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What to Expect in 2012 from the DOL, Supreme Court, Health Care Reform, and More

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If you weren't paying attention, you may have missed several rules, regulations, and pieces of law that go into effect this year. There are new design standards to comply with under the Americans with Disabilities Act. While several deadlines for the health care reform law are looming, the U.S. Supreme Court has accepted a review of that law (and others pertinent to employers) for its 2012 docket. As for Washington, D.C., the forecast is for stepped-up regulatory changes from the Department of Labor and its agencies, including the Wage and Hour Division, the Office of Federal Contract Compliance Programs, and the Office of Labor Management Standards, as well as the National Labor Relations Board. And that can only mean employers' obligations will continue to increase and expand in 2012.

Forecast for Washington, D.C.: It's Raining Regulations at the DOL

The U.S. Department of Labor's (DOL) agencies have a robust schedule for adding new regulations over the next several months. The published schedule calls for new and revised regulations that will affect the Wage and Hour Division's enforcement of the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA), federal contractors' nondiscrimination obligations, which are enforced by the DOL's Office of Federal Contract Compliance Programs (OFCCP), and reporting by union-related consultants/advisers – known as persuaders – retained by employers, which are regulated by the DOL's Office of Labor Management Standards (OLMS).

The DOL's regulatory agenda will affect a wide range of employer interests.

New "Right to Know" Regulations and FMLA, FLSA Updates

The Wage and Hour Division's regulatory agenda calls for new regulations affecting a number of employer interests. First and most significant, there are plans to issue new requirements under the FLSA affecting employers' obligations under the wage and hour laws. The planned "Right to Know" regulations will require employers to advise workers in writing of their status as an employee or independent contractor, state how their pay is computed (which necessarily will entail addressing whether they are exempt from the FLSA's overtime obligations), and provide other information.

The proposed regulations envision that when workers are hired – either as employees or independent contractors – the employer will have to create a record for each worker addressing the required information. Similarly, if a worker's status or pay changes, the written notice and the employer's records would presumably need to be updated.

The proposed regulations were scheduled to be published in October 2011, but as we went to press, the rules had not yet been issued. The rules are expected to be controversial, and we will keep you posted as these efforts progress.

The Wage and Hour Division is behind schedule in amending the FMLA regulations to incorporate

amendments made by the National Defense Authorization Act for Fiscal Year 2010 and the Airline Flight Crew Technical Corrections Act. The FMLA rulemaking will update the FMLA regulations to reflect statutory changes expanding employers' obligations relating to veterans and military reservists. The proposed regulations were to be published in September but have not yet been issued.

There also will be new regulations addressing the application of the FLSA to domestic service employees. FLSA Section 13(a)(15) provides an exemption from minimum wage and overtime compensation for domestic employees engaged in providing companionship services. The DOL is proposing to update those regulations, including examining the definition of "companionship services," the criteria used to judge whether employees qualify as trained personnel who aren't exempt companions, and the applicability of the exemption to third-party employers. The expected result will be a narrowing of which employees are exempt from the minimum wage and overtime exemptions. The proposed regulations were scheduled to be issued in October but haven't yet been published.

Finally, the Wage and Hour Division is proposing to revise the FLSA's child labor regulations that set forth the criteria for the employment of minors in agriculture. The division's proposed revisions primarily concern part E-1 of the regulations, which addresses hazardous occupations in agriculture. The regulations were published in October but have not yet been issued.

OFCCP's New Regs for Federal Contractors

On December 9, 2011, the OFCCP published significant proposed revisions to the regulations governing affirmative action obligations for federal government contractors to recruit, hire, promote, retain, and reasonably accommodate individuals with disabilities under Section 503 of the Rehabilitation Act of 1973. Unless there is an extension, the 60-day public comment period will close on February 7, 2012.

The dramatic proposed changes from current regulations include:

- voluntary self-identification of disability status both pre- and postoffer when an individual becomes an applicant;
- an annual survey of the current workforce to determine disability status through voluntary self-identification;
- priority consideration in recruitment and hiring for individuals with disabilities;
- a standard quantitative affirmative action goal of seven percent for individuals with disabilities; and
- specific requirements for a reasonable accommodation process, including mandated timelines and required steps.

The OFCCP's proposal is extremely broad in scope and, if published "as is," will have a significant impact on federal contractors. In addition to the changes listed above, the proposed revisions include extensive data-reporting obligations as well as requirements for testing, technological processes, medical examinations, training, and dissemination of policies.

In addition to these regulations that would apply to all federal contractors, the construction industry should see even more expanded regulations and obligations in 2012. The OFCCP was scheduled to issue the proposed regulations in November that would require federal and federally assisted construction contractors and subcontractors to prepare affirmative action plans and keep detailed records, particularly in the area of recruitment and job training. When this white paper went to press, the regulations had not yet been released. However, the OFCCP lists "Issuing proposed rules to strengthen its affirmative action regulations in order to increase the hiring of protected veterans by Federal contractors" as one of the things the agency will be doing this year in its FY 2012 budget.

There are also new regulations coming that will expand federal contractors' recruitment, affirmative action, and record-keeping obligations for persons with disabilities under Section 503 of the Rehabilitation Act and for protected veterans. The comment period on the proposed regulations for veterans ended in July. The proposed regulations under Section 503 were due in August but have not yet been issued. There is no published date for the regulations' issuance in final form, which we expect in 2012 or later.

The sex discrimination guidelines will be revised through new regulations that are scheduled to be published in proposed form in February 2012. The changes will affect all federal contractors, including construction contractors.

New Reporting by Employer's Union Consultants

The OLMS proposed changes to reporting by employer-consultant agreements to make employees aware of their rights to

organize and bargain collectively under the public disclosure objectives of the Labor-Management Reporting and Disclosure Act (LMRDA). Under LMRDA Section 203, an employer must report any agreement or arrangement with a third-party consultant to persuade employees regarding their collective bargaining rights or to obtain certain information concerning the activities of employees or a labor organization in connection with a labor dispute involving the employer.

The proposed regulations, which narrow the statutory exceptions to those reporting requirements, are set forth in LMRDA Section 203(c), which provides in part that employers and consultants aren't required to file a report by reason of the consultant's giving or agreeing to give "advice" to the employer. There are also questions about whether narrowing the advice exception may require the disclosure of attorney-client-privileged communications. If the proposed regulations are enacted, there will be a chilling effect on employers' use of advisers in responding to union representation campaigns and elections.

The OLMS isn't the only agency concerned with union activity in 2012. Amid much controversy and negative public response, the National Labor Relations Board seems set to continue its anti-employer agenda this year.

NLRB Likely to Maintain Aggressive Stance

In addition to the DOL's plans for new regulations, the National Labor Relations Board (NLRB) has published regulations requiring nearly all private-sector employers to display a new poster on employee rights and expediting the timelines for union elections. However, employers have united to fight the poster requirement. All this comes as the NLRB was technically without quorum for a short time – until President Barack Obama used recess appointments to add three members.

NLRB Almost without a Quorum

When operating at full strength, the NLRB has five members. Since Republicans refused to confirm President Barack Obama's nominations to fill the empty seats, the Board had been operating with three members since August. Since he was a recess appointment, Craig Becker's term expired when Congress adjourned, with his last official day of service being January 3, 2012. The Board lost its quorum because it was down to two members – one Democrat, Chairman Mark Pearce, and one Republican, Bryan Hayes.

On January 4, 2012, President Barack Obama stepped in and filled the three empty NLRB seats with recess appointments. The appointees are Sharon Block, deputy assistant secretary for congressional affairs at the U.S. Department of Labor; Terence F. Flynn, chief counsel to NLRB member Brian Hayes; and Richard Griffin, general counsel for the International Union of Operating Engineers and a member of the board of directors for the AFL-CIO Lawyers Coordinating Committee.

The move has been sharply criticized by Republicans as well as business organizations. It is likely that Obama's appointees will continue what the U.S. Chamber of Commerce Executive Vice President for Government Affairs Bruce Josten calls "an aggressive agenda favoring the unions."

The recess appointments aren't the only controversy brewing at the NLRB.

Employers Fight the Poster

On August 25, 2011, the NLRB issued a final rule requiring private-sector employers under the Board's jurisdiction to display by November 14 a workplace poster describing employee rights under the National Labor Relations Act (NRLA), including the right to form and join unions, bargain collectively, and engage in or refrain from other protected activities.

The National Association of Manufacturers (NAM) CEO Jay Timmons stated in a press release that the "rule is just another example of the Board's aggressive overreach to insert itself into the day-to-day decisions of businesses – exerting powers it doesn't have." Many other employers and business organizations agreed.

National Federation of Independent Business

The NAM and other high-profile trade groups, such as the U.S. Chamber of Commerce and the National Federation of Independent Business, filed three separate lawsuits in federal court to stop the implementation of the notice-posting rule. In the wake of the pending lawsuits, the Board postponed the rule's November 14 effective date, first to January 31, 2012,

and then later to April 30, 2012. When the Board changed the effective date the second time, it released a statement saying the move was made because the agency "determined that postponing the effective date of the rule would facilitate the resolution of the legal challenges that have been filed with respect to the rule."

Controversial Election

The same date employers are now supposed to have those posters hung – April 30, 2012 – is also an important date for another widely criticized NLRB rule to go into effect. The rule changes the procedure for union elections, meant to decrease the time it takes to go through the election process by reducing unnecessary litigation and delays.

"This rule is about giving all employees who have petitioned for an election the right to vote in a timely manner and without the impediment of needless litigation," asserted Chairman Pearce in a statement.

According to the NLRB, "The rule is primarily focused on procedures followed by the NLRB in the minority of cases in which parties can't agree on issues such as whether the employees covered by the election petition are an appropriate voting group." The rule also:

- gives hearing officers the authority to limit testimony to relevant issues and to decide whether or not to accept post-hearing briefs;
- consolidates all appeals of regional director decisions to the Board into a single post-election request for review (currently, parties can appeal those decisions at multiple stages in the process); and
- makes all Board review of decisions made by regional directors discretionary, which leaves "more final decisions in the hands of career civil servants with long experience supervising elections."

Is Your Workplace Up to ADA Design Standards?

Towards the end of 2011, the U.S. Department of Justice adopted revised "Standards for Accessible Design" (the "2010 standards") as well as modifications to the Americans with Disabilities Act's general nondiscrimination requirements. The 2010 standards replace the 1991 standards, which were implemented with the original ADA. While the new general nondiscrimination requirements took effect on March 15, 2011, the deadline for complying with the 2010 standards is March 15, 2012. In the interim, commercial facilities and employers subject to the accessible design standards can choose to comply with either the 1991 or 2010 standards for new construction or alterations.

The new regulations provide a safe harbor for existing facilities. Facilities built or altered to comply with the 1991 standards need not be updated to comply with the 2010 requirements. However, you should be aware that the 2010 standards may be used to determine a reasonable accommodation for a particular employee or applicant.

The 2010 standards apply to most employers in one of two ways. First, every commercial facility (including office buildings) or public accommodation (businesses that provide goods or services to the public) is subject to the new standards. Additionally, private employers with 15 or more employees must follow the 2010 standards for new construction, unless greater accessibility is provided, and for renovations, unless it's technically infeasible. Moreover, the ADA requires that you provide reasonable accommodation to employees with disabilities, and the 2010 standards can be instructive.

Noncompliance with the regulations and construction standards of the ADA can lead to a lawsuit and liability. Any employee or applicant can sue your company on the basis that he has been denied access or a reasonable accommodation because of an architectural barrier. If you are found to have denied access or a reasonable accommodation to an employee or applicant because of an architectural barrier, you can be liable for monetary damages and the employee's attorneys' fees in addition to your own defense costs. Clearly, the cost of accommodating an employee or applicant is much cheaper than the alternative.

Here are some pitfalls you should be aware of:

- **Barriers to accessible routes for employees and applicants.** Something as simple as rearranging furniture so that it intrudes on an accessible route can create a barrier that's a violation of the ADA. For instance, a pedestal table adorned with fresh-cut flowers in the lobby may intrude into an accessible route and become a potential barrier to

a person with a visual impairment. The barrier can be fixed by removing the table or possibly by placing objects on the floor around the table to enhance detection by visitors.

- **Alterations that don't comply.** A facility that was constructed or modified to meet the 1991 standards must be updated to meet the 2010 standards if it undergoes an alteration. According to the ADA, "alterations" include remodeling, renovations, rearrangements in structural parts, and changes to or rearrangement of walls and full-height partitions. Thankfully, an employer that has a "commercial facility" (*e.g.,* an office building) need not update the entire facility, only the area that is "altered." For instance, since in the 2010 standard the required mounting height for light switches dropped from 54 to 48 inches, a routine restroom remodeling can lead to legal liability if the switches aren't lowered.
- **Parking lots.** You will have to comply with the 2010 standards if you make an alteration to an existing parking lot. For instance, restriping a parking lot is considered an alteration. The 2010 standards up the requirement for van-accessible parking spaces from one in every eight to one in every six.

The ADA isn't the only Act to require stricter standards in 2012.

Health Care Rules, Effective Dates to Watch for in 2012

In 2010, the Patient Protection and Affordable Care Act (PPACA, commonly referred to as "the health care reform law") was enacted. The Act included several future dates by which certain aspects of the law were to go into effect and/or those subject to the law would need to be doing things a different way. Several of those dates that affect employers come due in 2012.

W-2s

Beginning with tax year 2012, W-2s (furnished in January 2013) must disclose the "aggregate cost" of employer-provided health coverage under any group health plan that is excludable from the employee's gross income except long-term care, benefits excepted under the Health Insurance Portability and Accountability Act, standalone dental and vision coverage, noncoordinated coverage for a specific illness or disease, and hospital indemnity or other fixed indemnity arrangements not excludable from gross income.

Here are some reporting specifics you should note:

- **Who must report?** Generally, all employers that provide health coverage must comply with the new W-2 reporting requirement. However, Indian tribe governments and employers that file fewer than 250 W-2s are exempt (that may change with future guidance).
- **What amount is reported?** The "aggregate cost" includes both the employer's and employee's share of the cost of coverage as well as any portion of the cost that is includable in the employee's gross income (*e.g.,* dependent coverage or domestic partner coverage).
- **What types of plans are excepted?** Standalone dental and vision plans, coverage provided under multiemployer plans, self-insured plans otherwise not subject to COBRA regulations (*e.g.,* church plans), and government-provided coverage primarily for the benefit of members of the military and their families are exempt from W-2 reporting. Amounts contributed to account-based plans such as health savings accounts, Archer medical savings accounts, and health reimbursement accounts are excluded. Subject to certain rules, amounts contributed to a health flexible spending account are also generally excluded.

For more guidance, see IRS Notice 2011-28.

Disclosure

A key goal of health care reform is to promote more efficient use of the health care system by ensuring that citizens are well informed about their health care benefit programs so they will choose the best option available to them and use their benefits wisely. To promote that goal, the PPACA requires health plans to provide a "Summary of Benefits and Coverage" (SBC) to plan participants and beneficiaries in a timely manner. The PPACA directs the Department of Treasury, the DOL, and the Department of Health and Human Services (HHS) to develop SBC standards for group health plans and health insurance issuers in consultation with the National Association of Insurance Commissioners (NAIC), a working group of health care and health insurance professionals and other interested constituencies. Following a yearlong consultation process, on August 17, 2011, the U.S. Department of Treasury, DOL, and HHS jointly proposed regulations governing the preparation and delivery of SBCs pursuant to the PPACA's requirement, which is slated to take effect March 23, 2012.

The proposed regulations include:

- **Four new issues to be covered in SBCs.** The proposed regulations largely restate the statutory requirements as well as address four additional issues not covered in the statute, which include requiring an Internet address or other contact for certain information as well as providing information about premiums or other costs of coverage associated with the program.
- **Formatting requirements.** This includes a looser interpretation of the PPACA's restrictive minimum standards for appearance as well as a rule on when the form may be provided on paper and/or electronically and requirements for non-English language documents.
- **Notification requirement.** As the PPACA requires, the regulations mandate that an updated SBC be provided in the event of a "material modification" – that is, a change in the SBC that would be considered an important change in covered benefits or other terms of coverage under the program by an average plan participant. This notice of modification must be provided to participants no later than 60 days *before* the change will become effective if the change is not reflected in the most recent SBC *and* does not occur in connection with a renewal or reissuance of coverage. The requirement is significantly more stringent than the DOL's current rule.
- **State and federal rules, enforcement.** The regulations make clear that while the PPACA is partly incorporated into the Employee Retirement Income Security Act (ERISA) and is therefore subject to ERISA's preemption provisions, the new rules do not supersede any state law covering health insurance issuers or group or individual health insurance coverage except to the extent that the state's rules might prevent the application of federal law.

External Review

In the context of health care reform, external review involves an evaluation of the denial of insurance and employee benefit plan claims for medical expenses. Under ERISA, group health plans must provide for internal claims-review procedures that permit employees to challenge the plan's (or insurer's) denial of a claim. The PPACA modified the ERISA claims-review process to require insurers and plans to offer disappointed claimants the option of an external review of denials when the denial is based on certain criteria. The external review must be performed by an entity that's independent of the employer, plan, or insurer.

On June 22, 2011, the DOL issued additional guidance on the external review standards that included a transition period until January 1, 2012, for state external review process implementation and a set of temporary standards for NAIC-similar processes that will apply until January 1, 2014, in the absence of an approved state-administered external review process.

If the state's external review process hasn't received a favorable determination in time, beginning on January 1, 2012, plans and insurance companies will be subject to the temporary standards spelled out in the technical release. State-administered external review processes apply to fully insured ERISA group health plans, nonfederal governmental plans, and individual health insurance policies. For self-funded ERISA plans, there is an interim safe harbor. The DOL and IRS will not take enforcement action against such a plan if it (1) complies with the standards prescribed in an August 23, 2010, technical release (as amended) or (2) voluntarily complies with an approved state external review process.
If all else fails – that is, if a state's external review process hasn't been approved – a federally administered external review process becomes applicable on January 1, 2014. Insurers can choose to participate in the external review process

administered by the HHS or engage in the private independent review organization process for ERISA plans.

If your group health plan is – and stays – grandfathered, you shouldn't need to worry about any of this. Sooner or later, though, it's likely that your company will have a nongrandfathered plan that will be subject to the external review process requirements. If your plan is fully insured, the carrier will be on the hook for compliance, but there is a potential for increased premiums due to additional transaction costs.

Important Cases for Employers Included in Supreme Court's Upcoming Docket

In its current term, the U.S. Supreme Court has some important employment law cases on its docket, including a much-anticipated showdown over the PPACA. Here is a brief summary of each.

The High Court Takes on "ObamaCare"

The Supreme Court will review certain questions about the constitutionality of the PPACA, setting the stage for a historic opinion regarding the federal government's power to regulate the health insurance market. The questions accepted for review come from three petitions from the Eleventh U.S. Circuit Court of Appeals' decision in *Florida v. Department of Health and Human Services.* The state of Ohio joined the Florida case as one of the 26 states challenging the constitutionality of the health care reform law after Ohio Governor John Kasich and Attorney General Mike DeWine took office in January 2011.

The Court will address four issues:

1. the constitutionality of the requirement that virtually every American obtain health insurance by 2014 (the "individual mandate");
2. whether some or all of the health care reform law must fail if the individual mandate is struck down as unconstitutional ("severability");
3. whether the federal Anti-Injunction Act bars some or all of the legal challenges to the individual mandate that are before the Court (similar to traditional "standing" issues); and
4. the constitutionality of the expansion of the Medicaid program for the poor and disabled.

The Court did not accept review of all the issues raised, and it chose issues only from three of the appeals before it. The Court will not review the constitutionality of the penalty imposed (beginning in 2014) on employers:

1. that don't offer their employees adequate or affordable insurance; and
2. whose employees receive premium tax credits or the penalty imposed on public employers for the same reasons.

Additionally, the Court didn't grant review of any issues from the challenge filed by the Michigan-based Thomas More Law Center and three of its members, which was appealed to the Sixth Circuit in Cincinnati. That decision concluded that the individual mandate is constitutional.

The Court has set aside five and a half hours for oral argument to take place over two days in March 2012. An opinion is expected in June, in the midst of the 2012 presidential race.

ADA's Ministerial Exception

The ministerial exception to the ADA allows religious entities to practice preferential hiring based on religion and requires employees to conform to the employer's religious beliefs and practices. The employer must be a religious institution, and the employee must be a ministerial employee. The issue before the Supreme Court is whether the ministerial exception precludes an ADA claim by a teacher who is not only responsible for a full secular curriculum at a religious elementary school but also teaches daily religion classes and is a minister. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC.*

Resolving a Difference of Statutory Interpretation

The Outer Continental Shelf Lands Act (OCSLA) provides compensation for "any injury occurring as a result of operations conducted on the Outer Continental Shelf." In *Pacific Operators Off-Shore LLP v. Valladolid*, the Court will consider whether the Act entitles workers who are injured on land to compensation. The Third, Fifth, and Ninth Circuits have taken

different approaches in interpreting the Act's language. The issue before the Court is how the causal nexus or connection under the OCSLA and the Longshore and Harbor Workers' Compensation Act (LHWCA) should be interpreted.

Three More Cases to Watch

In *Coleman v. Maryland Court of Appeals*, lower courts have held that the Eleventh Amendment barred Coleman's FMLA claim, which alleged a violation of the "self-care" provision, because the state employer was immune from suit. The Supreme Court will determine whether Congress constitutionally abrogated Eleventh Amendment immunity with that provision of the FMLA.

In *Knox v. Service Employees International Union Local 1000,* the Court will hear arguments on First and Fourteenth Amendment issues relating to employment conditioned on the payment of a special union assessment for political expenditures when employees weren't provided an opportunity to object to the assessment.

Finally, in *Roberts v. Sea-Land Services, Inc.*, the Court will consider a provision of the LHWCA to determine the maximum weekly rate available to employees as compensation for a disability.

General Trends to Watch for in 2012

Some "hot-button" employment topics just never seem to go cold. Here are a few that should be in the forefront in 2012:

- **Disability claims.** In light of the amendments to the ADA and recent guidance issued by the Equal Employment Opportunity Commission (EEOC), employers (and their attorneys) are assuming almost any ailment could qualify. Based on the new lower threshold for proving disabled status and given the aging workforce with all its attendant aches and pains, disability lawsuits will increase in the coming months.
- **Wage and hour issues.** Wage and hour claims – with particular emphasis on independent contractor misclassification and "off the clock" claims – will be particularly hot issues in 2012. The increased aggressiveness by DOL investigators is well documented. And because of the "attorneys' fees" incentives built into the federal wage and hour statute, there is no end in sight to the recent wave of wage and hour class actions.
- **Criminal history.** There is a big push right now from the EEOC to limit employers' ability to take an applicant's criminal history into account in making employment

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CONTRIBUTORS

David S. Fortney is a cofounder of Fortney & Scott, LLC, in Washington, D.C., and an editor of *Federal Employment Law Insider*. He may be contacted at dfortney@fortneyscott.com.

Douglas R. Chamberlain is a senior member of Sulloway & Hollis in Concord, New Hampshire, and a contributor to *New Hampshire Employment Law Letter*. He may be contacted at dchamberlain@sulloway.com.

Sara E. Hauptfuehrer is of counsel with Steptoe & Johnson in Bridgeport, West Virginia, and a contributor to *West Virginia Employment Law Letter*. She may be contacted at sara.hauptfuehrer@steptoe-johnson.com.

Rachel A Gonzalez is an associate with Day Pttney LLP in Parsippany, New Jersey, and a contributor to *New Jersey Employment Law Letter*. She may be contacted at rgonzalez@daypitney.com.

Jeffrey S. Beck is an associate with Faegre Baker Daniels in Indianapolis, Indiana, and a contributor to *Indiana Employment Law Letter*. He may be contacted at jeffrey.beck@FaegreBD.com.

Kathleen J. Raynsford is an attorney with Fortney & Scott, LLC in Washington, D.C., and an contributor to *Federal Employment Law Insider*. She may be contacted at kraynsford@fortneyscott.com.

decisions. The EEOC's position is that rigid no-felony hire policies have a disparate impact on racial minorities, and the agency is actively pursuing litigation against employers. On another front, many municipalities – and two states (Massachusetts and Hawaii) – have enacted laws prohibiting employers from asking about a prospective employee's criminal history on an employment application.

- **Cities are speaking up.** And speaking of cities, there seems to be a trend of cities and counties stepping into the fray on a variety of employment issues. In addition to the "ban the box" ordinances limiting review of criminal history, some cities have banned discrimination based on sexual orientation, while others require employers to provide paid sick leave. Most ordinances apply only to city employees or contractors, but a few apply to private employers, so you need to make sure you know which laws apply in each location where you do business.
- **Unemployment discrimination.** Did you know that Obama's jobs bill (the American Jobs Act) contains a provision prohibiting employers with 15 or more employees from discriminating against a job applicant because he is unemployed? Well, it does, and yes, that adds yet another protected category for employers to worry about. The law hasn't been enacted yet, just proposed, but it's one to look out for in 2012.
- **Immigration laws.** A handful of states (Arizona, Alabama, and Tennessee) have passed laws mandating that employers in those states use E-Verify to ensure employees are working legally. Additionally, H.R. 2885, also known as the "Legal Workforce Act," was introduced by Representative Lamar Smith (R-Texas) on June 14, 2011. If the legislation is approved by Congress and signed into law by the President, it would replace the paper-based I-9 program for employment eligibility verification with electronic checks through E-Verify, an online database. The new law would preempt state and local laws on verification of work authorization. Use of E-Verify would be mandatory for most employers nationwide.

No, We Didn't Forget the Presidential Race

Obviously, the outcome of the 2012 presidential election will have a profound impact on employment law and how employers do business. If Obama is reelected, employers can expect continued aggressive enforcement from federal agencies. If his opponent – whoever that may be – is elected, there is a good chance those agencies will see their budgets cut and their powers checked. But since almost every Republican presidential candidate has had at least a brief, shining moment atop the opinion polls, it is too early to predict who will get the nod to run in the big race.

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