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Employment Regulatory and Enforcement Activity Is Already Underway. Are You Ready?

An employer's guide to new regulations and initiatives that are currently being considered by federal agencies.

September 2011

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Preventive Strategies and Positive Solutions for the Workplace®

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About the Report

The purpose of this special report is to provide employers with information to prepare for, and plan for, the new regulations and initiatives, as well as those that are currently being considered, by federal agencies.

The passage of healthcare reform in early 2010 was hailed as a victory by Democrats and President Obama. Several months later, however, the 2010 midterm Congressional elections quickly translated into a legislative stalemate. Republicans seized control of the U.S. House of Representatives, while Democrats maintained a slim majority in the Senate. As a result, there has been no new federal labor and employment legislation passed in 2011.

The legislative stalemate, however, has not slowed regulatory and enforcement activity by federal agencies. Many agencies, including the Department of Labor (DOL), Equal Employment Opportunity Commission (EEOC), Occupational Safety and Health Administration (OSHA), Office of Federal Contract Compliance (OFCCP), and Department of Homeland Security (DHS) have been busy changing and updating federal labor and employment regulations and enforcing those regulations.

In addition, many agency initiatives are coming from outside the regulatory rule-making process. These initiatives and programs are not subject to the strict rule-making process, which would include public notice and an opportunity for the public to comment on the proposed rules. Such initiatives and programs have the potential to shape agency policy and can have an important impact on employer operations.

Federal agencies have also openly stated their commitment to change as part of fulfilling their overall mission statement. The head of the Department of Labor has said, "There is a new sheriff in town and the agency is once again back in the enforcement business." The head of the Office of Federal Contract Compliance Programs has said, "We are committed to enforcing our laws to keep the doors of opportunity open for all workers–even if we have to pry those doors open from time to time."

> "There is a new sheriff in town and the agency is once again back in the enforcement business."
>
> — Hilda Solis, U.S. Secretary of Labor

Wages and Hours Worked

The U.S. Department of Labor (DOL) is an agency that enforces many federal labor and employment laws, including a key wage and hour law called the Fair Labor Standards Act (FLSA). This law has received renewed attention and vigor under the DOL's leadership. Secretary of Labor Hilda Solis remarked not so long ago, "Workplace enforcement and safety is not only our responsibility, it's our moral obligation."

By embracing an aggressive enforcement policy and hiring hundreds of new investigators, DOL handled about 32,000 wage and hour matters in fiscal year 2010 (ending September 30, 2010), a jump of more than 30 percent in just two years. DOL's activity in 2011 has shown no signs of slowing down.

DOL INITIATES "WE CAN HELP" CAMPAIGN AIMED AT INCREASING ENFORCEMENT

"We Can Help" is a campaign designed to educate workers about their rights under the FLSA. The campaign includes, among other features, a separate website with links to pages explaining the rights of workers and Public Service Announcements (PSAs) in both English and Spanish by Hollywood stars, including Jimmy Smits and Esai Morales. Secretary Solis and Dolores Huerta (co-founder of the United Farm Workers of America, AFL-CIO) also recorded PSAs in support of the campaign.

"I'm here to tell you that your president, your secretary of labor and this department will not allow anyone to be denied his or her rightful pay — especially when so many in our nation are working long, hard and often dangerous hours," Secretary Solis said during a speech. "We can help, and we will help. If you work in this country, you are protected by our laws. And you can count on the U.S. Department of Labor to see to it that those protections work for you."

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"We Can Help" appears to be targeted toward specific industries, such as construction, day laborers and farm workers, and it clearly reaches out to non-citizens and/or undocumented workers. The campaign's encouragement of self-action in employee recordkeeping, coupled with the media blitz, will likely increase complaints filed with the DOL. To that end, the DOL added some 250 additional investigators, in large part to support this campaign.

DOL ANNOUNCES COLLABORATION WITH THE AMERICAN BAR ASSOCIATION

The DOL has announced a new collaboration with the American Bar Association (ABA), which is a national association of lawyers. Under this initiative, FLSA or Family and Medical Leave Act complainants who are informed that the DOL is declining to pursue their complaint are provided a toll-free number to contact a newly created, ABA-sanctioned Attorney Referral System. The DOL has also pledged to provide prompt, relevant information and documents on the referred case to complainants and the referral attorney electing to take the case including, but not limited to, a list of any violations found and the amount of back wages owed.

DOL'S "PLAN/PREVENT/PROTECT" REGULATORY INITIATIVE

Pursuant to the DOL's "Plan/Prevent/Protect" initiative, employers and others must "find and fix" violations — that is, assure compliance — before a DOL investigator arrives at the workplace. Employers must understand that the burden is on them to obey the law, not on the DOL to catch them violating the law. This is the heart of the DOL's new strategy. Simply put, the DOL is going to replace "catch me if you can" with **"Plan/Prevent/Protect."**

Although the specifics will vary by law, industry and regulated enterprise, this strategy will require (at some unknown point in the future) all regulated entities to take three steps to ensure safe and secure workplaces and compliance with the law:

Step One: DOL will propose a requirement that employers and other regulated entities create a plan for identifying and remediating legal violations and other risks to workers — for example, a plan to review potentially unlawful pay practices. The employer would provide their employees with opportunities to participate in the creation of the plans. In addition, the plans would be made available to workers so they can fully understand them and help to monitor their implementation.

Step Two: DOL will propose a requirement that employers thoroughly and completely implement the plan in a manner that prevents legal violations. The plan cannot be a mere paper process. The employer cannot draft a plan and then put it on a shelf. The plan must be fully implemented for the employer to comply with the "Plan/Prevent/Protect" compliance strategy.

Step Three: DOL will propose a requirement that the employer or other regulated entity ensures that the plan's objectives are met on a regular basis. Just any plan will not do. The plan must actually protect workers from violations of their workplace rights.

Employers who fail to take these steps to address comprehensively the risks, hazards, and inequities in their workplaces will be considered out of compliance with the law and, depending upon the agency and the substantive law it is enforcing, subject to remedial action.

DOL PROPOSES "RIGHT TO KNOW" REGULATION

From an employer's perspective, one of the most difficult challenges associated with the FLSA is properly classifying employees as exempt or non-exempt. This is an important distinction. Exempt employees are not entitled to be paid overtime, while nonexempt employees are.

DOL has proposed a new rule, entitled the "Right to Know Under the Fair Labor Standards Act," that would require employers to produce a written "classification analysis" to justify exempt employee status (and/or independent contractors status) for each employee. This proposed rule has generated interest in the employer community because of the potential burden and cost that it would place on employers.

DOL LAUNCHES TIMESHEET APPLICATION FOR SMARTPHONES

What happens when an employee is misclassified as exempt by an employer? That employee may be owed several years of overtime compensation (and additional penalties may apply). In order to determine the amount of compensation due, the DOL may ask the employee to construct a record of hours worked. This has now become an easier task for employees.

The DOL has announced the launch of its first application for smartphones, described as "a timesheet to help employees independently track the hours they work and determine the wages they are owed." Users can track regular work hours, break time and any overtime hours they work for one or more employers, according to the DOL press release on the application. The free "app" is compatible with iPhone® and iPod touch® and is available in English and Spanish.

The DOL predicts that workers' information "could prove invaluable" during an investigation of employers accused of failing to maintain accurate time records. Indeed, the app will allow workers to "email the summary of work hours and gross pay as an attachment" to the Department of Labor's investigators. The app provides a "glossary, contact information and materials about wage-and-hour laws through links to the Web pages of the Department's Wage and Hour Division." According to Secretary of Labor Solis, "This app will help empower workers to understand and stand up for their rights when employers have denied their hard-earned pay."

The DOL also is considering future updates to enable use on other smartphone platforms, such as Android™ and BlackBerry®, and to capture information on types of pay not currently addressed, "such as tips, commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials and pay for regular days of rest."

DOL CEASES ISSUING OPINION LETTERS

Historically, employers have been able to request an Opinion Letter from the DOL to obtain guidance in a specific factual setting. That is no longer true. DOL has ceased issuing Opinion Letters and, instead, has decided to issue more general "Administrator's Interpretations" on topics the DOL selects. The first several Interpretations, including the DOL's current view that loan officers generally cannot qualify for the administrative exemption, have reflected a pro-employee position.

DOL TAKES NEW PROACTIVE, COMPANY-WIDE APPROACH TO SETTLEMENTS

The DOL has promised to pursue corporate-wide compliance strategies to ensure that employers take on responsibility for their compliance behavior. In a 2011 speech, Solicitor of Labor Patricia Smith mentioned a recent settlement with an employer as an example of the DOL's new approach. Solicitor Smith explained that even though the DOL's enforcement action was limited to only one of the employer's facilities, the settlement included a nationwide injunction which broadly covers other company facilities and workers. Solicitor Smith explained "that's the type of settlement you will see us entering into more and more in the future…if we find a violation at one facility, it should be corrected at all the company's facilities." During the same speech, Ms. Smith reiterated that "the Labor Department is open once again."

DOL POSTS ENFORCEMENT DATA ONLINE

The DOL has unveiled a publicly accessible online enforcement database which provides access to enforcement data collected by the Employee Benefits Security Administration (EBSA), Occupational Safety and Health Administration (OSHA), Office of Federal Contract Compliance Programs (OFCCP), Mine Safety and Health Administration (MSHA), and Wage and Hour Division (WHD) in one location.

Anyone can access the database and search by state, zip code and company name. Users can obtain detailed information including, for example, the number of "FLSA violations" per employer, amount of back wages the employer "agreed to pay," the number of employees the employer "agreed to pay," the type of violation (i.e., minimum wage or overtime) and the amount of civil money penalties assessed.

The DOL has itself suggested that "perhaps workers will review the database before beginning their job search, allowing them to more accurately assess a prospective employer's reputation. Or maybe someone will create a mashup of the employers in their community and encourage neighbors to stop doing business with serial employment law violators."

DOL ISSUES NEW CHILD LABOR REGULATIONS

The DOL issued new regulations concerning child labor under the FLSA. The regulations are focused on the limitations as to both duties and work hours applicable to 14-15 and 16-17 year-olds in "non-agricultural" occupations. The regulations address in detail the types of machinery that minors are permitted to, and barred from, operating as part of their employment.

An employer must notify the employee that it will be using a tip credit.

DOL IMPLEMENTS NEW TIP CREDIT REGULATIONS

The FLSA allows an employer to pay a tipped employee an hourly wage less than the legal minimum wage under certain circumstances. The tipped employee's tips and hourly wage combined must equal at least the legal minimum wage. The difference between minimum wage and the employee's hourly wage is known as a tip credit. Federal law currently allows an hourly wage as low as $2.13 per hour, resulting in a maximum tip credit of $5.12 per hour (i.e., current minimum wage of $7.25 per hour minus $2.13 per hour minimum tip wage = $5.12 per hour maximum tip credit).

The new rule specifies what information an employer must provide to tipped employees as a condition to being able to take the tip credit. An employer must notify the employee that it will be using a tip credit. The notice must include the following:

- The amount of wage the employer will pay the employee;
- The amount the employer will credit against tips received;
- That the tip credit will be no greater than the value of tips actually received;
- That the tip credit cannot be applied unless the tipped employee has been informed of the tip credit provisions of the FLSA; and
- That, except for valid tip pooling, all tips received by the tipped employee must be retained by the employee.

The new rule states that requiring an employee to share his or her tips with a lawful tip pool is the only permissible use to which an employer can put an employee's tips. The new rule also states that there is no cap on the percentage of an employee's tips that may be contributed to a valid tip pool. This portion of the rule discards long-standing agency policy and acquiesces in the rulings of several courts that had rejected DOL's position on this issue. Thus, employers may require tipped employees to pool their tips with other service personnel without a restriction on the amount pooled.

Immigration

As noted on the website for the Department of Homeland Security (DHS), Secretary of Homeland Security Janet Napolitano "has forged a smart and effective approach to enforcing our immigration laws and prioritizing public safety while targeting criminal aliens and aggressively pursuing employers that knowingly take advantage of illegal labor." DHS has focused on businesses that hire undocumented workers, and not the workers themselves.

This change in approach — from one that emphasized punishing the illegal foreign worker to one that emphasizes punishing the employer that hired the worker — is designed to reduce the demand for illegal employment by focusing on employers suspected of employing illegal or unauthorized workers.

It is also an approach that is being supported by stepped-up regulatory enforcement. Under the Obama administration, DHS has conducted more audits and debarred more employers for hiring illegal immigrants than in the entire tenure of the prior administration. Employers should take notice.

ICE AUDITS THOUSANDS OF EMPLOYERS

Pursuant to advance notice, called a Notice of Inspection, U.S. Immigration and Customs Enforcement (ICE), which is part of DHS, has audited several thousand employers across the country to determine compliance with employment eligibility verification laws. The audits cover I-9 documentation, payroll records, copies of immigration filings, Social Security Administration communications requesting corrections, information on independent contractors, and related information. All documentation normally must be produced within three business days of the employer receiving the Notice.

ICE says the employers targeted are those whose businesses have a key role in keeping national infrastructure safe. The 17 sectors singled out for the enforcement action include those associated with agriculture and food, financial services, commercial nuclear reactors, drinking water and water treatment, postal and shipping, healthcare, and transportation. According to ICE, "The inspections will touch on employers of all sizes and in every state in the nation, with an emphasis on businesses related to critical infrastructure and key resources."

DHS OPENS NEW EMPLOYMENT AND COMPLIANCE INSPECTION CENTER

ICE has signaled that it intends to keep conducting I-9 audits and imposing civil fines on employers. ICE chief John Morton announced the establishment of ICE's Employment Compliance Inspection Center. Located in Crystal City, Virginia, near ICE Headquarters, the Center will be staffed by 15 forensic auditors supporting ICE's worksite enforcement strategy. They will help local field offices around the country expedite Form I-9 audits of businesses selected by ICE.

USCIS FRAUD DETECTION UNIT

U.S. Customs and Immigration Services (USCIS), another arm of the DHS, has again stepped up its efforts to investigate and combat fraudulent use of immigration programs. The Fraud Detection Unit first started making random site visits in late 2009. USCIS has continued site visits in 2010 and 2011, with no signs of slowing down. A visit usually involves an unannounced drop-in by a USCIS agent or contractor who reviews the employment conditions of a nonimmigrant worker, usually H-1B employees. The agent will request to speak to the employee, review the workplace, and review payroll and related records.

CIVIL WORKSITE ENFORCEMENT AGREEMENT BETWEEN DOL AND DHS

To avoid potential conflict, DOL and DHS have entered into a Memorandum of Understanding (MOU) concerning their respective civil worksite enforcement activities. Under the MOU, ICE agreed that, unless determined necessary by the Director of ICE, Secretary of Homeland Security, or an Officer of the DOL, it would refrain from engaging in civil worksite enforcement at a worksite if there is an existing DOL investigation. The MOU specifically states that ICE and DOL agree to create a means by which they will exchange information from their respective investigations.

The DOL's enforcement activities are intended to ensure proper wages and working conditions for all workers regardless of their immigration status. In contrast, DHS enforces immigration laws to ensure that all workers are authorized to work.

SSA "NO MATCH" LETTERS MAKE A COMEBACK

The Social Security Administration (SSA) has resumed notifying employers of Social Security number mismatches of employees. The "No-Match" or "Request for Employer Information" letter states that the information reported on an individual's W-2 or W-2c form do not match the Agency's records. On receiving a "No-Match" letter, the SSA requests the employer do the following:

- Compare the SSA information with the individual's employment records.
- If the records match, ask the employee to check the name and Social Security number on their Social Security card.
- If the card does not show the employee's correct name or Social Security number, or if a name change or a correction is necessary, instruct the employee to contact a Social Security Administration office to resolve the discrepancy.
- Provide written responses to several questions about the individual in question and return the completed form to the Agency (separately from any Form W-2c correction filing).

In the past, about 10 percent of all W-2s initially received by the Agency had some sort of a name-number mismatch.

The SSA cautions the employer that the "No-Match" letter alone should not be the basis for taking adverse action against an employee. A mismatch can be for many reasons, including typographical errors, incomplete or blank names reported, name changes, or incomplete or blank Social Security numbers reported. In the past, about 10 percent of all W-2s initially received by the Agency had some sort of a name-number mismatch.

Workplace Safety

The Occupational Safety and Health Administration (OSHA) is the federal agency responsible for workplace safety. OSHA has continued to maintain its high level of annual inspection activity. In fiscal year 2010, OSHA conducted 40,993 total inspections. The Agency looks to increase those numbers in 2011, along with increased regulatory activity.

OSHA PLANS SPECIFIC CHANGES TO INCREASE ENFORCEMENT

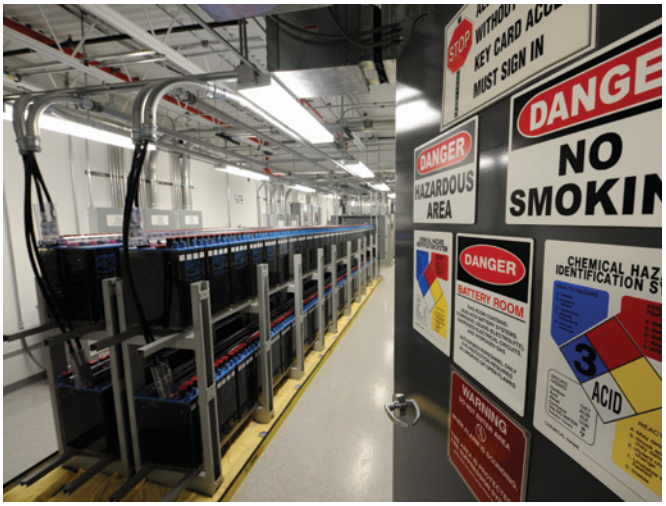
The Agency has shifted its resources to regulatory and enforcement activities, including:

- Hiring 25 additional inspectors to "expand the agency's enforcement presence."
- Conducting more inspections.
- Training its inspectors to recognize where independent contractor misclassification is occurring and to refer such situations to the proper DOL division for enforcement.
- The Site-Specific Targeting (SST) Program, which focuses on businesses that report high injury rates, will target businesses with 20 or more employees. The minimum number of employees had been 40.
- Implementing a new directive for its inspectors on Corporate-Wide Settlement Agreements (CSAs) for multisite employers. CSAs address safety and health hazards that exist at more than one employer location. The new directive will emphasize using these agreements for smaller employers with more than one location.

OSHA HAS PROPOSED INJURY AND ILLNESS PREVENTION PROGRAM (I2P2)

Consistent with the DOL's "Plan/Prevent/Protect" initiative, OSHA wants employers everywhere to undertake a systematic approach to occupational safety and health, a framework for their businesses to incorporate hazard investigation, identification, remediation and prevention into workplace culture. OSHA Administrator Dr. David Michaels describes the program rule as a "risk-based system to address hazards" in which workers will play "an important role." OSHA, he said, is "trying to get away from [a] 'catch-me-if-you-can'" approach to dealing with workplace safety and health issues.

OSHA is laying the groundwork for such a national program, referred to as I2P2. It has engaged the Eastern Research Group (ERG) to prepare a "Safety and Health Practices Survey." ERG's questionnaire attempts to determine how safety is managed in various workplaces and may hold clues to potential program elements that may be included in any I2P2 that is adopted. It will be sent to employer establishments selected at random from a publicly available database, according to OSHA. All sectors of the economy will be represented.



OSHA promotes participation in the survey as a way "to enable you to have your voice heard and your experience considered as OSHA approaches new regulation." While Michaels said a draft of proposed regulatory text for I2P2 should be ready for publication by year's end, the rule is certainly a work-in-progress. The Agency will need to receive and assess the information from the survey and incorporate it meaningfully in any proposed rule.

The Agency recognizes some employers may hesitate to hit the send button on the multiple-choice questionnaire for fear of disclosing their identity. It seeks to reassure them, saying, "No individual or company will be identified to OSHA, nor will ERG provide any information to OSHA that will enable identification of any individual or company." It will receive only aggregate data from ERG and participation will be voluntary.

The 49-question survey includes questions to profile the employer's establishment, determine existing safety and health management practices and responsibilities, explore types of hazards present and types of safety training, identify sources of safety information, catalog safety management systems, programs and program elements already in place, including accident investigation methods, and obtain information on protections for contractor employees working on the host employer's site.

OSHA TO REVISE WHISTLEBLOWER INVESTIGATIONS MANUAL

In response to external and internal reviews of the operation and effectiveness of OSHA's Whistleblower Protecton Program, OSHA has announced significant changes in how the Agency runs the program. OSHA enforces the whistleblower provisions of 21 different statutes, including Section 11(c) of the Occupational Safety and Health Act and other workplace and environmental safety and health laws.

The significant changes announced by OSHA include:

- Reorganizing the Agency so that the Whistleblower Protection Program reports directly to the Assistant Secretary of OSHA;
- Adding 25 new investigators; and
- Revising the Whistleblower Investigations Manual to "provide further guidance on the enforcement program to help ensure consistency and quality of investigations."

Employers should continue to monitor OSHA's actions in this area carefully and, in particular, review the updated Investigations Manual once it is released.

OSHA COMMENCES SEVERE VIOLATORS ENFORCEMENT PROGRAM

OSHA's new Severe Violators Enforcement Program (SVEP) focuses enforcement efforts on employers who willfully and repeatedly endanger workers by exposing them to serious hazards. The directive establishes procedures and enforcement actions for the severe violator program, including increased inspections, such as mandatory follow-up inspections of a workplace found in violation and inspections of other worksites of the same company where similar hazards or deficiencies may be present.

SVEP is intended to focus enforcement efforts on employers who have demonstrated recalcitrance or indifference to their legal obligations by committing willful, repeated or failure-to-abate violations in one or more of the following circumstances: a fatality or catastrophe situation; in industry operations or processes that expose workers to severe occupational hazards; exposing workers to hazards related to the potential releases of highly hazardous chemicals; and all egregious enforcement actions.

OSHA ANNOUNCES PHOTO CONTEST

Sometimes a picture is worth a thousand words, or at least OSHA thinks so. The Agency has announced the "Picture It!: Safe Workplaces for Everyone" photo contest. The contest challenges anyone to capture an image of workplace safety and health and share it with OSHA. The purported goal of the contest is to raise awareness of workplace safety and health. The public is invited to interpret "image of workplace safety and health" in any way they choose; they are not restricted to particular subjects or themes. Prizes are awarded for the most outstanding portrayals of occupational safety and health in terms of artistic value and ability to raise awareness of safety and health to the general public.

OSHA does not deny that the photos can be used to investigate employers.

REVIEW COMMISSION HOLDS EMPLOYERS ACCOUNTABLE FOR RECORDKEEPING INACCURACIES

In a much anticipated decision, the Occupational Safety and Health Review Commission (Review Commission) has ruled that OSHA can enforce its requirement for employers to record work-related injuries and illnesses on the OSHA 300 Log even when the employer's duty to record the injuries and illnesses occurred more than six months before the issuance of the citation. The employer in the case had argued that the six-month statute of limitations in the Occupational Safety and Health Act for OSHA to enforce violations of the Act prohibited OSHA from enforcing recordkeeping violations that occurred beyond that six-month period. The Commission disagreed, however, and by doing so has reiterated for employers the need to continually review their recordkeeping logs to ensure the entries are accurate.

Under OSHA's recordkeeping rule, employers are required to enter a recordable injury on the OSHA 300 Log within seven days of the occurrence of the injury. Employers must also retain their logs for five years and under OSHA's rule, there is an obligation for employers to go back and update entries should the circumstances surrounding them change.

This decision reiterates the need for employers to integrate into their recordkeeping procedures a mechanism to ensure they go back and continually evaluate the accuracy of entries — during the entire retention period. It is not enough to record an injury within seven days and then "forget" about it. OSHA expects employers to be diligent in updating recordkeeping entries for accuracy and may cite employers who are not.

OSHA PROPOSES REQUIRING NEW INDUSTRIES KEEP OSHA 300 LOGS, ADDS MORE STRINGENT REPORTING OBLIGATIONS

OSHA has proposed changing the industries that would be generally exempt from maintaining regular workplace injury and illness records. Employers in exempt industries are not required to maintain OSHA 300 Logs, complete OSHA 301 incident report forms, or complete the OSHA 300A annual summary forms. The current exemption list is industry-specific and based on the now-outdated 1987 Standard Industrial Classification (SIC) coding system. OSHA's proposed rule will re-categorize the exempt industries based on the North American Industrial Classification System (NAICS), which is the system used by federal agencies for statistical research purposes. The proposal also will remove some industries from the list based on new injury and illness data compiled by the Bureau of Labor Statistics.

OSHA's proposed rule also would require employers to report workplace amputations to the agency within 24 hours, as well as all in-patient hospitalizations within 8 hours. Existing recordkeeping rule (Part 1904) requires employers to report in-patient hospitalizations of 3 or more employees to OSHA within 8 hours. Any workplace fatality would continue to be reportable, as well.

Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) is a federal agency that enforces many federal discrimination laws, including those that prohibit discrimination based on race, sex, religion, color, national origin, disability and age.

Jacqueline Berrien, Chair of the EEOC, has noted that while "blatant forms of discrimination have receded, more sophisticated, but equally effective methods of restricting employment opportunities have emerged – not only for people with disabilities, but also on the basis of race, color, national origin, religion and sex...The EEOC will continue to work to meet new and emerging challenges in order to ensure the equality of employment opportunity to all."

The EEOC has indeed been working hard. Individuals are bringing more charges of workplace discrimination against employers than ever before. The EEOC reported that it received nearly 100,000 workplace discrimination charges in its fiscal year 2010. The number of charges filed (99,922) is more than seven percent higher than the year before. The agency noted another record for fiscal year 2010: through its enforcement, mediation and litigation programs, it secured more than $404 million in monetary benefits from employers.

The EEOC has responded to this higher volume by hiring staff, increasing enforcement activity, issuing new regulations, and engaging in an active public relations campaign.

The ADAAA made clear that the primary focus in ADA cases should be on whether employers complied with their obligations under the statute and whether discrimination occurred, not whether individuals are disabled under the law.

EEOC RELEASES NEW ADA REGULATIONS

The EEOC has recently experienced an increase in disability-based charges of discrimination from private-sector employees. At the same time, the EEOC has released long-awaited Final Regulations implementing the ADA Amendments Act (ADAAA). The ADAAA was signed into law on September 25, 2008, and became effective on January 1, 2009. The Final Regulations reaffirm the purpose of the ADAAA: to make it easier for individuals with disabilities to obtain the ADA's protection.

The Final Regulations seek to provide a "predictable, consistent, and workable" framework for ensuring more generous coverage and application of the ADA's discrimination prohibition.

The ADAAA made clear that the primary focus in ADA cases should be on whether employers complied with their obligations under the statute and whether discrimination occurred, not whether individuals are disabled under the law. Accordingly, the Final Regulations follow Congress' lead by providing "rules of construction" to evaluate ADA-coverage issues. These "rules of construction" are as follows:

- The term "substantially limits" is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.
- Whether an impairment "substantially limits" a major life activity should not demand extensive analysis.
- An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population; this usually will not require scientific, medical, or statistical analysis.
- 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.
- "Substantially limits" is to 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.
- Except in the cases of ordinary eyeglasses or contact lenses, the determination of whether an impairment substantially limits a major life activity is to be made without regard to the ameliorative (beneficial) effects of mitigating measures.
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- 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.
- The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.

While careful to state that an individualized assessment is always required, the Final Regulations allow that some impairments involve "predictable assessments" which, in "virtually all cases," will result in a finding that they are covered by the ADA. The Final Regulations seek to provide a "predictable, consistent, and workable" framework for ensuring more generous coverage and application of the ADA's discrimination prohibition. Impairments that should lead to "predictable assessments" include deafness, blindness, intellectual disabilities, partially or completely missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.

The most far-reaching provisions of the Final Regulations arguably can be found in the provision on coverage when one is "regarded as" having a substantially limiting impairment. The Final Regulations clarify that an individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity.

Prohibited actions include refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, and denial of any other term, condition, or privilege of employment, among others.

In practice, an individual is "regarded as having such an impairment" if his or her employer takes a prohibited action against the individual because of an actual or perceived impairment, even if the employer asserts, and may ultimately establish, a defense to such action. This highlights the ease with which individuals can now obtain ADA coverage. However, coverage alone does not mean the employer has violated the ADA. Liability is established only when an individual proves that an employer discriminated on the basis of disability, which, in turn, requires an analysis of whether the individual was qualified for the position sought or held.

EEOC ISSUES REGULATIONS REGARDING GENETIC TESTING AND ACQUISITION OF GENETIC INFORMATION

The EEOC also issued final regulations for the employment provisions (Title II) of the Genetic Information Nondiscrimination Act (GINA). GINA restricts the acquisition, use, and disclosure of genetic information in the employment context. The Final Regulations, among other things, clarify the meaning of a "genetic test," the circumstances under which the acquisition of genetic information is permissible, and requirements for employer compliance with GINA's confidentiality and posting requirements.

In general, Title II of GINA prohibits employers from discharging, refusing to hire, or otherwise discriminating on the basis of genetic information, and from intentionally acquiring genetic information about applicants and employees. Congress defined genetic information broadly to include information about the following: (1) an individual's genetic tests; (2) the genetic tests of the individual's family members; and (3) the manifestation of a disease or disorder in a family member. The law imposes strict confidentiality requirements on genetic information.

In the Final Regulations, the EEOC identifies many specific tests that will be considered "genetic tests" and within GINA's reach. They include, but are not limited to:

- Certain genetic tests that might determine whether individuals are genetically predisposed to breast cancer, colon cancer, or Huntington's Disease;
- Carrier screening to detect the risk of conditions such as cystic fibrosis, sickle cell anemia, spinal muscular atrophy, or fragile X syndrome in future offspring;
- Amniocentesis;
- Newborn screening;
- Preimplantation genetic diagnosis performed on embryos created using in vitro fertilization;
- Pharmocogenetic tests to predict how an individual might react to a drug or particular dosage of a drug;
- DNA testing to detect genetic markers associated with information about ancestry; and
- DNA testing that reveals family relationships such as paternity.

Information about the race or ethnicity of an employee or his or her family members, not derived from a genetic test, is not protected genetic information according to the EEOC. The Final Regulations also clarify that a test for infectious and communicable diseases that may be transmitted through food handling, complete blood counts, cholesterol tests, and liver-function tests are not covered genetic tests.

The Final Regulations focus particular attention on requests for medical information that inadvertently acquire genetic information. The Final Regulations essentially impose a duty on employers and other covered entities to prevent such occurrences. An employer's receipt of genetic information will "not generally be considered inadvertent" unless the employer/covered entity has directed the employee not to provide genetic information when responding to an otherwise lawful request for medical information. The EEOC provides the following sample notice that, if used when requesting medical information, will protect employers:

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

The Final Regulations focus particular attention on requests for medical information that inadvertently acquire genetic information. The Final Regulations essentially impose a duty on employers and other covered entities to prevent such occurrences.

Even without this notice, the acquisition of genetic information may still be considered inadvertent if the employer's request was not "likely to result in a covered entity obtaining genetic information." An overly broad response received in response to a tailored request for medical information, for example, would be considered inadvertent. Other situations where receipt of medical information may be considered inadvertent include the following:

- Where managers or supervisors learn genetic information about an individual by overhearing a conversation between the individual and others.
- During casual conversations that include responses to an ordinary expression of concern about the employee or a parent or child that is the subject of the conversation. However, this exception does not apply where an employer follows up with more probing questions concerning a family member's general health.
- When employers receive unsolicited genetic information, including in emails about the health of an employee or an employee's family member.
- When employers inadvertently learn of genetic information from a social media platform.

Like the ADA, GINA requires employers to keep records containing genetic information on separate forms and in separate medical files and to treat them as confidential medical records. According to the Final Regulations, genetic information placed in an employee's personnel file before November 21, 2009 does not need to be removed from the file. However, the prohibitions against disclosing or using genetic information apply to all such information, regardless of when it was obtained.

Lastly, the Final Regulations provide that every covered entity "shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this regulation and information pertinent to the filing of a complaint."

Federal Contractors

The Office of Federal Contract Compliance Programs (OFCCP) administers the federal affirmative action requirements for government contractors pursuant to Executive Order 11246. The requirements for written affirmative action plans apply to contractors or subcontractors with annual federal contracts totaling $50,000 or more and at least 50 employees. These contractors and subcontractors must create and implement affirmative action plans annually.

According to OFCCP Director Patricia Shiu, the march toward equality has been a long and arduous one, spanning over 150 years in the United States. And while substantive steps have been made, particularly over the last 50 years, there is still more work to do and the nation must keep moving.

> "We believe businesses that play by the rules shouldn't have to compete at a disadvantage against those who don't."
>
> — OFCCP Director Patricia Shiu

"We are committed to enforcing our laws to keep the doors of opportunity open for all workers—even if we have to pry those doors open from time to time," said Director Shiu. "We believe businesses that play by the rules shouldn't have to compete at a disadvantage against those who don't."

MORE COLLABORATION IN THE FUTURE FOR OFCCP AND CIVIL RIGHTS ENFORCEMENT AGENCIES

OFCCP, the EEOC, 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. Deputy Secretary of Labor Seth Harris moderated a panel with OFCCP Director Patricia Shiu, EEOC Chair Jacqueline Berrien and Assistant Attorney General for Civil Rights Thomas Perez to discuss opportunities for sustained collaboration moving forward. In addition, opening remarks were offered by Melody Barnes, White House Domestic Policy Council Director and principal advisor to President Obama on civil rights.

All of the 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. "We need to start talking to each other, to start sharing information, and to put our egos and turf issues aside to really prioritize what's in the best interests of workers," Director Shiu said.

OFCCP ISSUES NEW PROCEDURES FOR CONDUCTING COMPLIANCE EVALUATIONS

Claiming that its previous Active Case Management (ACM) method for conducting compliance evaluations was only "of limited utility," the OFCCP has rescinded ACM and instituted a new system. The new Active Case Enforcement (ACE) is intended to allow the Agency to "more effectively utilize its resources and strengthen its enforcement efforts" by:

- Lowering the thresholds for an "indicator" of discrimination prompting in-depth review,
- Expanding the definition of what constitutes an indicator of discrimination,
- Planning to assess contractor compliance for the three years preceding an evaluation,
- Expanding enforcement tools available to the agency when conducting evaluations,
- Requiring compliance officers to conduct full desk audits in every review, and
- Requiring an on-site audit requirement in at least every 25th evaluation scheduled.

Under the old ACM, OFCCP focused on identifying cases of class-based discrimination that may have affected at least 10 individuals. Under ACE, however, OFCCP removes the affected-class-member threshold, saying indicators of discrimination may be of an individual or class nature. OFCCP defines "class" as "two or more victims." The agency has much to choose from in finding an indicator of discrimination or violation. It may include statistical evidence, anecdotal evidence, patterns of individual discrimination, patterns of systemic discrimination, patterns of major technical violations, and indicators of non-compliance with non-EEO (Equal Employment Opportunity) labor and employment laws enforced by other federal agencies (e.g., Department of Labor's Wage and Hour Division, Occupational Safety and Health Administration, and Equal Employment Opportunity Commission).

All ACE compliance evaluations will begin with a full desk audit, regardless of the enforcement method used thereafter. A full desk audit is a comprehensive analysis of a contractor's affirmative action plan (AAP) and supporting documentation prepared pursuant to Executive Order 11246, the Rehabilitation Act and the Vietnam-Era Veterans Readjustment Assistance Act. As with the old ACM, the ACE audit will include a full evaluation of a contractor's selection decisions (i.e., hires, promotions and terminations), compensation and other more programmatic aspects of a contractor's AAP (e.g., goal-setting and outreach efforts).

Under ACE, OFCCP will select every 25th compliance evaluation for an automatic full compliance review, regardless of whether any problematic employment processes are identified.

Following the full desk audit, OFCCP will consider initiating one of the following review methodologies:

- Compliance Review – A comprehensive review of all components of a contractor's AAP. In addition to the desk audit, the review may include an on-site review and off-site analysis.
- Compliance Check – An abbreviated review of a contractor's recordkeeping practices to ensure compliance with the affirmative action regulations. A compliance check may be followed by a more expansive evaluation, as appropriate.
- Focused Review – An on-site review that focuses on one or more components of a contractor's employment organization or practices.
- Off-site Review of Records – As the name suggests, the review will involve OFCCP's receipt and review of documentation related to a contractor's employment processes to ensure compliance with the affirmative action regulations.

On a positive note for contractors, OFCCP re-emphasizes that, if during the desk audit of a contractor's AAP, the compliance officer identifies no violations or only minor technical violations, the compliance officer should seek to close the review at the desk-audit stage.

Under ACE, OFCCP will select every 25th compliance evaluation for an automatic full compliance review, regardless of whether any problematic employment processes are identified. A full compliance review will consist of all three stages of a compliance review — desk audit, on-site review, and off-site analysis, when necessary.

OFCCP SEEKS TO OVERHAUL AUDIT SUBMISSION FOR FEDERAL CONTRACTORS

OFCCP is proposing to overhaul its Scheduling Letter and associated Itemized Listing used to commence agency audits of employers. While the Agency states that it is seeking to "reduce overall burden hours on contractors," the proposed changes, if approved, will significantly increase the burden on employers subject to OFCCP audit. The proposal comes as the current Scheduling Letter is set to expire on September 30, 2011.

The OFCCP Scheduling Letter is sent to notify a particular contractor establishment that it has been scheduled for a compliance evaluation and to request submission of the contractor's Affirmative Action Program(s) and the supporting data, including personnel activity data and summary pay data. A sample Scheduling Letter currently in use is available from the Department of Labor website at www.dol.gov/ofccp/regs/compliance/OMB_appr_letter.pdf.

OFCCP's proposal would require the selected contractor establishment to submit, among other things, (a) Family and Medical Leave Act (FMLA) and other leave or accommodation policies; (b) data on sub-minority by both job group and job title for applicants, hires, promotions, and terminations; (c) data on "actual pool" of employees considered for promotions and terminations; and (d) detailed employee-specific pay data (typically requested only where OFCCP identifies indicators of potential discrimination).

CHANGES TO CONTRACTORS' OBLIGATIONS UNDER OFCCP'S PROPOSED RULE ON VETERAN RECRUITMENT, PLACEMENT

The OFCCP has published a Notice of Proposed Rulemaking that would affect federal contractors' compliance obligations significantly. The proposal is the first modification to the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) since 1976. Veterans protected by VEVRAA include those with disabilities, those recently discharged, and those who served during a war, campaign or expedition for which a campaign badge is authorized.

In the most significant departure from existing requirements, OFCCP is proposing that federal contractors be required to track applicants who are covered veterans and analyze the data. Applicants would be invited to self-identify their protected-veteran status both before and after an offer of employment is extended. The data to be tracked are considerable and include:

a) Raw number of priority referrals of protected veterans;

b) Total number of referrals;

c) Ratio of priority referrals of veterans to total referrals (referral ratio);

d) Number of applicants who self-identified as veterans (or are otherwise known to be);

e) Total number of job openings and total number of jobs filled;

f) Ratio of jobs filled to job openings;

g) Total number of applicants for all jobs;

h) Ratio of protected-veteran applicants to all applicants (applicant ratio);

i) Number of protected-veteran applicants hired;

j) Total number of applicants hired; and

k) Ratio of protected veterans hired to all hires (hiring ratio).

From the data, contractors must establish annual hiring benchmarks based on the average percentage of veterans in the civilian labor force in the state(s) where the contractor is located, the number of veterans who participate in the employment service delivery system in the state(s) where the contractor is located for the previous four quarters, the previous year's referral, applicant and hiring ratios, the contractor's self-assessment of its recruitment and outreach efforts, and other factors, including the nature of the contractor's job openings or its location. Additionally, documentation of the annual hiring benchmarks and how it was determined must be retained for five years.

OFCCP ISSUES LONG-AWAITED FUNCTIONAL AFFIRMATIVE ACTION PLAN (FAAP) DIRECTIVE

OFCCP has issued a new Functional Affirmative Action Plan (FAAP) directive that governs the application, updating, modification, renewal, and administration of FAAP agreements. FAAP agreements permit covered federal contractors to develop affirmative action plans (AAPs) along functional or business units, rather than by physical establishment. The release of the directive, effective June 14, 2011, ends OFCCP's lengthy moratorium on considering new requests for, and modifications to, FAAP agreements.

Under the federal affirmative action regulations, covered contractors must include all employees in a written affirmative action plan and maintain a separate plan for each physical establishment of at least 50 employees. This method of constructing AAPs is known as the "establishment model." The affirmative action regulations also permit covered contractors to develop AAPs based on functional or business units. AAPs thus prepared are known as "functional affirmative action plans" or FAAPs. Before contractors can prepare FAAPs, they must secure permission from, and enter into an FAAP agreement with, OFCCP.

A contractor requesting an FAAP agreement initially must submit a written request to OFCCP demonstrating why an FAAP would be appropriate. The contractor must be prepared to demonstrate that the functional or business unit a) currently exists and operates autonomously, b) includes at least 50 employees, c) has its own managing official, and d) has the ability to track and maintain its own personnel activity. The directive mandates that certain information concerning the request must be provided to the Agency prior to a conference. This information includes organizational profile/workforce analysis, total number of employees by race and gender within each functional or business unit, and copies of personnel policies.

All FAAP requests must be received by the OFCCP Director no later than 120 calendar days prior to the expiration of the current corporate headquarters AAP or within 120 days from the award of a covered federal contract for a first-time contractor.

OFCCP will consider whether a contractor is currently reporting its compliance under a conciliation agreement in determining whether to grant the FAAP request. OFCCP also will consider any local, state, and federal equal employment opportunity (EEO) violations for the past three years. Once approved, FAAP agreements will expire three years following the approval date.

Existing FAAP agreement contractors that experience significant corporate structure changes must notify OFCCP's Director within 30 days of the changes. Failure to do so may lead to termination of the agreement. Under the new directive, existing FAAP contractors must annually (within 30 days from the anniversary date of the agreement) notify the OFCCP of any minor changes to the agreement, such as contact information. Failure to do so could trigger a compliance review.

Contractors that have an approved FAAP agreement must (1) submit a renewal request no later than 120 days prior to the expiration of the current agreement and (2) have undergone at least two functional unit compliance evaluations during the initial three-year term. To meet this requirement, OFCCP says that it will conduct compliance evaluations of at least two of the contractor's functional or business units during the three-year term of the agreement. All renewal requests granted will be for an additional three-year term.

The directive permits either the contractor or OFCCP to terminate the agreement upon 90 days' written notice. Should OFCCP terminate the agreement, the contractor will not be permitted to reapply for a period of three years. OFCCP may terminate an FAAP agreement where the contractor is found to be in violation of any laws or regulations enforced by OFCCP (e.g., discrimination, failing to maintain accurate records, or failing to make good faith efforts).

Data Privacy

HHS ANNOUNCES PROPOSED CHANGES TO HIPAA PRIVACY RULE

The Department of Health and Human Services (HHS) is responsible for implementing and enforcing the Health Insurance Portability and Accountability Act of 1996 (HIPPA), and its implementing regulations, as well as the Health Information Technology for Economic and Clinical Health Act (HITECH). Prior to HITECH becoming law, the HIPPA Privacy Rule required covered entities to provide individuals with an accounting of certain disclosures of their protected health information (PHI). HITECH enhances these accounting rules and requires that individuals be able to know who has accessed their electronic PHI.

HHS's Office of Civil Rights (OCR) is proposing changes to the Privacy Rule to implement these new requirements. OCR's proposal would enhance the rules concerning the obligation to provide an accounting of certain disclosures of PHI and would flesh out the right of individuals to get a report on who has electronically accessed their PHI.

These two rights, to an accounting of disclosures and to an access report, would be distinct but complementary. The right to an access report would provide information on who has accessed an electronic PHI in a designated record set (including access for purposes of treatment, payment, and healthcare operations), while the right to an accounting would provide additional information about the disclosure of designated record set information (whether hard-copy or electronic) to persons outside the covered entity and its business associates for certain purposes (e.g., law enforcement, judicial hearings, public health investigations). The intent of the access report is to allow individuals to learn if specific persons have accessed their electronic designated record set information. In contrast, the intent of

the accounting of disclosures is to provide more detailed information (a "full accounting") for certain disclosures that are most likely to impact the individual.

THE WHITE HOUSE'S CYBERSECURITY LEGISLATIVE PROPOSAL

The White House issued a Cybersecurity Legislative Proposal that focuses on protecting the American people, the nation's critical infrastructure, and the federal government's computers and networks. While legislation of this nature would simplify the breach reporting process for businesses, and overall streamline cybersecurity laws, a number of legislative attempts to do this have previously failed. It is important to note that while this proposal sets forth some guidelines, the specific details of how each provision would be instituted are not yet clear.

Our critical infrastructure – such as the electricity grid, financial sector, and transportation networks that sustain our way of life – have suffered repeated cyber intrusion, and cyber crime has increased dramatically over the last decade. The president has thus made cybersecurity an administration priority.

1. The proposed legislation calls for a national data breach-reporting law which would simplify and standardize the existing patchwork of 47 state laws that contain these requirements. Additionally, the proposal calls for penalties for computer criminals and clarifies the penalties for computer crimes, synchronizes them with other crimes, and sets mandatory minimums for cyber intrusions into critical infrastructure.

2. The proposal calls for legislative changes to fully protect this infrastructure. Specifically, the proposal will enable the Department of Homeland Security (DHS) to quickly help a private-sector company, state, or local government when that organization asks for its help. It also clarifies the type of assistance that DHS can provide to the requesting organization. Additionally, the proposal permits businesses, states, and local governments to share information about cyber threats or incidents with DHS. To fully address these entities' concerns, it also provides them with immunity when sharing cybersecurity information with DHS. At the same time, the proposal mandates robust privacy oversight to ensure that the voluntarily shared information does not impinge on individual privacy and civil liberties.

3. The proposal includes: an update to the Federal Information Security Management Act (FISMA) as well as formalizing DHS' current role in managing cybersecurity for the federal government's civilian computers and networks, in order to provide departments and agencies with a shared source of expertise; giving DHS more flexibility in hiring highly qualified cybersecurity professionals; the permanency of DHS's authority to oversee intrusion prevention systems for all Federal Executive Branch civilian computers while codifying strong privacy and civil liberties protections, congressional reporting requirements, and an annual certification process; and preventions on states requiring companies to build their data centers in that state, as opposed to in the cloud, except where expressly authorized by federal law.

The administration's proposal also attempts to ensure the protection of individuals' privacy and civil liberties through a framework designed expressly to address the challenges of cybersecurity. Some of these provisions include: requiring federal agencies (and likely federal contractors) to follow privacy and civil liberties procedures; limitations on monitoring, collecting, using, retaining, and sharing of information; requiring efforts to remove identifying information unrelated to cybersecurity threats; as well as immunity provisions for those businesses which comply with the proposal's requirements.

Conclusion

As you can see, change is well underway. Constant changes in policy and regulations by federal agencies invariably necessitate a change to human resources strategy to remain competitive and help ensure compliance. ADP is committed to assisting businesses with increased compliance requirements resulting from rapidly evolving legislation. Our goal is to minimize your administrative burden across the spectrum of payroll, tax, HR and benefits, so that you can focus on running your business.

Contact your local ADP client service team if you have any questions regarding our services or call 1 (800) 225-5237.

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