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Labor and Employment Law Update

MARCH 2010

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Are Workplace Injuries Under-Recorded? OSHA Is Determined To Find Out!

By Suzanne W. King

Employers have been using the Occupational Safety and Health Administration ("OSHA") log to record workplace injuries and illnesses for years. OSHA in turn reviews a facility's OSHA log whenever it conducts an inspection. This routine process has recently attracted significant attention, as the accuracy of injury reporting has been challenged by a number of different groups. OSHA is now determined to find out whether employers are accurately capturing all workplace injuries and illnesses. OSHA's new focus on accuracy is likely to lead to an increase in citations and monetary penalties. Employers would be wise to take a proactive approach by addressing any problems with their injury/illness reporting before OSHA shows up at the front gate!

In recent months, the accuracy of injury reporting has been called into question by academic studies, the Government Accounting Office, and OSHA itself.

OSHA Injury Reporting

Under the Occupational Safety and Health Act of 1970 (the "Act"), OSHA is responsible for protecting the safety and health of the nation's workforce. The Act requires OSHA to collect and compile work-related illness and injury data.

To meet its obligation, OSHA requires most employers with more than ten employees to record non-minor injuries and illnesses on logs maintained at each worksite. Employers use the OSHA 300 Form, also known as the "OSHA log," to record workplace injuries and illnesses. For every work-related injury or illness that requires medical treatment other than first aid, the employer is required to record the worker's name, the date of the injury or illness, a brief description of the injury or illness, and the number of days

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Model Employer CHIP Notice Issued By Department Of Labor

By Paul Dubois

The United States Department of Labor ("DOL") has published a model notice to assist employers in complying with the Children's Health Insurance Program Reauthorization Act ("CHIPRA").

Under this statute, employers maintaining group health plans must provide an annual notice to employees of potential opportunities to receive premium assistance under Medicaid or the Children's Health Insurance Program ("CHIP") for health coverage of the employee or the employee's dependents. This is known as the "Employer CHIP Notice."

DOL's model Employer CHIP Notice is available on its website and can be accessed through the following link: http://www.dol.gov/ebsa/chipmodelnotice.doc. A summary of employer obligations relative to the Employer CHIP Notice is set forth below.

Employees Who Must Be Given The Employer CHIP Notice

The Employer CHIP Notice must be provided to all employees who *reside* in any of the 40 states that provide premium assistance through employer-based plans, regardless of the physical location or principal place of business of the employer, the group health plan, or its carrier.

The 10 states that do *not* currently offer premium assistance are Connecticut, Delaware, Hawaii, Illinois, Maryland, Michigan, Mississippi, Ohio, South Dakota and Tennessee. However, as noted, employers located in these states must nonetheless provide the Employer CHIP Notice to any and all employees who *reside* in states that *do* offer such assistance.

An employer with one or more covered employees may send the model notice to all employees if it is administratively easier to send the notice to all than to distinguish between employees based on residency. Alternatively, "[a]n employer which is not facing multi-State complexities and who wants to provide more comprehensive State-specific information to its workforce may modify the Model Employer CHIP Notice," provided that the modified notice does not omit any of the applicable state contact information.

When The Employer CHIP Notice Must Be Provided

Many employers will be required to provide their first annual Employer CHIP Notice as early as May 1, 2010. The notice deadline is determined by reference to the first day of the first plan year after February 4, 2010, when the model Employer CHIP Notice was issued. Specifically, employers whose plan year begins between February 4, 2010 and April 30, 2010 must provide the Employer CHIP Notice by May 1, 2010. Employers whose next plan year begins on or after May 1, 2010 must provide the Employer CHIP Notice by the first day of the next plan year (*e.g.*, January 1, 2011 for calendar year plans).

How The Employer CHIP Notice Must Be Provided

The Employer CHIP Notice may be provided by first-class mail, electronically (if DOL's electronic disclosure safe-harbor regulations, which appear at 29 C.F.R. § 2520.104b-1(c), are satisfied), or concurrently with other administrative materials. If this third alternative is chosen, the notice must appear as a "separate, prominent document."

Penalties For Noncompliance

Civil penalties of up to $100 per day may be assessed against employers for failure to comply with

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Are Workplace Injuries Under-Recorded? OSHA Is Determined To Find Out!

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the worker was away from work, assigned to restricted duties or transferred to another job as a result of the injury or illness. OSHA requires employers to post summaries of their logs annually at each worksite and to provide these logs to OSHA and the Bureau of Labor Statistics if requested.

In recent months, the accuracy of injury reporting has been called into question by academic studies, the Government Accounting Office ("GAO"), and OSHA itself.

GAO's Performance Audit Of OSHA

Between August 2008 and October 2009, GAO conducted a performance audit of OSHA to determine whether the Department of Labor verifies the accuracy of injury reporting and, further, to determine what factors affect the accuracy of employers' injury and illness records. GAO published its final report in October 2009 and recommended that OSHA do the following:

1. *Require* inspectors to interview employees during records audits (currently employee interviews are *optional* and are conducted in less than half of the records audits);
2. Reduce the time between the recording of injuries and the audit of the records (OSHA currently audits injury records two years after the injuries are recorded);
3. Update the list of high-hazard industries that OSHA uses to select sites for records audits (there are eight high-hazard industries that are not included in the records audit process because the list of high-hazard industries has not been updated since 2002); and
4. Increase employer education and training.

GAO's report also identified certain disincentives that may discourage workers from reporting and employers from recording injuries and illnesses. Disincentives facing employees include fear of disciplinary action, mandatory post-accident drug testing, and safety incentive programs. The primary disincentive facing employers is the impact that high injury and illness rates have on their workers' compensation costs. Significantly, over one-half of the health care providers surveyed by GAO said that they had experienced pressure from company officials to downplay injuries or illnesses, and over one-third said that they had been asked by company officials or workers to provide treatment that resulted in the injury or illness not being recorded even though the treatment was not sufficient to properly treat the illness or injury.

OSHA's National Emphasis Program

In an effort to address the issue of inaccurate reporting, OSHA recently initiated a National Emphasis Program ("NEP") under which it plans to focus on the issue of under-reporting by specifically targeting for inspection workplaces with low injury rates which are in historically high-rate industries.

The industries covered by the NEP are:

- Animal (except poultry) slaughtering;
- Scheduled passenger air transportation;
- Steel foundries (except investment);
- Other nonferrous foundries (except die-casting);
- Concrete pipe manufacturing;
- Soft drink manufacturing;
- Couriers;
- Manufactured home (mobile home) manufacturing;
- Rolling mill machinery and equipment manufacturing;
- Iron foundries;
- Nursing care facilities;
- Fluid milk manufacturing;
- Seafood canning;
- Marine cargo handling;
- Copper foundries (except die casting);
- Bottled water manufacturing;
- Refrigerated warehousing and storage;
- Motor vehicle seating and interior trim manufacturing; and
- Pet and pet supplies stores.

As part of this new program, OSHA inspectors are required to interview employees and review medical records, workers' compensation records, payroll/absence records, safety incident reports, first-aid logs, disciplinary records related to injuries/illnesses, and alternate duty rosters. *In short, the records inspection will be specifically designed to determine whether the OSHA log is accurate, and the inspector will look at many different sources of information to determine whether any injuries or illnesses were not properly recorded.*

In addition to the NEP, OSHA is developing other enforcement and quality assurance programs to address the record-keeping issues in workplaces and industries that are outside the scope of the NEP, *e.g.*, the construction industry, Voluntary Protection Program ("VPP") sites, and Safety and Health Achievement Recognition Program ("SHARP") sites. The VPP and SHARP programs identify workplaces that show excellence in safety and health.

More Employer Audits Anticipated

What does all of this focus on injury reporting mean for employers? Most importantly, employers in the industries covered by the NEP must prepare now for OSHA to interview employees, look at medical records, review disciplinary actions, and generally focus on whether the facility captures *all* injuries and illnesses, because OSHA is targeting employers in those industries for records audits. Failure to properly record all injuries and illnesses is a violation, and OSHA can issue citations or fines when record-keeping violations are found. Generally, failure to record a workplace injury or illness will result in an OSHA citation. Where there is evidence that the employer had been informed of the record-keeping requirement or deliberately failed to record an injury or illness, a fine of $1,000 per citation typically will be imposed.

Even if an employer is not in one of the industries covered by the NEP, if OSHA conducts an inspection based on a complaint or referral, the employer should expect an increased focus by OSHA on the accuracy of its injury reporting. Although OSHA has always reviewed the OSHA log as part of an inspection, OSHA is now likely to focus not only on whether the employer has an OSHA log but also on whether it captures all of the workplace illnesses and injuries that should be recorded.

Recommendations For Employers

We recommend that all employers review their OSHA logs and related records to ensure that all workplace injuries and illnesses are properly recorded. In addition, employers should review safety incentive programs, disciplinary procedures, and any company interactions with medical providers to ensure that employees are not pressured to under-report and/or under-record workplace injuries and/or illnesses. Such issues should be addressed proactively by employers to ensure that all injury and illness recording obligations are being met. Employers should consider involving legal counsel to ensure that record-keeping and related obligations are legally compliant and to maintain the privileged and confidential nature of this internal review.

Please feel free to contact us if you have questions about the GAO report, the NEP, or OSHA injury reporting in general. ◆

President Obama Extends Federal COBRA Subsidy Again

By Frances S. P. Barbieri

On March 2, 2010, President Obama signed the Temporary Extension Act ("TEA"). TEA extends the eligibility period for the COBRA subsidy contained in the American Recovery and Reinvestment Act ("ARRA") and broadens ARRA's definition of "assistance eligible individual," or AEI, as discussed below.

Extension Of COBRA Subsidy

TEA extends the eligibility period for the COBRA subsidy so that employees who are involuntarily terminated between March 1, 2010 and March 31, 2010 will be eligible for the subsidy. Prior to TEA's enactment, employees involuntarily terminated only through February 28, 2010 were eligible.

In making this change, TEA clarifies that an employee involuntarily terminated on March 31, 2010, will be eligible for the COBRA subsidy even if his or her COBRA coverage would not commence until April 1, 2010. In this regard, the termination date, not the subsidy commencement date, governs.

Under ARRA's subsidy provision, as long as an AEI pays 35% of the premium for COBRA continuation coverage, the applicable health plan must treat the individual as having paid the full premium. Employers must "front" the cost of the 65% subsidy but may obtain reimbursement from the federal government by taking a credit on their payroll tax returns. The COBRA subsidy is available to AEIs for a maximum period of 15 months.

(For details of the logistical requirements of the COBRA subsidy, as well as the first extension, see the Firm's December 2009 e-alert entitled President Obama Extends Federal COBRA Subsidy.)

Broadened Definition Of Assistance Eligible Individuals

TEA also broadens the definition of AEI to include certain employees who previously lost health insurance coverage due to a reduction in working hours. Specifically, if an employee (a) was subject to a reduction in hours between September 1, 2008 and March 31, 2010, causing the loss of health insurance coverage; (b) did not elect COBRA continuation coverage at that time (or made an election but then discontinued COBRA continuation coverage); and (c) subsequently becomes involuntarily terminated between March 2, 2010 and March 31, 2010, the involuntary termination will be treated as a qualifying event for purposes of COBRA continuation coverage.

In this scenario, however, the date when the reduction in hours took place will be deemed the date of the qualifying event for purposes of commencing the COBRA continuation coverage. For example, if an AEI's hours were reduced on January 1, 2010, resulting in a loss of health coverage, and the AEI is involuntarily terminated on March 15, 2010, the AEI would be eligible for COBRA continuation coverage following the involuntary termination, but the period of COBRA continuation coverage would be deemed to have started on January 1, 2010.

Recommendations For Employers

Employers are encouraged to do the following to ensure compliance with TEA's requirements:

- Send required notices to employees whose employment is terminated through March 31, 2010, including employees who previously lost health insurance coverage due to a reduction in hours;
- Update COBRA forms for compliance with all recent statutory amendments;
- Confer with group health-insurance carriers and counsel to ensure that all AEIs are being offered continuation coverage in accordance with federal COBRA requirements; and
- Follow procedures for maintaining accurate records of the COBRA premium assistance payments.

As the purpose of TEA is to give Congress more time to consider extending certain programs, including the COBRA subsidy, through 2010, further changes in this area of the law are expected. We will keep you apprised of significant developments as they occur.

Meanwhile, please contact us if you have any questions about the potential impact of TEA on your business. ◆

The Nuts And Bolts Of Compliance With The Amended Family And Medical Leave Act

Thursday, April 1, 2010
9:00 a.m. to 12:00 p.m.

Location:
Schwartz Hannum PC
11 Chestnut Street, Andover, MA 01810

Is your organization in compliance with the recently amended Family and Medical Leave Act?

Topics Will Include:

- The FMLA Demystified: Who Is A Covered Employer? Who Is A Covered Employee?
- Types Of Leave
- Complying With The FMLA: Employers' Obligations and Employees' Obligations
- Overlaps And Intersections With State Laws
- Compliance Strategies
- Practical Implementation Steps
- Action Items

Tuition is $295. Registration is limited to 14 participants.

Please register by contacting Kathie Duffy at (978) 623-0900 or kduffy@shpclaw.com.

Model Employer CHIP Notice Issued By Department Of Labor

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CHIPRA's notice requirements. Significantly, each violation related to any single employee or beneficiary is treated as a separate violation.

Recommendations For Employers

Employers should plan now to meet their CHIPRA notice requirements by taking the following actions:

- Determine which employees reside in a state that provides premium assistance under Medicaid or CHIP for health coverage of the employee or the employee's dependents;
- Determine the due date for the first annual Employer CHIP Notice (*e.g.*, May 1, 2010 or later in the year);
- Download the model Employer CHIP Notice from DOL's website (at http://www.dol.gov/ebsa/chipmodelnotice.doc); and
- Determine whether to use the model notice "as is" or to voluntarily modify it by including more comprehensive state-specific information.

Please contact us if you have questions about CHIPRA or your organization's potential notice requirements under this statute. ◆

Major Labor Law Developments Expected In 2010

By Brian D. Carlson

The new year is shaping up to be an active one in the field of labor law. Developments expected during the coming year include the appointment of new members to the National Labor Relations Board (the "Board" or "NLRB"), a renewed push by the Obama Administration for passage of the Employee Free Choice Act ("EFCA"), and anticipated decisions by the NLRB in a number of important areas.

Composition Of The NLRB

Since the terms or recess appointments of three former members ended in December 2007, the NLRB has been operating as a two-member agency. The Board's decisions have been issued jointly by Chairman Wilma Liebman (a Democrat) and Member Peter Schaumber (a Republican).

Last year, President Obama nominated three candidates (two Democrats and one Republican) to fill the open seats on the Board. Thus far, however, Senate Republicans have been successful in delaying confirmation of these nominees.

GOP senators have objected particularly to the nomination of Craig Becker, a Chicago union-side attorney who Republicans charge would seek to bring about major changes in current labor law, to employers' detriment. In a party-line vote, the Senate Health, Education, Labor and Pensions Committee recently approved Becker's nomination, and Democrats then sought to move the nomination forward to a full Senate vote. GOP senators have indicated, however, that they intend to filibuster the nomination, and in an initial February 9 vote, Senate Democrats were able to mount only 52 of the 60 votes needed to invoke cloture and force a floor vote. Although a number of senators were not present for this vote due to inclement weather, two Democrats crossed party lines to join Republicans in voting to maintain the filibuster, and none of the 41 Senate Republicans has expressed an intention to vote in favor of cloture. A second cloture vote on Becker's nomination has not yet been scheduled.

Thus, the future of Becker's candidacy remains very much in doubt, and it is likewise unclear when the other two Board nominees may be voted on. Should Republicans be successful in continuing to block Becker's confirmation, it is possible that President Obama might withdraw his nomination and submit a less controversial candidate for consideration. Alternatively, Senate Majority Leader Harry Reid has suggested that the open NLRB seats might be filled through recess appointments, a strategy that Senator Reid himself criticized when former President George W. Bush used such appointments to fill Board openings. The Obama Administration has hinted that the President might consider pursuing this strategy if his Board nominees continue to be stalled in the Senate, but has given no clear indication as to whether (or when) such recess appointments might be made.

Change In NLRB General Counsel

A matter that has not drawn significant attention but may emerge as a major issue is the pending expiration (in August) of Republican Ronald Meisburg's tenure as General Counsel of the NLRB. Because the General Counsel's Office functions as the Board's "gatekeeper" by deciding whether to pursue actions against employers and unions, the appointment process for Meisburg's successor may become at least as controversial as that involving Becker and the Obama Administration's other Board nominees.

Although President Obama has not yet nominated a candidate to succeed Meisburg, this is likely to occur by the spring. The Administration's success in shepherding its nominee through the confirmation process may well hinge on whether a resolution of the current standoff on President Obama's NLRB nominations has been reached.

Validity Of Recent Board Decisions

As noted, the NLRB has been functioning as a two-member agency since December 2007. Numerous parties have challenged the Board's right to adjudicate cases this way, arguing that the National Labor Relations Act ("NLRA") does not permit the NLRB to delegate its authority to a quorum of fewer than three members. If this argument prevails, the many decisions issued by the two-member Board during the past two years may need to be withdrawn and reconsidered after the NLRB has gained at least one additional member.

The U.S. Supreme Court has agreed to resolve this issue. Oral arguments are scheduled for March, and a decision is expected by the end of June. Thus far, five of the six federal Courts of Appeals that have considered the matter have held that the Board is permitted to operate as a two-member agency. Notably, however, the one appellate court that has held to the contrary is the Court of Appeals for the D.C. Circuit, whose views on labor-law matters are often given special weight by the Supreme Court. Also, since the NLRA permits any party – regardless of its location – to appeal an adverse Board decision to the D.C. Circuit, until the Supreme Court has ruled on the matter, parties may be able to delay enforcement of current Board orders by appealing to the D.C. Circuit.

Prospects For Passage Of EFCA

The proposed EFCA would significantly alter existing labor law in a number of ways. In particular, the legislation would do away with the requirement of a representation election where a union obtains signed authorization cards from a majority of employees in a proposed bargaining unit. In addition, the EFCA would provide for the terms of an initial collective bargaining agreement ("CBA") to be determined through mandatory, binding arbitration if an employer and union fail to reach agreement on the terms of a CBA within a short time period after commencing bargaining.

Given President Obama's strong support of the EFCA and the overwhelming majorities enjoyed by congressional Democrats following the 2008 elections, most observers expected that the legislation would be enacted relatively swiftly after the new administration's inauguration. A number of moderate Senate Democrats, however, have expressed concern over certain aspects of the bill, and the Obama Administration ultimately decided to suspend its active lobbying for the legislation while it pursued national health-care reform.

Now, with the future of health-care reform in serious question, and with the recent election of Massachusetts Senator Scott Brown having put an end to the Democrats' filibuster-proof majority, the prospects for enactment of the EFCA seem equally unclear. President Obama has continued to voice strong support for the bill, and it is likely that the Administration will renew its lobbying efforts in the future. In the meantime, however, it seems likely that the Administration will press the NLRB to speed up the scheduling of union elections, enforce the NLRA more aggressively as to alleged violations occurring during elections, and otherwise address the union concerns that underlie the proposed EFCA. Because the future of the EFCA is of tremendous significance for businesses, employers should continue to pay close attention to developments in this area.

Future NLRB Decisions

Finally, 2010 may bring significant NLRB decisions in a number of areas. In particular, some highly anticipated decisions have been pending for some time, perhaps because the Board has been reluctant to decide them as a two-member body. For instance:

- The NLRB has yet to rule on a pending case considering whether employees of a vendor that leases space in a property have a right to distribute union literature in public areas of the property during non-working hours.
- The Board is expected to decide whether a "neutrality agreement" (under which an employer agrees not to actively oppose a union's workplace organizing efforts) can include specific conditions that will apply to future bargaining in the event that the union is ultimately certified as the employees' bargaining representative.

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ICE Continues Employer Crackdowns

By Frances S. P. Barbieri

U.S. Immigration and Customs Enforcement ("ICE"), the largest investigative agency in the U.S. Department of Homeland Security ("DHS"), is continuing its aggressive agenda of investigating employers for potential violations of immigration laws.

On March 2, 2010, ICE announced that it will be auditing 180 businesses in five southeastern states: Alabama, Arkansas, Louisiana, Mississippi, and Tennessee. This is a continuation of ICE's "bold, new audit initiative" to address and deter illegal employment through inspection of employer Form 1-9 records.

When ICE announced the initiative in July 2009, it simultaneously issued Notices of Inspection to 654 businesses nationwide—more notices than ICE issued in all of 2008. On November 19, 2009, ICE issued Notices of Inspection to another 1,000 employers.

Employers found to have knowingly hired and/or continued to employ unauthorized workers may be subject to the following penalties, depending on the circumstances:

- Cease and desist orders;
- Monetary penalties ranging from $375 to $16,000 per violation;
- Debarment from future federal contracts; and
- Criminal prosecution.

As of November 19, 2009, ICE had issued nearly $2.5 million in fines, and was considering issuing fines in another 267 cases, as a result of the 654 audits announced last July. Moreover, just last month, an ICE investigation resulted in the arrest of a Maryland restaurant owner on charges of transporting, employing and harboring illegal aliens – charges that carry maximum sentences of three to five years each.

We strongly recommend that employers undertake an internal Form I-9 audit to ensure that all employees are appropriately documented. This should facilitate compliance with the law and allow for correction of any errors *before* an ICE audit.

Please let us know if you have any questions about ICE's enforcement program or if we can assist in conducting an internal I-9 audit. ◆

If you would prefer to receive a copy of the Firm's Labor and Employment Law Update by e-mail in pdf (portable document format), please contact Kathie Duffy at kduffy@shpclaw.com or (978) 623-0900 to let us know and to provide us with your correct e-mail address. (As you may know, you must have Adobe Acrobat Reader to view the Update in pdf.)

A searchable archive of past Update Articles and E-Alerts is available on the Firm's website, www.shpclaw.com.

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- The NLRB has several pending cases considering whether a union violates its duty of fair representation by requiring members to inform the union on an annual basis if they object to paying dues for non-representational purposes (such as political lobbying).

These decisions could have significant implications for future union organizing campaigns.

Also, assuming that the NLRB is eventually reconstituted with a Democratic majority during the coming year, many observers anticipate that the Board eventually will overrule or modify a number of Bush-era decisions that were favorable to employers. These decisions include:

- A Board decision (*Guard Publishing*) giving employers wide latitude to prohibit employees from using employer-provided e-mail and other electronic communications systems for union-related messages.
- A holding (*Oakwood Healthcare*) expanding the legal standard under which employees may be found to be supervisors, and thus not entitled to be represented by a union.
- A decision (*H.S. Care*) requiring that a joint employer (such as a staffing company) consent to the inclusion of its employees in a bargaining unit with employees of another business.

* * *

If you have any questions about these matters or any other labor-law issues, please do not hesitate to contact us. We regularly assist employers in this area and would be happy to help. ◆

Labor Relations Boot Camp

Tuesday, April 13, 2010

8:30 a.m. to 4:30 p.m.

Location:

Schwartz Hannum PC
11 Chestnut Street, Andover, MA 01810

A one-day program for human resources professionals, in-house counsel, and managers at both unionized and non-unionized employers.

Topics Will Include:

- Strategies For Avoiding Unionization
- Effectively Preparing For Collective Bargaining
- Hot Topics In Negotiations
- Good Faith Negotiations And Impasse
- Job Actions, Strikes And Lockouts
- Decertification: What Is It And When Is It Possible?
- Drafting Collective Bargaining Agreements And Side Letters
- A Mock Arbitration: Lessons In How To Successfully Handle Grievances And Arbitrations

Tuition is $500. Registration is limited to 12 participants.

Please register by contacting Kathie Duffy at (978) 623-0900 or kduffy@shpclaw.com.

EEOC Clarifies "RFOA" Defense In Age Discrimination Cases

By Brian D. Carlson

The Equal Employment Opportunity Commission ("EEOC") has issued proposed regulations to clarify its view of the reasonable factor other than age ("RFOA") defense available to employers under the federal Age Discrimination in Employment Act ("ADEA"). The RFOA defense applies to "disparate impact" claims, which involve facially neutral employment practices that disproportionately affect older workers.

EEOC's proposed regulations arise from two recent Supreme Court decisions. In *Smith v. Jackson*, 544 U.S. 228 (2005), and *Meacham v. Knolls Atomic Power Lab*., 128 S. Ct. 2395 (2008), the Court held that an employment practice shown to have a disparate impact on employees who are 40 and older may violate the ADEA, but that once such a showing is made, an employer may avoid liability by proving that the practice was based on an RFOA. EEOC's proposed regulations attempt to delineate the meaning of this term.

EEOC's interpretation of RFOA is based on tort law, which relies on concepts of reasonableness and prudence. Thus, EEOC states that an RFOA is "one that is objectively reasonable when viewed from the position of a reasonable employer under like circumstances," as well as "one that an employer using reasonable care to avoid limiting the employment opportunities of older persons would use."

EEOC provides various examples of criteria that may be relevant in determining whether an employment practice is based on an RFOA. These criteria, which are not intended to be exhaustive, include:

- The extent to which the practice is related to the employer's business goals;
- The extent to which the employer took steps to define and apply the factors underlying the practice fairly and accurately;
- The severity of the employment practice's disparate impact on older workers;
- The extent to which the employer took steps to assess the adverse impact of the practice; and
- Whether the employer had other options available that could have accomplished the desired goal without disproportionately harming older workers.

At first glance, EEOC's reference to "other options" might be taken as suggesting that an employer must make certain that there is no less discriminatory alternative to an employment practice that disparately affects older workers. The proposed regulations, however, make clear that this is not the case.

Under Title VII (which governs other forms of employment discrimination, such as race and sex), an employment practice that results in a disparate impact will be found lawful only if required by "business necessity," but the analogous standard for disparate-impact claims under the ADEA is significantly less stringent. Under the ADEA, EEOC explains, the availability of less discriminatory options may be one relevant factor in determining whether an employment practice causing a disparate impact violates the statute, but "the availability of a less discriminatory practice does not by itself make a challenged practice unreasonable."

EEOC's proposed regulations are subject to a 60-day public comment period (which expires on April 19, 2010), after which they may be revised before taking effect. Some employers may want to review these proposed regulations and submit comments to EEOC. In addition, employers are advised to review the proposed regulations and to use them as guidance in formulating and implementing any policy that might arguably have a disproportionate impact on older workers. This will help to ensure consistency with prevailing EEOC thinking, which should help significantly in the event of an EEOC charge alleging disparate impact under the ADEA.

* * *

Please do not hesitate to contact us if you have any questions about the proposed EEOC regulations or employment-discrimination law generally. ◆

Employment Law Boot Camp

April 6 and 7, 2010

8:30 a.m. to 4:30 p.m.

Schwartz Hannum PC has developed a fourteen-hour intensive human resources skills development program in response to the growing challenges confronting our clients. Presented in an interactive seminar format, Employment Law Boot Camp reinforces participants' existing knowledge of fundamental employment laws and personnel practices by exploring major risk areas and problem-solving strategies. Expert attorney instructors will provide extensive written resources, engaging real-life role-plays, and valuable networking opportunities for participants. Participants will receive a comprehensive Tool Kit containing essential compliance forms, checklists and guidance.

Topics Will Include:

- Hiring Traps And Strategies
- Background Checks And Substance Abuse Testing For The Uninitiated
- Managing And Documenting Employee Performance: Discipline And Discharge
- Limiting Exposure To A Wage And Hour Complaint
- Mastering An Effective Investigation Of Alleged Workplace Misconduct
- Risk Factors That Cause Discrimination Claims
- Harassment – It's Not Just About Sex Anymore
- Critical Employment Policies – Limit Liability And Exposure While Serving Your Business Needs
- Employee Rights And Responsibilities Related To Family, Medical And Other Leaves Of Absence
- Employment, Severance, Non-Competition And Non-Disclosure Agreement Basics

Tuition is $950. Registration is limited to 12 participants.

Only a few seats left!

To register, please contact Kathie Duffy at (978) 623-0900 or kduffy@shpclaw.com.