliciting or contacting the customers with whom the employee worked directly and about whom the employee has information that could be of assistance in soliciting their business. Restrictive covenants that prohibit solicitation of all of the employer’s customers may be overly broad and unenforceable.
   
   B. The amount of scrutiny by the Court will likely depend on the extent of the restriction. An employer should be prepared to explain why a restriction applicable to all of the employer’s customers is necessary.

6. Can the employee be restricted from working with any customers with whom the employee personally did business at any previous time?
   
   A. The absence of a “backward” time restriction may render the restrictive covenant unreasonably broad and therefore unenforceable. A recent Wisconsin case holds customer non-solicitation clauses lacking any backward restriction—whether express or implied—are unreasonable.

7. Can the length of the covenant be extended by the period of time in which the employee is in violation?
   
   A. Minnesota courts have discretion to extend the length of the restrictive covenant beyond the time period stated in the contract so that the employer receives compliance with the restriction for the full amount of time stated in the contract.
   
   B. Other states, such as Wisconsin, view such extension of time provisions to be unreasonable and may render the entire covenant void.

8. What is the permissible geographic scope of a restrictive covenant, i.e., can the restrictive covenant cover any area in which the employee did business during employment?
   
   A. Employers should be careful to state the geographic restriction with particularity at the time of signing. Prohibiting competition in any area in which the employer does business during employee’s employment (or areas that might be served in the future) may render the covenant unenforceable.
9. Can the court re-write a restrictive covenant in order to make it reasonable and enforceable?
   A. Minnesota has long followed the rule that courts may “blue pencil” an overly broad restriction to make it reasonable and enforceable.
   B. Wisconsin is the best known example of a state that follows an “all or nothing” rule. Wisconsin law specifically does not permit “blue penciling” of non-compete agreements to make some overbroad provision more reasonable. The agreement is either valid or invalid as written in the restrictive covenant.
   C. Employers should include provisions in the restrictive covenant that allow for severance of any unenforceable provisions so that the entire agreement does not become invalidated.

10. Will choice of law provisions be given effect?
    A. Minnesota courts will generally recognize and give effect to choice of law provisions in contracts. If a non-compete agreement designates the state law to govern the agreement, Minnesota will usually apply the chosen state’s law.
    B. Some states with tougher laws concerning the enforcement of non-compete provisions are reluctant to recognize choice of law provisions if the chosen law would conflict with the forum state’s public policies.
    C. When there are substantial differences between the laws of the states where a lawsuit concerning the restrictive covenant could be brought, often there is a race to the courthouse. The employer tries to commence a case in a state with more favorable laws concerning restrictive covenants and the employee brings a declaratory judgment action in a state where a court is more likely to apply its law and rule that the covenant is unenforceable.

11. Are restrictive covenants assignable to successor employers?
    A. As a general matter, restrictive covenants are assignable under Minnesota law. The employee’s consent is not necessary to an assignment of the restrictive covenant unless the agreement requires the parties’ consent.
    B. Other states, however, will not enforce restrictive covenants that have been assigned from one employer to another employer on the grounds that the covenants are personal services contracts and personal services contracts are only enforceable between the two original contracting parties. As a result, employers considering a merger, acquisition, or asset purchase should consider whether it is necessary to obtain new employment agreements with employees if the applicable law does not permit assignment of the existing employment agreement to the new employer.
HEALTH CARE REFORM: WHAT’S NEXT?

1. Introduction
Health care reform was enacted in March 2010 by the Patient Protection and Affordable Care Act ("PPACA") and Health Care and Education Reconciliation Act of 2010 ("Reconciliation Act"). Over the past year, additional regulations and guidance have been issued by the Department of Labor ("DOL"), Department of Treasury ("IRS"), and Department of Health and Human Service ("HHS") in order to implement many of the health care reform provisions. This outline provides a brief summary of health care reform focusing on the areas that affect employer-sponsored group health plans and related benefits.

2. Two Phases of Health Care Reform:
   A. 2010-2014: Compliance.

3. Grandfathered Health Plans
A group health plan that has at least one participant on March 23, 2010 is considered to be a grandfathered health plan. The significance of being a grandfathered health plan is that the plan will have extended deadlines to make changes and is permanently exempt from certain provisions of health care reform.

   A. Definition of Group Health Plan.
   Health care reform applies to group health plans covering at least two employees (including mini-med plans), but does not include certain excepted benefits, such as: dental benefits, vision benefits and long-term care benefits if one of the following two conditions are met:

   i. The benefits are offered under a separate policy, certificate, or contract of insurance; or
ii. The benefits are not an integral part of a group health plan. Benefits are not an integral part of a group health plan if the participants have the right to elect not to receive the benefits, and a participant who elects to receive the benefits must pay an additional premium or contribution.

B. Grandfathered Health Plans Must:

i. Disclose Grandfathered Status. A grandfathered plan must include a statement, in any plan materials provided to a participant or beneficiary describing the plan, that the plan believes it is a grandfathered plan within the meaning of the health care reform laws and must provide contact information for questions and complaints. The DOL model language can be found in Attachment A.

ii. Keep Records of the Grandfathered Plan. A grandfathered plan must maintain, and make available upon request, records documenting the terms of the plan in effect on March 23, 2010, and any other documents necessary to verify, explain, or clarify its continued status as a grandfathered plan.

C. Grandfathered Health Plan Must Not:

i. Eliminate Benefits. Grandfathered plans cannot eliminate all or substantially all of the benefits for a particular condition, including any necessary element to diagnose or treat the condition. For example, if a plan decides to no longer cover care for people with diabetes, cystic fibrosis or HIV/AIDS.

ii. Raise Co-Insurance Charges. Typically, co-insurance requires a patient to pay a fixed percentage of a charge (for example, 20% of a hospital bill). Grandfathered plans cannot increase this percentage.

iii. Raise Co-Payment Charges. Frequently, plans require patients to pay a fixed-dollar amount for doctor’s office visits and other services. Compared with the copayments in effect on March 23, 2010, grandfathered plans can only increase those copays by no more than the greater of $5 (adjusted annually for medical inflation) or the medical inflation rate plus 15%.

iv. Significantly Raise Deductibles. Many plans require patients to pay the first bills they receive each year (for example, the first $500, $1,000, or $1,500 a year). Compared with the deductibles required as of March 23, 2010, grandfathered plans can only increase these deductibles by the medical inflation rate plus 15%.

v. Significantly Lower Employer Contributions. Many employers pay a portion of their employees’ premium for insurance and the employees’ pay the remainder through payroll deduction. Compared to the percentage in effect on March 23, 2010, grandfathered plans cannot decrease the
percent of premiums the employer pays by more than 5 percentage points (for example, decrease their own share and increase the workers’ share of premium from 15% to 20%).

vi. Add or Reduce an Annual Limit on What the Insurer Pays. Some insurers cap the amount that they will pay for covered services each year. If they want to retain their status as grandfathered plans, plans cannot reduce any annual dollar limit in place as of March 23, 2010. Moreover, plans that do not have an annual dollar limit cannot add a new one unless they are replacing a lifetime dollar limit with an annual dollar limit that is at least as high as the lifetime limit.

vii. Force Employees to Switch Plans. Employers cannot force employees to switch to another grandfathered plan that, compared to the current plan, has less benefits or higher cost sharing if there is no bona-fide employment reason for the switch.

viii. Merge with Another Plan. A plan will lose its grandfathered status if the principal purpose of a merger, acquisition, or similar business restructuring is to cover new individuals under a grandfathered plan.

D. Grandfathered Health Plan May:

i. Enroll New Participants. Family members of employees who were covered on March 23, 2010, and any new employees (newly hired or newly enrolled) and their family members may join the grandfathered health plan after March 23, 2010.

ii. Make Certain Administrative Changes. For self-insured plans, it appears that changing third-party administrators, stop-loss carriers or provider networks will not affect grandfathered status.

iii. Make Mandatory Changes. Implementing design changes mandated by law will not affect the grandfathered health plan status.

iv. Change Insurance Contracts or Carriers. Changing insurance carriers or entering into a new insurance contract will not cause a group health plan to lose grandfathered status, so long as the policy is effective after November 15, 2010, and does not include any of the other changes discussed in II.C above that would cause a loss of grandfathered health plan status.

4. Timeline of Health Care Reform Requirements:
The following is a timeline summarizing some of the significant changes made by health care reform. Health care reform requirements that do not apply to grandfathered health plans are identified with an asterisk symbol (*).
5. Significant Changes in 2010:

A. Coverage of Adult Children Required. If the plan provides coverage for dependent children, it must provide coverage for adult children until the child turns 26 years of age. The cost of coverage for an adult child is excluded from an employee’s federal gross income. Minnesota has also excluded this from state income for taxes in 2010 only. Written notice of the enrollment rights should have been provided no later than the first day of the first plan year beginning on or after September 23, 2010. The DOL model language can be found in Attachment A. Grandfathered plans do not need to cover adult children who are eligible for other employer-sponsored coverage prior to 2014.

B. No Pre-Existing Exclusions for Children. Plans may not impose any pre-existing condition limitations on participants who are under 19 years of age. This exclusion will be extended to all enrollees in 2014.

C. No Annual or Lifetime Limits. Generally, plans may not establish lifetime or annual limits on the dollar value of essential health benefits. Existing plans that have lower limits (so-called “mini-med plans”) may apply for an annual waiver prior to 2014. “Essential health benefits” includes, among others, ambulatory services, emergency services, maternity and newborn care, mental health and substance abuse services, prescription drugs, wellness and disease management, and pediatric services. Until final regulations are issued to define “essential health benefits,” the IRS, DOL, and HHS will take into account a good faith effort to comply with a reasonable interpretation of this term.

D. Rescission of Coverage Prohibited. Plans will not be able to rescind an individual’s coverage, except in the case of fraud and misrepresentation.

E. Preventive Care Coverage.* Plans must cover preventative care, such as immunizations, without co-payments or deductible.

F. Emergency Services Coverage.* If a plan covers emergency services, it must cover such services without requiring prior authorization and must cover out-of-network expenses with few exceptions.

G. Provider Choice Requirement.* Plans that require or allow the designation of a primary care physician, must allow designation of any doctor as a primary care physician. For example, an OB/GYN for a female, and a Pediatrician for a child. These plans also must provide a notice to participants of these rights. The DOL model language can be found in Attachment A.

H. Small Business Tax Credit. Employers with no more than 25 employees with average annual wages of less than $50,000 may be eligible for a tax credit of up to 35% of the premiums paid by the employer.

I. Reimbursement for Early Retiree Health Benefits. Plans may be reimbursed for 80% of annual claims between $15,000 and $90,000 for each retiree between age 55 and 65 who is not Medicare-eligible. The program stopped accepting applications on May 5, 2011.
J. Appeals Process Required.* Plans must establish an appeals and external review process for coverage and claims determinations and must provide benefits to the individual during the appeals and external review process. Enforcement of some of the appeals process requirements have been delayed until plan years beginning after January 1, 2012.

K. Adoption Assistance Limit. Plans may increase limits for adoption assistance programs to $13,170 (from $12,170), adjusted annually for inflation.

L. Medicare Part D Deduction Accounting Change. Although, employers will no longer be allowed to deduct the subsidy that is received for continuing retiree drug programs in 2013, accounting rules require immediate recognition of the changed tax treatment in the employer’s financial statements for 2010.

M. Nondiscrimination Testing.* Fully-insured plans are subject to nondiscrimination testing similar to that under IRC § 105(h), which prior to this, only applied to self-insured plans. The effective date of this requirement has been delayed until regulations are issued.

N. Auto Enrollment. Employers with more than 200 employees that offer coverage must automatically enroll new full-time employees in coverage with the opportunity to opt-out. The effective date of this requirement has been delayed until regulations are issued, which are expected in 2014.

6. Significant Changes in 2011:

A. Exclusion of Over-the-Counter Medicine. The definition of qualified medical expenses for HSA, FSA, HRA, and Archer MSA excludes over-the-counter medicine unless obtained with a prescription or the medicine is insulin.

B. Increase in Excise Tax. The excise tax on distributions from HSA or Archer MSA not used for qualified medical expenses is increased from 15% to 20%.

C. Medical Loss Ratio & Rebates. Health plan insurers must submit to HHS the ratio of amounts paid for claims and health care quality compared to the premium revenue (“Medical Loss Ratio”) by June 1 of the year following the end of the reporting year. If the Medical Loss Ratio is less than set percentages (85% in the large group market and 80% in the small group market), the insurer must provide rebates to policyholders on a pro rata basis. The rebates are required to be provided no later than August 1 of the year following the end of the reporting year.

D. SIMPLE Cafeteria Plan for Small Employers. Employers with 100 or fewer employees may establish SIMPLE cafeteria plans, which are deemed to comply with all applicable nondiscrimination requirements applicable to cafeteria plans.

E. Small Business Grants for Wellness Programs. Employers with less than 100 employees that did not provide a workplace wellness program as of March 23,
2010, may be eligible for a federal grant to help provide comprehensive workplace wellness programs.

7. Significant Changes in 2012:
   A. Summary of Benefits and Coverage. Prior to enrollment, employers or their insurance providers must provide applicants and enrollees a four-page summary of the benefits and coverage under the plan. This summary is in addition to providing a summary plan description. Any material modification of plan terms or coverage that is not reflected in the most recently provided four-page summary must be issued in a Summary Material Modification at least 60 days before the modification becomes effective. Technical guidance is to be issued in 2011.
   B. W-2 Reporting. Most employers must report the aggregate cost of employer-sponsored health coverage on each employee’s W-2 form in January 2013. Eventually this information will be used to determine whether the care is affordable.

8. Significant Changes in 2013:
   A. Health FSA Limit. Annual flexible spending account contributions under a cafeteria plan must be limited to $2,500.
   B. Notice of Exchanges. Employers must provide all new hires and current employees with a written notice about the health benefit exchange and some of the consequences if an employee decides to purchase a qualified health plan through the exchange in lieu of employer-sponsored coverage.
   C. Repeal of Deduction for Retiree Prescription Drug Plans. Employers who provide prescription drug benefits for Medicare Part D eligible retirees will not be able to take a tax deduction for the costs of providing those benefits (see 2010 description regarding the earlier effect on an employer’s financial statement).

9. Significant Changes in 2014:
   A. Individual Mandate. All individuals must maintain minimum essential health coverage. A tax penalty, referred to as the “shared responsibility penalty” is imposed on any applicable individual for any month after 2013 in which he or she fails to maintain minimum essential coverage.
   B. Play or Pay Tax. Employers who employ an average of at least 50 full-time employees on business days during the preceding year are subject to a penalty tax if (i) the employer fails to offer minimum essential coverage for all full-time
employees, offers minimum essential coverage that is unaffordable, or offers minimum essential coverage under which the plan’s share of the total allowed cost of benefits is less than 60%, and (ii) any full-time employee purchases health insurance through the Exchange for which health coverage assistance is allowed or paid.

i. Penalty Tax on Employers Not Offering Coverage. The penalty tax is equal to the “applicable payment amount” ($166.67 per month for 2014 [$2,000 annually], adjusted for inflation after 2014) times the number of full-time employees employed by the employer (less a 30-employee reduction) for every month the employer fails to offer coverage. The tax is paid to the IRS and is a non-deductible expense.

ii. Penalty Tax on Employers Who Offer Unaffordable Coverage. The penalty tax is equal to the “applicable payment amount” ($250 per month for 2014 [$3,000 annually], adjusted for inflation after 2014) times the number of full-time employees for any month who receive insurance through the Exchange for which health coverage assistance is allowed or paid. The tax is paid to the IRS and is a non-deductible expense.

C. Exchanges Established. Each state must establish an Exchange to facilitate the purchase of qualified health plans for qualifying individuals and small employers through the Small Business Health Options Program (“SHOP Exchange”).
Department of Labor Model Notices

**GRANDFATHERED HEALTH PLAN NOTICE.**
This [group health plan or health insurance issuer] believes this [plan or coverage] is a “grandfathered health plan” under the Patient Protection and Affordable Care Act (the Affordable Care Act). As permitted by the Affordable Care Act, a grandfathered health plan can preserve certain basic health coverage that was already in effect when that law was enacted. Being a grandfathered health plan means that your [plan or policy] may not include certain consumer protections of the Affordable Care Act that apply to other plans, for example, the requirement for the provision of preventive health services without any cost sharing. However, grandfathered health plans must comply with certain other consumer protections in the Affordable Care Act, for example, the elimination of lifetime limits on benefits.

Questions regarding which protections apply and which protections do not apply to a grandfathered health plan and what might cause a plan to change from grandfathered health plan status can be directed to the plan administrator at [insert contact information]. [For ERISA plans, insert: You may also contact the Employee Benefits Security Administration, U.S. Department of Labor at 1-866-444-3272 or www.dol.gov/ebsa/healthreform. This website has a table summarizing which protections do and do not apply to grandfathered health plans.] [For individual market policies and nonfederal governmental plans, insert: You may also contact the U.S. Department of Health and Human Services at www.healthreform.gov.]

**ADULT CHILD COVERAGE NOTICE.**
Individuals whose coverage ended, or who were denied coverage (or were not eligible for coverage), because the availability of dependent coverage of children ended before attainment of age 26 are eligible to enroll in [Insert name of group health plan or health insurance coverage]. Individuals may request enrollment for such children for 30 days from the date of notice. Enrollment will be effective retroactively to [insert date that is the first day of the first plan year beginning on or after September 23, 2010.] For more information contact the [insert plan administrator or issuer] at [insert contact information].
CHOICE OF PRIMARY CARE PHYSICIAN NOTICE.
For plans that require or allow for the designation of primary care providers by participants or beneficiaries, insert:

[Name of group health plan or health insurance issuer] generally [requires/allows] the designation of a primary care provider. You have the right to designate any primary care provider who participates in our network and who is available to accept you or your family members. [If the plan or health insurance coverage designates a primary care provider automatically, insert: Until you make this designation, [name of group health plan or health insurance issuer] designates one for you.] For information on how to select a primary care provider, and for a list of the participating primary care providers, contact the [plan administrator or issuer] at [insert contact information].

For plans that require or allow for the designation of a primary care provider for a child, add:

For children, you may designate a pediatrician as the primary care provider.

For plans that provide coverage for obstetric or gynecological care and require the designation by a participant or beneficiary of a primary care provider, add:

You do not need prior authorization from [name of group health plan or issuer] or from any other person (including a primary care provider) in order to obtain access to obstetrical or gynecological care from a health care professional in our network who specializes in obstetrics or gynecology. The health care professional, however, may be required to comply with certain procedures, including obtaining prior authorization for certain services, following a pre-approved treatment plan, or procedures for making referrals. For a list of participating health care professionals who specialize in obstetrics or gynecology, contact the [plan administrator or issuer] at [insert contact information].
SQUEEZING THE MOST MONEY OUT OF YOUR 401(K) PLAN

1. Vendor Fee Disclosure Regulations
   A. Important for plan sponsor to review closely - potential fee savings
   B. Compare to other vendors/alternatives
   C. Keep in mind Institutional Client
   D. Don't be afraid to ask
   E. Performance must be reviewed

2. Participant Fee Disclosure Regulations
   A. May be more participant questions

3. Additional Target Date Fund Disclosure

4. Potential Expanded Fiduciary Definition

5. Retirement Security
   A. Annuities
   B. Automatic Enrollments

6. Fiduciary Liabilities
   A. Two important audiences:
      i. Participants – care about results
      ii. Government – care more about procedure
      iii. Most of the litigation has involved company stock but some cases have started involving fees related to plan investments.

   B. Who is a fiduciary – facts and circumstances question
      i. Some clear; others not as clear
      ii. Do not readily admit being a fiduciary – but keep the principle of how to act in mind.

   Important to fully understand the different roles service providers play. Important to understand and review disclosure and contracts. For example, directed vs. discretionary trustees, broker vs. fiduciary investment advisor.

   C. Fiduciary Liability Decision Making
      i. Where are your plan assets?
      ii. Who have you appointed to manage assets?
      iii. Does the appointment conform to plan and legal requirements?
iv. What process did you undertake for this appointment?
v. Is the process documented?
vi. How do you monitor performance, and how often?
vii. Are your advisors independent?
viii. What are participants paying for administrative and money management services?
ix. Who is responsible for plan recordkeeping?
x. Who monitors the accuracy and timeliness of this service?
xi. Are errors discovered and corrected on a timely basis?
xii. Do your participants receive accurate, timely information?

D. What You Should Be Doing Now to Address Fiduciary Liability Concerns
   i. Understand the plan
   ii. Exercise procedural prudence
   iii. Document your actions

E. The Department of Labor (DOL) provides many useful publications to describe fiduciary duties. The following is the link for a DOL fiduciary guidance article:

   http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html

F. Visit www.dol.gov/ebsa for a tune-up – webcasts available

G. Uncertain? Seek advice.
RISKY BEHAVIOR: WHAT THE IRS AND DOL ARE AUDITING

1. What Causes IRS Plan Audits and DOL Investigations:
   A. Random review by geography, industry or plan type
   B. Review of Form 5500
   C. Participant or third-party complaint
   D. IRS Audit Targets

2. Retirement Plans
   Through its Employee Plans Compliance Resolution System (EPCRS), the IRS tracks failures in plan operations, and uses this data when auditing plans.

The top reported failures, in order of occurrences and steps to consider:

   A. Untimely plan amendments
      i. Maintain calendar for plan amendments
      ii. Compare plan against SPD to assure consistency
      iii. Maintain contact with attorney or plan servicer
   
   B. Incorrect compensation for contribution and testing purposes
      i. Coordinate between benefits and payroll departments, and TPA
      ii. Understand compensation limits
      iii. Perform annual reviews
   
   C. Failure to follow eligibility and participation provisions
      i. Misclassification of independent contractors
      ii. Coverage of affiliated employers
      iii. Part-time vs. full-time eligibility issues
      iv. Rehired employees
   
   D. Failure to satisfy minimum distribution requirements
      i. Assure accurate age, date of termination and ownership data to TPA
   
   E. Failure to follow plan’s in-service distribution rules
      i. Understand plan provisions and legal limitations
      ii. Understand hardship provisions and document approvals
   
   F. Failure to provide correct distribution forms or make timely distributions
      i. Determine whether spousal consent is required
ii. 20% withholding requirement
iii. Loan documentation and limits
iv. Full disclosure of plan options

G. Failure to follow plan’s vesting schedule
   i. NRD, death and/or disability as events of full vesting
   ii. Coordination of data with TPA
   iii. Consider partial termination events, i.e., layoffs

H. Failure to retain records
   i. Retain until all benefits have been paid
   ii. Maintain in format for easy audit

I. Failure to follow terms of QDRO
   i. Review plan and legal requirements

J. Failure to satisfy Section 415 limits
   i. Consider participation in multiple plans

K. Failures unique to 401(k) plan
   i. Timely correction of ADP and ACP violation
   ii. Incorrect application of matching formula
   iii. Ignoring maximum deferral caps under the plan
   iv. Failing to comply with automatic enrollment language under plan

3. Executive Compensation Plan Audit Targets
IRS initiative began in 2010 to audit large and small companies non-qualified compensation plans ("NQP's") selected at random, with a focus on 409A compliance.

A. Issues raised and data required:
   i. Identify all NQPs with right to compensate in one year, but payment in subsequent years.
   ii. Provide support for non-409A coverage, i.e., short-term deferral rule.
   iii. Identify terms of NQPs elections, including deadlines.
   iv. Identify terms of reschedule payment dates.
   v. Identify any acceleration in payments.
   vi. Identify "specified employees" and payments within 6 months of separation.
   vii. Description of NQPs and each modification made to comply with 409A.
viii. Identify and describe 409A violations and if such amounts were reported to IRS.

4. DOL Investigation Targets

The DOL, through its Employee Benefits Security Administration (EBSA), is increasing the number and scope of retirement plan investigations and enforcements, which require plan sponsors to devote time, energy and organizational resources.

A. Key Areas of EBSA Plan Investigations:
   i. Failure to remit 401(k) contributions to plan on timely basis
   ii. Transactions between the plan and a party in interest
   iii. Payment of plan-related expenses
   iv. Investment process – selection, monitoring and performance of money managers
   v. Accuracy of financial data on Form 5500
   vi. Bonding requirement
   vii. Selection and monitoring of pension consultants
   viii. Selection and monitoring of plan auditor

B. Special issues for ESOPs:
   i. Control premiums
   ii. Post-transaction valuations
   iii. Revisions to the ESOP note
   iv. 409(p) compliance
   v. Reasonable compensation and expenses

C. What to do if selected for audit or investigation:
   i. Contact counsel and plan administrative record keeper immediately
   ii. Arrange information to track DOL request
   iii. Review books and records internally for possible problems
   iv. Have counsel available or present at on-site meeting
   v. Do not talk to agent about plan informally or formally without counsel’s assistance
   vi. Appoint one spokesperson to speak with agent, and limit communication with IRS/DOL to that spokesperson and counsel
   vii. Establish location for audit, i.e., isolated office at company
   viii. Provide requested documents only as requested by IRS/DOL
   ix. While documents may be sufficient, audits and investigations often require personal interviews – prepare for questions that may be asked
INCREASING PROFITABILITY THROUGH PHANTOM STOCK

1. Introduction
   A. There are many types of employee incentive plans, which usually take the form of cash bonuses based on sales (commissions) or quarterly or annual performance goals. Many companies also have long term performance plans, which also pay in cash based on achievement of 2, 3 or 5 year performance of the company, division, product line, etc.

   B. Companies should consider various incentives based on the stock value of the company. There are two types of such “equity incentive plans”

      i. Plans that pay in actual shares of company stock, in which employees become actual or beneficial shareholders of the company; and

      ii. Plans that are based on the value of the shares of stock of the company, but under which participants do not become actual shareholders, so-called “phantom stock” or “phantom stock appreciation rights” plans.

   C. Each type of plan has unique tax, corporate, financial and securities laws requirements. Some are simple, such as a bonus payable based on the sale price of the company, or a direct purchase of company stock, and others are complex, such as an “employee stock ownership plan” (ESOP); “incentive stock option plan” (ISO) or “employee stock purchase plan” (ESPP).

2. Actual Stock and Stock Appreciation Rights
   A. The grant of actual stock in the company or a subsidiary makes an employee also a shareholder, which results in additional rights under state corporate laws, in addition to the rights of an employee. Many of these corporate rights, such as voting, inspection of company records, transferability of stock to family or third parties, can be restricted by written agreement of the parties, such as in a shareholder agreement or buy-sell.

   B. Actual shares can be given or sold to employees, provided the company complies with state (and sometimes federal) securities laws regarding the offer and sale of stock. There are special exemptions for certain grants of stock to employees. These type of grants are either

      i. a direct purchase,

      ii. a grant of restricted stock or restricted stock units that will vest as additional services are rendered by the employee (time vesting) or

      iii. grant of the right to be issued stock only if certain performance goals are met (performance stock)
C. Alternatively, an “option” to purchase shares can be granted to employees at the discretion of the company, where shares are not issued until a later date when the employee elects to purchase the shares at a purchase price based on the value of the company at the time of the grant of the option. If the value of the company has increased since the date of the stock grant, the value of the stock purchased represents only the appreciation in the value of the company.

i. Incentive stock options represent a tax favored option that, if certain conditions are met, will tax the appreciation on the stock from the date of grant at capital gains tax rates, rather than as ordinary income.

ii. Nonqualified stock options have fewer restrictions but result in tax on the appreciation from the date of grant to the date of exercise at ordinary income tax rates, rather than capital gains rates.

iii. Many publicly-traded companies also have a plan that provides incentive stock options to any employee wishing to purchase stock through payroll deduction.

D. For Limited Liability Companies and partnerships, employees can be granted a “profits interest” for services, which may be subject to vesting, but which entitles the employee to a share of current profits (similar to dividend or Sub-S distributions) and the appreciation in the value of the company upon later sale or liquidation of the LLC or partnership, similar to a stock option. There is favorable capital gains tax treatment that is available to employees who sell a “profits interest.”

E. Actual stock can also be acquired for employees through a tax-qualified pension or retirement plan, such as a 401(k) plan. The trustee of the plan is the owner of the shares, which are beneficially allocated to the participants based on account balance or compensation, depending on how the shares are acquired. Purchase of stock can be made on a pre-tax basis, and the appreciation on the stock can be tax-deferred to the participants. Stock or in some cases cash can be distributed to employees upon termination of employment, usually with a right or duty to repurchase from the participant any shares distributed from the plan.

F. There is a special type of tax-qualified retirement plan called an ESOP (employee stock ownership plan) that is permitted to borrow money from the company or a bank to purchase shares on behalf of participants and repay the loan on a tax-deductible basis, with employees receiving an allocation of stock over time in an amount based on their compensation each year, and sharing in the future appreciation of the purchased stock on a tax-deferred basis.
G. Acquiring and holding stock in a qualified retirement plan is subject to strict conditions under both the Tax Code and ERISA involving:

i. Fiduciary responsibilities in the purchase of shares by the company and the trustee

ii. Securities laws compliance, if participants’ own contributions are used to purchase stock

iii. Ongoing independent appraisal of the fair market value annually and in connection with certain events, such as the purchase or sale of shares held by the plan

iv. Administrative complexities in the distribution of shares, and diversification out of shares by participants in the plan.

3. Phantom Stock and Stock Appreciation Rights

A. There are three basic types of phantom stock or phantom unit plans:

i. Phantom stock appreciation rights plan, which is similar to an stock appreciation right, except that the payment is generally made in cash;

ii. Phantom stock plan, which is similar to a restricted stock unit, whereby the recipient is paid in cash based on the full value of an actual share or unit outstanding; and

iii. A change in control bonus plan, where the recipient is paid a bonus in cash, equal to a percentage (or a number of units), representing the value received by the shareholders as a result of the change in control.

B. Special considerations for Phantom Stock Plans

i. The value of the phantom stock appreciation right or phantom stock will generally be made payable at the same time as an option or a restricted stock unit would be payable, if stock, rather than cash, had been the manner of payment.

ii. A change in control bonus, while similar to restricted stock, is generally payable only if the employee or consultant is actively in the service of the company at the time of an event constituting a change in control.

iii. Many private companies choose to use an approximation of fair market value, based on certain formulas or other valuation methods that may or may not constitute a reasonable valuation method that would exempt the award from Code § 409A.

a. Companies can be more creative in defining the value of units if not required to comply with the reasonable valuation method required for the Code § 409A exemption.

b. Compliance with Code § 409A is generally not burdensome, since in many instances, the general timing of the payment will most often
coincide with an event where such payment is permitted under Code § 409A.
c. However, the flexible exercise dates of an option or SAR are lost under Code § 409A.

C. Phantom Stock Issues
   i. Define each unit as equivalent to either a whole or fractional share or unit of actual equity in the company.
   ii. Determine whether the phantom units represent the full value of a share or unit or only the appreciation between date of grant and date of payment.
   iii. Determine whether the phantom units be treated as if outstanding with actual shares or units in calculating the value of each actual share.
   iv. Provide for adjustment in the number and value of units in the event of a recapitalization that does not result in payment on phantom shares.

D. Limit eligibility to management employees only so that the plan is considered a top hat plan, which is exempt from many ERISA requirements.

E. Vesting Issues
   i. Define circumstances under which right to payment will vest, such as time, achievement of performance goals or change in control.
   ii. Consider whether vesting should accelerate upon certain events such as death, disability, termination without cause or change in control.
   iii. Add forfeiture and clawback upon certain events such as for-cause termination or violation of noncompete.

F. Valuation Issues
   i. Will a formal or informal appraisal be required for each payment event?
   ii. Specify the date of the financial statements to be used in determining the value of phantom shares.
   iii. Specify any adjustments to the financial statement and/or valuation formula in determining the value of phantom shares.
   iv. Specify how the value of any retained interest by shareholders or partial sale of stock or assets is treated in the valuation of phantom shares.
   v. How are contingent payments, escrows or earn-outs valued for phantom shares.
   vi. Determine whether the recipient is permitted to dispute valuation method and/or value.

G. Payment Issues
i. Define which events permitted by Code § 409A will give rise to payment under the plan
ii. Consider using payment events that will cause the plan to be a bonus plan, which is exempt from all of ERISA requirements.
iii. Define the date and form of payment for each event giving rise to payment to comply with Code § 409A
iv. Determine what will happen when dividends or other distributions are made to shareholders.
v. If a subchapter S corporation or limited liability company (LLC), determine how the tax distributions to actual shareholders will be accounted for in the number and value of phantom units
vi. If actual shares rather than assets of the company are sold by shareholders in a change in control, the company will be responsible for paying liability associated with phantom units
vii. Should payments to participants be delayed or contingent based on when payments are received by shareholders
viii. Consider waiver and release of rights and other claims as a condition of payment

H. Tax Compliance
   i. Require withholding from the payment of phantom units.
   ii. Plan must be unfunded and recipients must be no more than general creditors of the company, to avoid immediate taxation on vesting.
   iii. Disclaim any tax advice to recipient and, other than withholding, make recipient responsible for any and all taxes.
   iv. Reserve the right to amend as necessary to comply with any tax laws, with or without the consent of the recipient.

I. ERISA Compliance
   i. Design the plan to be exempt from most of ERISA.
   ii. Determine whether to include ERISA benefit claims determination and review procedures.
   iii. Provide specific disclaimer of any fiduciary responsibility under ERISA or state law.
   iv. Prepare and file a top-hat exemption letter with the Department of Labor to avoid the reporting requirements of ERISA.

J. Phantom Stock Appreciation Rights Exempt from Code § 409A
   i. Short Term Deferral Exemption
   ii. Features That Make Phantom Stock Appreciation Rights Exempt From Code § 409A
a. Nonqualified Stock Option (NQSO) or Stock Appreciation Right (SAR) must meet all of the following conditions:
   (i) company or parent common stock;
   (ii) “Reasonable Valuation Method” for determining FMV from date of grant to date of exercise (see below);
   (iii) no deferral features beyond date of exercise.

b. Modifications to Phantom Stock Appreciation Right that do not result in a loss of the exemption from Code § 409A (i.e., extensions of time to exercise, adjustments for corporate transactions)

iii. Reasonable Valuation Methods
   a. Does the valuation of Stock Appreciation Right at grant and exercise constitute the “reasonable application of a reasonable valuation method” under IRS guidelines: assets, cash flow, comparable sales, discounts or premiums
   b. If a non-publicly traded company, does the valuation method create a rebuttable presumption of a reasonable valuation method: independent appraisal, informal appraisal by qualified person (start up only) or non-lapse formula
   c. If a publicly traded company, is the valuation based on one of the following methods: grant date closing price (high-low price) or price on day before or day after, or average over 30-day period after grant

iv. Exemption from Code § 409A permits participant flexibility in when (time and form) to exercise the option or right that results in taxable income.

K. Features That Make Phantom Stock Appreciation Rights Subject To Code § 409A
   i. Does the Phantom Stock Appreciation Right contain any feature that would not meet the conditions for exemption, such as the following:
      a. discount exercise price,
      b. deferral features,
      c. stock other than company or parent common stock
   ii. Does a change to the Phantom Stock Appreciation Right result in the loss of the exemption
   iii. Restrictions On Phantom Stock Appreciation Rights Subject To Code § 409A
      a. The right to exercise and receive payment under the Phantom Stock Appreciation Right must be limited to an event or time permitted by Code § 409A (death, change in control, separation from service) and not at the discretion of the participant
b. Delay exercise or payment of non-exempt Phantom Stock Appreciation Rights required upon separation from service by “specified employees” of public company for six months from separation from service, (or earlier in the event of death or change in control)

c. Delay in exercise or payment of non-exempt Phantom Stock Appreciation Rights only if payment would violate securities or tax laws (Code § 162(m))

d. Acceleration in exercise or payment of non-exempt Phantom Stock Appreciation Rights only if a divorce payment, employment taxes, to avoid a conflict of interest
NEW DEVELOPMENTS IN EMPLOYMENT LAW

1. The ADA Amendments Act (“ADAAA”) Regulations
   B. On March 24, 2011, the Equal Employment Opportunity Commission (EEOC) released the final regulations for the ADAAA. The regulations became effective on May 24, 2011.
   C. Although the actual definition of “disability” did not change under the ADAAA or ADAAA regulations, the ADAAA and ADAAA regulating made a number of significant changes to the ADA that make it easier for individuals with disabilities to pursue ADA claims. This conforms to the ADAAA mandate that the ADA shall be constructed in favor of “broad” coverage.
      i. Under the ADAAA and ADAAA regulations, an individual must still establish the he/she has: “a physical or mental impairment that substantially limits one or more major life activities.”

2. The ADAAA regulations indicated the primary focus of ADA cases should be: “whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.” (29 C.F.R. §1630.1(4)).

3. The regulations expand the definition of “major life activities” through two non-exhaustive lists:
   A. The first list focuses on activities, many of which were recognized in the previous rule. The list includes the major life activities of caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.” (29 C.F.R. 1630.2(i)(i))
   B. The second list adds “major bodily functions” as a major life activity. The regulations define “major bodily function” to include “functions of the immune
system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal and reproductive function. The operation of a major bodily function includes the operation of an individual organ within a body system (29 C.F.R. 1630.2(i)(ii).

C. The ADAAA regulations specifically provide that the term “major” shall not be interpreted strictly to create a demanding standard for a disability. (29 C.F.R. 1630.2(i)(2).

D. The regulations also state that whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.” (29 C.F.R. 1630.2(i)(1(ii).

4. The ADAAA regulations include 9 Rules of Construction deriving from the statutory language of the ADAAA and its legislative history. These rules of construction apply when determining whether an impairment “substantially limits” a major life activity. The Rules of Confirmation are as follows:

A. The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.

B. An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

C. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual’s impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment “substantially limits” a major life activity should not demand extensive analysis.

D. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for “substantially limits” applied prior to the ADAAA.

E. The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of
scientific, medical, or statistical evidence to make such a comparison where appropriate.

F. The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

G. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

H. An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

I. The six-month “transitory” part of the “transitory and minor” exception to “regarded as” coverage in § 1630.15(f) does not apply to the definition of “disability” under paragraphs (g)(1)(i) (the “actual disability” prong) or (g)(1)(ii) (the “record of prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

(29 C.F.R. 1630.2((j)(i)-(ix))

5. Family and Medical Leave Act ("FMLA") regulations.


i. “Qualifying Exigency” Leave is now available for all family members of the armed services.

ii. Veterans are eligible for “covered servicemember” leave for up to five years after military service.

B. The U.S. Department of Labor is expected to issues new regulations implementing these changes, but such regulation have not yet been published.


A. Staub v. Proctor Hospital is a case under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), which prohibits discrimination by employers based on the employee's membership or service in the military.

B. In Staub, the U.S. Supreme court held that where a final employment decision is significantly influenced by the anti-military motivation of the employee's supervisors, the employer can be held responsible for a USERRA violation even though the actual deciding official was unaware of the bias, since the discharge
decision was sufficiently motivated by the employee’s military service. This has been termed the “cat’s paw” theory of liability.

C. The majority opinion in the Staub case indicates that the following must occur (in this order) for “cat’s paw” liability to attach to employer: (1) a supervisor of the employee must perform an act motivated by anti-military animus; (2) that supervisor must intend to cause an adverse employment action; and (3) the supervisor’s action is found to be the “proximate” cause of the ultimate employment action — even if the executive or supervisor who actually carries out the firing or other penalty is someone else, and that person was not at all biased. Staub, 131 S.Ct. 1194.

D. Although Staub is a USERRA case, the “cat’s paw” theory of liability may well apply to actions under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and similar federal state or local laws. For example, the 10th Circuit recently held that the cat’s paw theory of liability extends to ADEA claims. (Simmons v. Sykes Enterprises, Inc., __ F.3d ___, 2011 WL 2151105 (10th Cir. June 2, 2011).


A. Title II of GINA (which applies to private and state and local government employers with 15 or more employees) took effect on November 21, 2009.

B. Title II of GINA prohibits employers from using genetic information in making employment decisions, restricts the acquisition of genetic information, and imposes confidentiality obligations on employers.


D. The GINA regulations prohibit discrimination against an individual on the basis of genetic information of the individual in regard to hiring, discharge, compensation, terms, conditions, or privileges of employment. (29 C.F.R. 1635.4(a)).

E. The GINA regulations define “genetic information” to include: (1) an individual’s genetic tests; (2) the genetic tests of that individual’s family members; (3) the manifestation of disease or disorder in family members of the individual (family medical history); (4) an individual’s request for, or receipt of, genetic services, or the participation in clinical research that includes genetic service by the individual or a family member of an individual; and (5) the genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology. (29 C.F.R. 1635.3(c)(1)).

F. Under the regulations, employers requiring medical examinations for employment must direct health care providers not to collect genetic
information, including family medical history, as part of a medical examination intended to determine the ability to perform a job. (29 C.F.R. 1635.8(d)).
WAGE/HOUR CLASS SUITS

   Staying up to date on new developments in wage and hour law is not just advisable, it is imperative. There has been a substantial increase in the number of lawsuits filed under state and federal wage and hour laws by employees. This may be due to factors including:
   A. In Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 170 (1989), the U. S. Supreme Court held that federal courts have the discretion to grant collective action status and approve notice to putative class members;
   B. Near-automatic double damages plus attorneys fees for successful plaintiffs;
   C. Continued uncertainty by employers about proper classification of exempt and non-exempt employees;
   D. Discontinuance of Wage/Hour Opinion letters
   E. Workers and their advocates becoming more informed about their rights to privately enforce FLSA claims;
   F. Competitive forces in the economy where employers are attempting to increase production and lower costs.

2. Common Collective Action Claims
   A. Improper classification of employees as exempt, resulting in unpaid overtime
   B. Off-the-clock work
   C. On-call work
   D. Donning and doffing
   E. Tipped employees, tip pool participation
   F. Deductions from wages for cash shortages, damages, or loss
   G. Improper recording of breaks or meal periods, automatic deducts from worktime
   H. “Outside sales” exemption improperly applied
   I. Time spent using iPhone, Blackberry or other remote device by non-exempt employees
   J. Training time
   K. Commuting time

3. Strategies for Employers to Reduce Risk of Collective Actions
   A. Audit exempt classifications to make sure employees are properly classified as exempt or non-exempt
   B. Audit payroll practices to ensure that deductions from employees pay are consistent with the law
C. Implement a safe-harbor policy that communicates the employer’s intention to avoid improper deductions and requires employees to notify the employer of improper deduction if they occur
D. Ensure proper recordkeeping practices to substantiate classification and payroll practices
E. Train management and supervisory employees regarding off the clock activities, proper deductions and enforcement of overtime policies.
PREPARING FOR AND RESPONDING TO OFCCP AUDITS

1. Introduction

In FY 2011, the OFCCP made significant contributions to its enforcement goals. Specifically, the agency completed 4,960 compliance evaluations attaining 99 percent of its goal of 5,000. Facilities identified with violations total 1,071; 919 of the violations were resolved through conciliation agreements compared to a total of 694 conciliation agreements for FY 2009. Financial settlements totaled $9,750,271 in back pay.

A. What are OFCCP’s most common Enforcement Activities?

OFCCP participates in a variety of activities that are intended to ensure contractor compliance with EEO laws, including conducting compliance evaluations of contractor employment practices, and investigating complaints of discrimination.

i. Compliance Evaluations

To ensure that Federal contractors are in compliance with the EEO laws, OFCCP conducts compliance evaluations that review contractors’ employment practices. Contractor establishments are scheduled for review on a periodic basis, generally not more frequently than every two years. OFCCP examines whether the contractor maintains hiring and employment practices that are nondiscriminatory, and determines whether the contractor is taking affirmative action to ensure that applicants and employees have an equal employment opportunity without regard to race, color, religion, sex, national origin, disability, or status as a protected veteran. Among the contractor practices reviewed are those concerning job placement, employee training, promotion, compensation, and termination. OFCCP also occasionally conducts other types of compliance evaluations, such as a Corporate Management Compliance Evaluation, a review designed to determine whether qualified minorities, women, persons with disabilities, and protected veterans have encountered artificial barriers to advancement into mid-level and senior corporate management.

Historically (prior to 1998), OFCCP Compliance Review involved a Desk Audit, On-Site review and Off-Sit processing ending with an outcome disclosed in a closure meeting in person or by phone detailing the agency’s conclusions and requirements for closure. Post 1998 and in the last few years, 75% of Compliance Reviews were completed with only a Desk Audit. On-Site reviews were reserved for contractors which the OFCCP believed
may be engaging in unlawful discrimination, unless the contractor was unfortunate to fall on the 50th Audit mandatory On-Site allocation for each District Office implemented in the last couple of years after 2005 when the OFCCP thought it prudent to quality control check its decision to not come On-Site. The OFCCP quietly announced its audit policy of coming On-Site every 25th audit, that was changed to every 50th audit.

Active Case Enforcement (ACE) is OFCCP’s newest enforcement protocol. Under this initiative, OFCCP will employ all of its compliance evaluation methodologies, i.e., Compliance Review, Compliance Check, Focused Review, and Offsite Review of Records (41 CFR 60-1.20). A federal contractor may be evaluated under any one or a combination of these methods. In addition, under ACE, federal contractors will undergo a more thorough review - beginning with a full desk audit. ACE became effective January 1, 2011. All supply & service (S&S) compliance evaluations scheduled on or after January 1, 2011, will be processed using ACE procedures.

a. Desk Audit

ACE procedures require a full desk audit in every compliance evaluation. In a “desk audit,” an OFCCP Compliance Officer analyzes employment and demographic data provided by the contractor regarding hiring, promotion, and termination actions, and the establishment’s compensation scheme. The facility’s affirmative action efforts are also examined. If there are no indications of possible violations, the compliance evaluation may be closed at this stage.

b. On-site Investigation

If the investigation is not closed at the Desk Audit stage, an on-site investigation will be scheduled and conducted. OFCCP’s Federal Contract Compliance Manual (FCCM) describes the procedures for conducting compliance evaluations and complaint investigations. OFCCP may request additional information and/or to speak with company officials or staff.

ii. Complaint Investigations

OFCCP also conducts investigations of complaints of discrimination that are filed by applicants or employees against Federal contractors. OFCCP works in coordination with the EEOC when processing discrimination complaints.

iii. Conciliation and Enforcement Action

If the result of a compliance evaluation or complaint investigation is a finding that a contractor is in violation of any part of the regulations,
OFCCP will attempt to negotiate with the contractor to reach an appropriate remedy. This negotiation process is called “conciliation.” If the conciliation is successful, the contractor and OFCCP will, generally, sign a Conciliation Agreement, and the contractor will be expected to comply with the Agreement’s terms. If conciliation efforts fail, OFCCP and the Department of Labor’s Office of the Solicitor may pursue an enforcement action against the contractor before an administrative judge or in Federal district court.

B. What should you do if you are selected to undergo a Compliance Evaluation?
   i. Contact your Legal Counsel.

   If you receive a Scheduling Letter titled Notice of Desk Audit and Itemized Listing, notify your legal counsel immediately. You may also receive a Corporate Scheduling Announcement Letter (CSAL) which is a notification to a corporation that two or more of its establishments are on the list of contractor establishments selected to undergo a compliance evaluation during the scheduling cycle. The CSAL is a courtesy notification and does not require the same sense of urgency, but you should still notify legal counsel of receipt of the CSAL. Beginning in FY 2010, there is no limit on the number of compliance evaluations that OFCCP may schedule or conduct per contractor during a fiscal year, thus notice and planning for a compliance evaluation should begin immediately with legal counsel.

   a. Handle all Disclosures to the OFCCP as if you are in High Profile Litigation

      When a contractor has been selected to undergo a compliance evaluation, or when a complaint of discrimination or retaliation has been filed against a contractor, the contractor is obligated to allow OFCCP access to its premises for the purpose of conducting an on-site investigation. The contractor must permit OFCCP to inspect and copy any paper and/or electronic records that may be relevant to the matter under investigation.

   b. BE Cooperative, but Not Careless

      Throughout the Audit Process from the initial submission through closure, a contractor should attempt to leave the OFCCP with the impression that it is making every attempt to assist the agency through the audit. But, leaving the OFCCP with the impression of cooperation does not mean a contractor should be careless or acquiesce in situations which can create serious legal liability. Contractors must understand that the OFCCP Compliance Review is a
full scale, class action case playing out not in the federal courts, but in the OFCCP’s offices and through e-mail, faxes and overnight deliveries of large volumes of employment records. With every disclosure, the contractor must be wary of the consequences of disclosure possibly down the road. Information going into the OFCCP is available pursuant to a Federal Freedom of Information Act (“FOIA” which presumes the disclosure of all documents in a federal agency’s physical possession) request. Private plaintiff’s attorneys take full advantage of FOIA’s broad disclosure rules to scout out potential class actions. Employment litigators make broad discovery requests demanding past years’ AAP’s and data generated in self-audit analyses and Compliance Reviews. All these things spawn potential legal liability.

c. Draft all Documents with an Eye to Litigation

Many documents developed to respond to a compliance audit create potential legal risk. The most common culprits are the well-intended analyses of problem areas, overly ambitious plans of action, statistical reports reflecting race and gender composition, recognition of “goals” and “underutilization” and personnel activity data, none of which may be protected by the attorney work product privilege. Regression and other compensation analyses are discoverable if not done under direction of legal counsel. For this reason, among others, contractors should engage experienced and pro-active legal counsel to oversee the Compliance Review process and to develop safe and effective affirmative action compliance policies and the development of the Company’s plans.

ii. So, You’ve Engaged Legal Counsel, Now What Can You Expect?

a. Submission of a Professional AAP with Accurate Information

First impressions are critical with the OFCCP. All verbal and written communication with the agency should be prompt, responsive, cooperative and set a positive tone. All information submitted in response to a Notice of Desk Audit Letter should be professional, complete and accurate. The AAP is the first substantive impression an audited contractor will make with the OFCCP District Office. A sloppy, erroneous or incomplete AAP reflects poorly on a company and encourages the agency to look harder to find discrimination. The paperwork should reinforce the notion that the company takes its legal obligations seriously and is careful to do things right.

b. Careful and Immediate Review of the AAP
There is 30 days before response to OFCCP’s Notice of Desk Audit and Itemized Listing is due back to the OFCCP. This is ample time to perfect an existing AAP and gather the other required data. A contractor rushing to generate an AAP from scratch after receiving a Notice of Desk Audit Letter will be crunched for time. An AAP submitted late or a plea for an extension for the initial submission is a strong signal to the OFCCP of a general lack of compliance.

The AAP should be reviewed meticulously to correct any inaccurate, wrong or incomplete data before the OFCCP finds its. Often times, companies rely on outside consultants or other resources to help in preparing their plan without really understanding their plan in its completed form. Often times the consultants who prepared the plan cannot even explain it because they used a software system to generate the analysis and don’t understand the mechanics of the program. These outside developers may also make inappropriate assumptions or errors in calculations and presentation of data because they don’t know your company or business and rely on job titles alone to select census data in calculating the Availability Analysis which may lead to false negatives or false positives in the Placement Goal Analysis. A scrubbing of the data with experienced legal counsel if they were not involved in preparing the plan in the first place that knows your company is crucial to make sure that the AAP has been prepared according to the federal regulations.

The same applies to the other information OFCCP requires in the Itemized Listing to the Notice of Desk Audit Letter. Personnel activity, and applicant data in particular, needs to be complete and accurate. Applicant tracking, terminations and promotions or transfers must be appropriately defined. Use this time to undertake confidential disparity analyses under attorney-client privilege to determine whether the resulting disparity analyses calculations are potentially problematic (reporting two or more standard deviations). Also, the definition of “who is an applicant” is so difficult and vague, that most disparity analyses are flawed and may be reporting inaccurate data without the intervention of legal counsel familiar with the applicant issue.

c. Careful deliberation about how much to deliver to the OFCCP

The OFCCP is entitled at the Desk Audit stage to no more documents or information than the Office of Management and Budget (“OMB”) has approved for OFCCP to collect in its Notice of Desk Audit and in its Itemized Listing attached to OFCCP’s Notice of Desk Audit.
But, the goal for most contractors today is to complete the process with a Desk Audit and avoid an On-Site review. To avoid a On-site review outside of the mandatory On-Site allocation, a contractor may consider accommodating the OFCCP and delivering more documents and data than the OFCCP may be entitled to, such as to clear up misunderstandings or provide support for disparity and compensation data. But, the consequence is that all documents as indicated above that are delivered to the OFCCP are potentially subject to disclosure to the public pursuant to FOIA. Whereas, in an On-Site audit, the OFCCP may review sensitive documents at the contractor’s place of business, but not retrieve nor place them in the OFCCP’s system of official agency records. Deliberations about how much to deliver to the OFCCP has to be determined on a case-by-case basis with the help of experienced legal counsel.

C. Update on OFCCP Enforcement News

i. OFCCP Proposes Change to the Scheduling Letter

OFCCP is requesting to make changes to its current Scheduling Letter and Itemized Listing which is set to expire on September 30, 2011. OFCCP proposes adding two new items, including submittal of the last three years VETS-100 and/or VETS-100A report as well as the contractors’ leave policies (FMLA, pregnancy leave, accommodations for religious observances and practices). Also, substantive changes to four other requests items in the Scheduling Letter regarding collective bargaining information, goal attainment reports, personnel activity data and compensation.

ii. OFCCP Publishes Proposed VEVRAA Regulation Revisions to Strengthen Employment Protections for Veterans

OFCCP published in the April 26, 2011 Federal Register a Notice of Proposed Rulemaking (NPRM) that proposes to strengthen affirmative action requirements of federal contractors and subcontractors for veterans protected under the Vietnam Era Veterans' Readjustment Assistance Act of 1974. Veterans protected by VEVRAA include those with disabilities and those recently discharged as well as those who served during a war, campaign or expedition for which a campaign badge is authorized.

OFCCP proposes several changes to the requirement that employers doing business with the Federal government engage in specific types of outreach and recruitment that target veterans. One proposal requires Federal contractors to evaluate annually the effectiveness of their efforts to ensure
that protected veterans have access to employment opportunities. The NPRM also proposes requiring Federal contractors to establish and maintain quantitative data on the number of protected veterans they learn about through job referrals, the number of protected veterans applying for jobs, and the number of protected veterans they hire. OFCCP’s proposal also requires contractors to establish annual hiring benchmarks based on availability data and other relevant information. These benchmarks will enable contractors to measure their success in recruiting, employing and retaining protected veterans.

iii. More Collaboration in the Future for Civil Rights Enforcement Agencies

On February 8, OFCCP, the Equal Employment Opportunity Commission and the Justice Department's Civil Rights Division hosted a webcast to discuss increased collaboration among their agencies in enforcing federal civil rights laws. The meeting, which was transmitted to field offices for all three agencies, represents the first time in history that these agencies have met to discuss joint enforcement efforts.

Agencies cited ways they will leverage resources and increase their collective ability to hold employers accountable for employment discrimination, including developing joint protocols, sharing information and best practices, and coordinating training and litigation strategies. The agency leaders committed to working more closely together as a joint force to end workplace discrimination and advance employment for American workers.

iv. Executive Order 13496

Executive Order 13496 (EO 13496 or Order) was signed by President Obama on January 30, 2009. 74 FR 6407 (February 4, 2009). The Order and its implementing regulations became effective June 21, 2010. EO 13496 requires that Federal contractors provide notice to their employees of their rights under Federal labor laws. Specifically, the Order requires that covered contractors provide notice of employee rights under the National Labor Relations Act (NLRA), the law that governs relations between unions and employers in the private sector. The NLRA guarantees the right of employees to organize and to bargain collectively with their employers, to engage in other protected concerted activity with or without a union, or to refrain from all such activity. EO 13496 revoked the “Beck” Order and it is no longer in force.

Contractors and subcontractors subject to the Order are required to post the Department of Labor notice informing their employees about their rights under Federal labor laws. The size, form, and content of the notice
are prescribed by the Secretary of Labor and may not be altered by contractors. The poster and related information are located on the OLMS website at http://www.dol.gov/olms/regs/compliance/EO13496.htm. Contractors and subcontractors must post the notice conspicuously in and around their establishments, work sites, and offices so that it is prominent and readily seen by employees that are covered by the NLRA and directly or indirectly (e.g., maintenance, repair, personnel or payroll work) engaged in contract-related activity. In particular, contractors and subcontractors must post the notice where other notices to employees about their jobs are posted, e.g., employee bulletin boards.

Additionally, all non-exempt Federal contracts, subcontracts, and purchase orders must include a prescribed contract clause that sets out the text of the employee notice, and outlines the contractor’s posting obligation. The employee notice clause may be incorporated by reference, rather than verbatim. To include the clause by reference, the contract or purchase order must cite to “29 CFR Part 471, Appendix A to Subpart A.” Appendix A is available at http://www.dol.gov/olms/regs/compliance/EO13496.htm.

v. DOL Directive December 16, 2010 regarding Health Care Providers and Insurers

Provides comprehensive guidance for assessing when health care providers and insurers are federal contractors or subcontractors based on their relationship with a Federal health care program and/or participants in a Federal health care program.
WORKSITE ENFORCEMENT

1. Changes in worksite enforcement generally
   A. Department of Homeland Security officials, speaking anonymously in order to discuss internal policy, said immigration officers were no longer authorized to carry out workplace raids unless they cooperated with federal prosecutors to prepare criminal cases against the employers.
   B. All of ICE's operations are based on tips, leads and intelligence. As with any law enforcement agency ICE uses tips and other investigative leads to uncover and investigate crime. The worksite enforcement program is focused primarily on employers involved in critical infrastructure facilities and cases involving employers who commit "egregious violations" of criminal statutes and engage in worker exploitation.

2. Changes in worksite enforcement locally
   A. New Special Agent in Charge Michael Feinberg
   B. Chipotle, cleaning companies

3. What To Do When ICE Knocks On Your Door
   A. DO NOT WAIVE THE 3-DAY NOTICE
   B. Call counsel immediately
   C. Make corrections to I-9 forms with counsel’s advice and to extent possible
   D. Make a copy of everything that you turn over to ICE

4. What Are They Looking For
   A. Criminal charges against the employer
   B. Undocumented workers
   C. Whether the company knew or should have known that a worker was undocumented.
      i. Nonexistent, incomplete or incorrectly completed I-9 forms
      ii. Failure to reverify
   D. Whether the company has engaged in discrimination against workers

5. Anatomy of an I-9 Inspection
   A. Notice of Inspection of I-9 forms -
      i. 3 days to submit – ICE no longer grants extra time as a matter of course
      ii. Accompanied by subpoena. Deadline more negotiable. Typical documents requested:
6. Why having audited I-9s already in order helps:
   A. Catch and correct substantive violations to reduce potential penalties
   B. Correct technical errors
      i. Ensure compliant workforce
      ii. Demonstrate good faith
      iii. Time to focus on individuals

7. Consequences for companies who did not have audited I-9s in order:
   A. In fiscal year 2010, ICE conducted audits of more than 2,740 companies
   B. In fiscal year 2010, ICE levied nearly $7 million in civil fines on businesses that employed undocumented workers, even though ICE recognizes that most employers wish to comply.
   C. ICE recently announced plans to establish an audit office to strengthen its efforts to investigate businesses’ hiring records

8. E-Verify
   A. 80,000 US citizens and permanent residents lost jobs in FY2010 because of errors in the E-Verify system.
   B. Does provide some security in assuring authorized workforce
   C. Use appropriately. Improper use of E-Verify is worse than no E-Verify.
   D. New E-Verify Self-Check program
   E. Recent U.S. Supreme Court decision on Arizona’s law.
9. Social Security No-Match Letters are Back
   A. Don’t use the old process for new forms.

10. I-9s
    A. Electronic versions now available. Buyer beware.