Federal Legislation Developments

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FEDERAL LEGISLATION DEVELOPMENTS

by Robert B. Fitzpatrick[1]

I. NEW WHISTLEBLOWER PROTECTIONS FOR GOVERNMENT CONTRACTORS AND EMPLOYEES OF STATE AND LOCAL GOVERNMENTS IN THE STIMULUS BILL

1. **Introduction**

    a. The American Recovery and Reinvestment Act of 2009 (ARRA), Pub L. No. 111-5, 123 Stat 115, signed into law by President Obama on February 17, 2009, provides for nearly $500 billion in spending to stimulate the economy.
    b. However, those who receive those funds should be aware that §1553 of the ARRA contains new protections for public and private employees who blow the whistle on gross mismanagement or waste of covered funds, danger to public health or safety related to covered funds, abuses of authority relating to the use of the funds, or violation of laws or regulations relating to the grant of the funds.

2. **Substantive Provisions**

    a. Broad Definition of Employer
    b. Broad Scope of Subject Matter of Disclosures
    c. Broad Class of Recipients of Protected Disclosures
    d. Broad Scope of Protection
    e. Broad Scope of Prohibited Reprisals

3. **Broad Definition of Employer §1553(g)(4)-(5)**

    a. New whistleblower protections affect employers receiving covered funds as:
    b. A contractor, subcontractor, grantee or recipient;
    c. A professional membership organization, certification or other professional body, agent or licensee of the federal government, or a person acting in interest of an employer receiving covered funds; or
    d. A state or local government and any contractor or subcontractor thereof receiving covered funds.

[1] This article was prepared with assistance by Donald R. McIntosh, an associate with Robert B. Fitzpatrick, PLLC. Mr. McIntosh is a May 2008 graduate of Georgetown University Law Center and a member of the Virginia State Bar.

4. **"Covered Funds" §1553(g)(2)**

    a. Any contract, grant or other payment received by any non-Federal employer if:
    b. Federal government provides any portion of money or property that is provided, requested or demanded; and
    c. At least some of the funds are appropriated or otherwise made available by the ARRA.

5. **Broad Scope of Subject Matter of Disclosures §1553(a)(1)-(5)**

    a. Disclosures are protected if they contain information that employee reasonably believes evidences:
    b. Gross mismanagement of an agency contract or grant relating to covered funds;
    c. Gross waste of covered funds;
    d. Substantial and specific danger to public health or safety related to implementation or use of covered funds;
    e. Abuse of authority related to implementation or use of covered funds;
    f. Violation of law, rule or regulation related to an agency contract (including the competition for a contract) or grant, awarded or issued relating to covered funds.

6. **Scope of the Five Practices About Which one can Complain**

    a. The five types of disclosures covered by sections 1553(a)(1)-(5) are stated in language that is virtually identical to the language contained in the federal Whistleblower Protection Act (WPA). *See* 5 U.S.C. 2302(b)(8); *see also* Broida, *A Guide to Merit Systems Protection Law and Practice*, ch. 13: Prohibited Personnel Practices.
    b. Further, the language of the WPA is routinely construed by the MSPB and the Federal Circuit. *See, e.g., Smart v. Dept. of Army*, 98 M.S.P.R. 566 (2005); *Downing v. Dept. of Labor*, 98 M.S.P.R. 64 (2004). Presumably the inspector generals and federal courts will look to that body of jurisprudence to interpret these provisions.
    c. An abuse of authority (§ 1553(a)(4)) is specifically defined in § 1553(g)(1).

7. **Gross Mismanagement of Agency Contract or Grant §1553(a)(1)**

    a. "Gross mismanagement" for the purposes of the WPA has been defined as a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. White v. Dep't of the Air Force, 63 M.S.P.R. 90, 95 (1994).
    b. The Federal Circuit has held that in determining whether an employee has made a disclosure protected by the WPA, the court must look for evidence that it was reasonable for the employee to believe that the disclosures revealed misbehavior described by the Act. *Chambers v. Department of Interior*, 515 F.3d 1362, 1367 (Fed. Cir. 2008); *Lachance v. White*, 174 F.3d 1378, 1380-81 (Fed. Cir. 1999).

c. In the context of gross mismanagement, the test is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence gross mismanagement. *Lachance*, 174 F.3d at 1381.

8. **Gross Waste of Funds §1553(a)(2)**

a. In order to make a disclosure of a "gross waste of funds" for the purposes of the WPA, courts have held that the disclosure must uncover more than a debatable or de minimis expenditure. The disclosure must uncover an expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. *White v. Dep't of Air Force,* 391 F.3d 1377, 1381-82 (Fed. Cir. 2004); *Crews v. Dep't of Army*, 217 F.3d 854 at *2 (Fed. Cir. 1999); *Embree v. Dep't of Treasury*, 70 M.S.P.R. 79, 85 (1996).
b. Disclosure of a "gross waste of funds" for the purposes of the WPA is also governed by the *Lachance* test—to be protected, the employee must have had a reasonable belief that the disclosure uncovered a "gross waste of funds."

9. **Substantial and Specific Danger to Public Health or Safety §1553(a)(3)**

a. For the purposes of disclosure of a "substantial and specific danger to public health or safety" under the WPA, it has been held that "revelation of a negligible, remote, or ill-defined peril that does not involve any particular person, place or thing, is not protected." *Sazinski v. Dep't of Housing & Urban Dev*., 73 M.S.P.R. 682, 686 (1997). It has further been held that disclosure of a danger only potentially arising in the future is not a protected disclosure. *Herman v. Dep't of Justice*, 193 F.3d 1375, 1379 (Fed. Cir. 1999). Rather, as indicated by the statutory language, the danger must be substantial and specific. *Id*. In determining whether an alleged danger meets this test, relevant considerations include the likelihood of harm resulting from the danger, when the alleged harm may occur, and the nature of the potential harm. *Chambers v. Dep't of Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008).
b. For the purposes of the WPA, such a disclosure is also governed by the *Lachance* test—to be protected, the employee must have had a reasonable belief that the disclosure uncovered such a danger.

10. **Abuse of Authority Related to Implementation or Use of Funds §1553(a)(4), (g)(1)**

a. § 1553(g)(1) defines abuse of authority as "an arbitrary and capricious exercise of authority by a contracting official or employee that adversely affects the rights of any person, or that results in personal gain or advantage to the official or employee or to preferred other persons."
b. For the purposes of the WPA, such a disclosure is also governed by the *Lachance* test - to be protected, the employee must have had a reasonable belief that the disclosure uncovered such an abuse of authority.

11. **Violation of law, Rule or Regulation Related to Agency Contract or Grant §1553(a)(5)**

    a. For the purposes of a disclosure of a "violation of law, rule, or regulation" under the WPA, the courts have held that to make a protected disclosure, a whistleblower need only disclose what he reasonably believes is an imminent – not an actual – violation of a law, rule, or regulation. *See, e.g., Reid v. Merit Sys. Prot. Bd.*, 508 F.3d 674, 678 (Fed. Cir. 2007).
    b. In *Drake v. Agency for Int'l Dev.*, 543 F.3d 1377, 1381 (Fed. Cir. 2008), the court held that whether an employee's disclosure was based on a reasonable belief regarding a violation of a law, rule or regulation turns on the particular facts of the case (citing *Herman v. Dep't of Justice*, 193 F.3d 1375, 1382 (Fed. Cir. 1999)).

12. **Broad Class of Recipients of Protected Disclosures §1553(a)**

    a. Disclosures are protected under the Act if the employee makes them to:
    b. Recovery Accountability and Transparency Board (so-called RAT Board is a body established by Section 1521 of the ARRA "to coordinate and conduct oversight of covered funds to prevent fraud, waste, and abuse);
    c. Agency's inspector general;
    d. Comptroller General;
    e. Member of Congress;
    f. State or federal regulatory or law enforcement agency;
    g. Person with supervisory authority over employee;
    h. Court or grand jury;
    i. Head of a federal agency; or
    j. A representative of any of the above.

13. **Broad Scope of Protection §1553(a)**

    a. The Federal Circuit has previously construed the WPA's protections (5 U.S.C. §2302) to exclude disclosures an employee makes in "merely carrying out his required, everyday job responsibilities." *Langer v. Dep't of the Treasury*, 265 F.3d 1259, 1267 (Fed. Cir. 2001).
    b. By contrast, §1553(a) of the new ARRA expressly includes disclosures "made in the ordinary course of an employee's duties" in the definition of protected activity.

14. **Broad Scope of Prohibited Reprisals §1553(a)**

    a. Section 1553(a)'s language regarding "prohibition of reprisals" explicitly provides that employees of employers covered by the act may not be "discharged, demoted, or otherwise discriminated against as a reprisal for" making disclosures protected by the act.
    b. Like other statutes with phraseology identical or similar to the phrase "otherwise discriminated against," presumably the phrase will be broadly construed to

include employment actions such as oral or written reprimands, lateral transfers, reassignment of duties, as well as many other actions that "might well have dissuaded a reasonable worker from making or supporting a claim." *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

c. Comparison with the WPA does not seem to be particularly helpful in this regard, since the "personnel actions" covered by that act are much more narrowly and explicitly defined. *See* 5 U.S.C. § 2302(a)(2)(A).

15. **Procedural Provisions**

a. Investigations (§1553(b)(1)-(4))
b. Burdens of Proof (§1553(c)(1))
c. Determinations (§1553(c)(2))
d. Lawsuits (§1553(c)(3))
e. Remedies for Employee (§1553(c)(3))
f. Judicial Enforcement of Agency Action (§1553(c)(4))
g. Judicial Review (§1553(c)(5))
h. Waiver of Rights (§1553(d)(1)-(3))
i. Notice Posting (§1553(e))

16. **Non-Preemption Provision §1553(f)(1)-(2)**

a. Section (f)(1) states that nothing in § 1553 may be construed "to modify or derogate from a right or remedy otherwise available to an employees."
b. Section (f)(2) states that nothing in this section of the ARRA "may be construed to preempt, preclude, or limit the protections provided for public or private employees under State whistleblower laws."

17. **Investigations §1553(b)(1)-(4)**

a. Complaints of reprisal are to be filed with inspector general (IG) of appropriate government agency having jurisdiction over the covered funds.
b. IG conducts investigation of complaint and prepares report.
c. As discussed herein, the statute contains no time limit within which to file a complaint with the appropriate IG.

18. **Burdens of Proof §1553(c)(1)**

a. The complainant must prove that a protected disclosure was a "contributing factor" in the reprisal.
b. The complainant may meet this burden by use of circumstantial evidence, including evidence that the official undertaking the reprisal knew of the complainant's protected disclosure, or evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

c. The burden then shifts to the employer to show by clear and convincing evidence that the employer would have taken the action allegedly constituting reprisal, even in the absence of the complainant's protected disclosure.

19. **Determinations §1553(c)(2)**

a. Head of agency concerned with covered funds makes the determination
b. Whether there is "sufficient basis" to find a prohibited reprisal
c. No required evidentiary hearing or administrative appeal

20. **Lawsuits (De Novo) §1553(c)(3)**

a. Civil actions may be filed after exhausting administrative remedies
b. Exhaustion includes:
c. Discontinuance of IG's investigation;
    i. Issuance of agency head's order denying relief; or
    ii. Passage of 210 days after submission of complaint.
    iii. Must file in U.S. district court in which alleged reprisal occurred
    iv. Not subject to amount in controversy requirements
    v. As discussed herein, the statute contains no limitations period governing the filing of such a lawsuit.

21. **Remedies for Employee §1553(c)(3)**

a. Civil actions may be filed after exhausting administrative remedies
b. Exhaustion includes:
    i. Discontinuance of IG's investigation;
    ii. Issuance of agency head's order denying relief; or
    iii. Passage of 210 days after submission of complaint.
    iv. Must file in U.S. district court in which alleged reprisal occurred
    v. Not subject to amount in controversy requirements
    vi. As discussed herein, the statute contains no limitations period governing the filing of such a lawsuit.

22. **Remedies for Employee §1553(c)(3)**

a. Affirmative action to abate reprisal
b. Reinstatement with back pay
c. Compensatory damages
d. Employment benefits
e. Other terms and conditions to restore employee to pre-reprisal position
f. Award of costs and expenses, with reasonable attorneys' and expert fees
g. No express caps or limits on damages
h. No punitive or exemplary damages available, reserved to government in enforcement actions

23. **Judicial Enforcement of Agency Action §1553(c)(4)**

a. When it is found that a reprisal occurred, an order is issued by the head of the agency granting some form of relief, and if a person fails to comply with the order, the head of the agency may bring an enforcement action in U.S. District Court.
b. In such an action, the court may grant "appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorneys' fees and costs."

24. **Judicial Review §1553(c)(5)**

a. Any person adversely affected or aggrieved by an order issued under §1553(c)(2) (under which the relevant agency either denies that reprisal occurred or finds that reprisal occurred and orders relief) may obtain review of the order's conformance with §1553(c) and any related regulations in the U.S. Court of Appeals for the circuit in which the alleged reprisal occurred.
b. Standard of Review: Administrative Procedure Act's guidance—court decides relevant questions of law, interprets statutory provisions and determines meaning and applicability of agency action.

25. **Waiver of Rights §1553(d)(1)-(3)**

a. No waiver of substantive or procedural rights by any:
    i. Agreement,
    ii. Policy,
    iii. Form or condition of employment, or
    iv. Pre-dispute arbitration agreements unless contained in collective bargaining agreement.

26. **Notice to be Posted §1553(e)**

a. Section 1553(e) requires that any employer receiving covered funds shall post a notice of rights and remedies provided under this section.
b. The poster is *available at* www.recovery.gov/sites/default/files/Whistleblower+Poster.pdf.

27. **Inspector General's Right to Interview Officers and Employees of the Recipient of Covered Funds**

a. Does § 1515, which provides for Inspector General access to certain records and employees, apply to investigations being conducted by inspector generals under § 1553 of whistleblower complaints
b. Employees should be aware of 18 U.S.C. § 1001 which requires imprisonment for anyone who knowingly and willfully:
    i. Falsifies, conceals, or covers up by trick, scheme, or device a material fact;

ii. Makes any materially false, fictitious, or fraudulent statement or representation; or
iii. Makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

28. **Contours of Protected Activity**

a. The removal of documents and electronically stored information (ESI) from the workplace by employees is increasingly a major problem for employers.
   i. *With Mass Layoffs Comes the Potential for Mass Misappropriation*, Posting of Kurt Kappes & Jim McNairy to Trading Secrets Law Blog (Feb. 10, 2009, 17:52 EST), *available at* http://www.tradesecretslaw.com/2009/02/articles/tradesecrets/with-mass-layoffs-comes-the-potential-for-mass-misappropriation/.
   ii. Michelle Goodman, *Stealing a Slice of the Company Pie*, ABCNews.com, Jan. 22, 2009, *available at* http://abcnews.go.com/Business/Economy/Story?id=6699815&page=1.
   iii. Tracy L. Coenen, *Fraud and the Economy: Correlation or Coincidence?*, Wisconsin L. J., Jan. 16, 2009, *available at* http://www.sequence-inc.com/index.php?option=com_content&view=article&id=301:fraud-and-the-economy-correlation-or-coincidence&catid=15:recent-articles-a-press&Itemid=64.
   iv. *Keep Your Documents Close and Your Flash Drives Closer*, Posting of Chad Wiener to E-Discovery Bytes (Feb. 4, 2009, 11:30 EST), *available at* http://ediscovery.quarles.com/2009/02/articles/corporate-record-retention/keep-your-documents-close-and-your-flash-drives-closer/.
   v. *Niswander v. The Cincinnati Ins. Co.*, 529 F.3d 714 (6th Cir. 2008) (majority sets forth a six-factor balancing test for determining whether employee's delivery of confidential documents to her attorney was reasonable).

29. **Scope of Actions Constituting Retaliation**

a. Section 1553(a) prohibits the discharge or the demotion of an employee as a reprisal for a covered disclosure.
b. It also states that such employee may not be "otherwise discriminated against as a reprisal" for a covered disclosure. SOX has identical language. *See* 18 U.S.C. 1514A(c).
c. Most commentators assume that the language "otherwise discriminated against" will be as broadly construed as the Supreme Court construed the language of § 704(a) in *Burlington N. & Santa Fe Ry. v. White,* 548 U.S. 53 (2006).
d. The ARB in *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008), stated: "[W]e see no reason not to apply the *Burlington Northern* materially adverse test to the STAA [Surface Transportation Assistance Act] and the other retaliation statutes that the Department administers." One member of the panel (Judge Beyer) declined to adopt the

Burlington Northern test; whereas two members (Judge Transui and Chief Judge Douglass) adopted the "materially adverse" standard set forth in *Burlington Northern.*

e. Ernest F. Lidge III, *What Types of Employer Actions are Cognizable Under Title VII? The Ramifications of Burlington Northern & Santa Fe Railroad Co. v. White*, 59 Rutgers L. Rev. 497 (2007).

30. **Scope of Actions Constituting Retaliation Post-*Burlington Northern***

a. *Ginger v. District of Columbia*, 527 F.3d 1340, 1343-44 (D.C. Cir. 2008) (movement of police officers from night shift to rotating shift).
b. *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1090-91 (10th Cir. 2007) (former employer's opposition to plaintiff's claim for unemployment compensation benefits).
c. *Kassner v. 2nd Avenue Delicatessen Inc.*, 496 F.3d 229, 242 (2d Cir. 2007) (alleged changes of work stations and work shifts for waitress established genuine issue of material fact on question of adverse employment action).

31. **Contributing Factor §1553(c)(1)(A)(i)**

a. The complainant's burden is merely to establish that reprisal was a "contributing factor."
b. Several courts have discussed "contributing factor" causality. For example, the D.C. Court of Appeals has had the opportunity to define the term "contributing factor" contained in the D.C. Whistleblower Protection Act (D.C. Code Ann. § 1-615.52(a)(2))), which defines a "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *See Crawford v. Dist. of Columbia*, 891 A.2d 216 (D.C. 2006); *see also Johnson v. Dist. of Columbia*, 935 A.2d 1113 (D.C. 2007).
c. A "contributing factor" appears to be akin to a "motivating factor," phraseology contained in the 1991 Amendments to the Civil Rights Act of 1964, and the phrase, a "contributing factor" would appear to not incorporate any notion of "but for" causation. *See, e.g., Gross v. FBL Financial Servs., Inc.*, No. 08-441 currently pending decision from the Supreme Court. *See* oral argument transcript of March 31, 2009, *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-441.pdf.

32. **Circumstantial Proof of a Reprisal: Knowledge Alone?**

a. § 1553(c)(1)(A)(ii) "Use of Circumstantial Evidence. A disclosure may be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial evidence including: (I) evidence that the official undertaking reprisal knew of the disclosure; or (II) evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal."

b. Does § 1553(c)(1)(A)(ii)(I) mean that knowledge alone is circumstantial evidence that there was a reprisal because of a covered disclosure, shifting the burden to the employer to demonstrate by "clear and convincing" evidence that the action taken against the complainant would have been taken in any event?

33. **Circumstantial Proof of a Reprisal: Temporal Proximity Alone?**

a. § 1553(c)(1)(A)(ii) "Use of Circumstantial Evidence. A disclosure may be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial evidence including: (I) evidence that the official undertaking reprisal knew of the disclosure; or (II) evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal."
b. Does § 1553(c)(1)(A)(ii)(II) mean that proof of temporal proximity between the disclosure and the alleged retaliatory act alone sufficient circumstantial evidence to shift the burden of proof to the employer to demonstrate by "clear and convincing" evidence that the action would have happened in any event?
c. Undoubtedly, the IG's and the courts will debate as to what constitutes temporal proximity.

34. **Temporal Proximity**

a. *Jones v. Bernanke*, 2009 U.S. App. LEXIS 4539 (D.C. Cir. Mar. 6, 2009) (employee's negative performance reviews following closely behind employee's request for an EEOC hearing may, on remand, support an inference of retaliation even though it occurred almost a year after the initial filing of charges).
b. *Hamilton v. Gen. Elec. Co.*, 2009 U.S. App. LEXIS 2725 (6th Cir. Feb. 12, 2009) (employer's increased scrutiny over employee after employee filed EEOC complaint and termination only three months later sufficiently established temporal proximity and causation requirements).
c. *Fabela v. Socorro Indep. Sch. Dist.*, 329 F.3d 409 (5th Cir. 2003) (Employer's justification of decision to terminate employee based partially on employee's "unsubstantiated EEOC charge" 5 years earlier sufficiently established causation requirement).
d. Troy B. Daniels & Richard A. Bales, *Plus at Pretext: Resolving the Split Regarding the Sufficiency of Temporal Proximity Evidence in Title VII Retaliation Cases*, 44 Gonz. L. Rev. (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1286132.
e. Justin O'Brien, Note, *Weighing Temporal Proximity in Title VII Retaliation Claims*, 43 B.C. L. Rev. 741 (2002).

35. **Clear and Convincing Evidence**

a. Once the complainant has demonstrated that a protected disclosure was a "contributing factor" in the reprisal, the agency must find for the complainant unless the non-Federal employer demonstrates by "clear and convincing"

evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.

b. Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." *Peck v. Safe Air Int'l, Inc.,* ARB No. 02-028 at 6, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004) (citing BLACK'S LAW DICTIONARY 1201 at 577 (7th ed. 1999)) (emphasis added). This standard of evidence is a higher burden than "preponderance of the evidence," but less than "beyond a reasonable doubt." *Duprey v. Florida Power & Light Co.*, 2000- ERA-5 at 4 (ALJ July 13, 2000), *aff'd*, (ARB Feb. 27, 2003) (citing *Grogan v. Garner*, 498 U.S. 279 (1991)). As the Eleventh Circuit observed in a nuclear whistleblower case employing the same burdens of proof, "For employers, [the clear and convincing evidence standard] is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves." *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1472 (11th Cir. 1997).

c. "Clear and convincing" evidence has been defined for purposes of MSPB proceedings in 5 C.F.R. 1209.4(d) as that "measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought be established." *See also Price v. Symsek,* 988 F.2d 1187, 1191 (Fed. Cir. 1993) ("evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is highly probable"); Broida, *A Guide to Merit Systems Protection Board Law and Practice*, ch. 13: Prohibited Personnel Practices.

36. **Extensions of Time to the IG**

a. Section 1553(b)(2)(B) contains rather extraordinary provisions regarding extensions of time for the IG to complete his/her investigation.

b. Without an extension, the IG investigation is to be completed within 180 days. Section 1553(b)(2)(B)(i) provides that the complainant can agree to confer an extension of time on the IG and (B)(ii) provides that the IG, on his/her own, may extend the period for not more than 180 days, provided the IG provides a written explanation for the extension.

c. This language seems to suggest that, with complainant's consent, the IG can obtain virtually unlimited extensions of time; whereas without the complainant's consent, the IG is limited to a single extension of 180 days and must provide a written explanation.

37. **Reasonable Belief Test: Objective or Subjective?**

a. The language of the statute ("the employee reasonably believes" (§ 1553(a))) is virtually identical to §806 of SOX, and §806 has been construed to establish an objective reasonable belief standard.

b. *See, e.g., Tuttle v. Johnson Controls Battery Div.,* 2004-SOX-76 (ALJ Jan. 3, 2005) (where the ALJ explained: "Protected activity is defined under SOX as reporting an employer's conduct which the employee reasonably believes

constitutes a violation of the laws and regulations related to fraud against shareholders. While the employee is not required to show the reported conduct actually caused a violation of the law, he must show that he reasonably *believed* the employer violated one of the laws or regulations enumerated in the Act. Thus, the employee's belief "must be scrutinized under both subjective and objective standards."). Nonetheless, it may be argued that the Congress's language incorporates a subjective reasonable belief test.

c. In other words, if complainant can demonstrate that he/she actually believed that there was one or more of the prohibited practices referenced in § 1553(a)(1)-(5), then even though an objectively reasonable person might well not have had such an opinion, the complainant's disclosure is nonetheless protected.
d. Given the uniform construction of §806 of Sox, this argument would not appear to have much traction.
e. Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 Ariz. St. L. Rev. 1127 (2007).

38. **Retaliation – Counterclaims**

a. An issue that has arisen with some frequency recently is whether an employer's counterclaims against the employee are actionable retaliation. We can expect this issue to arise in § 1553 litigation
b. *Gross v. Akin, Gump, Straus, Hauer & Feld, LLP*, 2009 U.S. Dist. LEXIS 16427 (D.D.C. Mar. 3, 2009).
    i. Plaintiff employee sued Defendant for age discrimination.
    ii. During discovery, employer found information to support counterclaim.
    iii. Plaintiff counterclaims for retaliation based on exercise of rights under the ADEA and DC HRA.
    iv. Court dismisses employee's counterclaim, holding that counterclaim is not actionable under *Burlington Northern* because:
        1. Plaintiff was not an employee of Defendant when Defendant filed the counterclaim,
        2. Counterclaim could not actually dissuade Plaintiff from filing his claim, and
        3. Rule 13 of Fed. R. Civ. Pro. required Defendant to file counterclaim in this case.
c. In *Darveau v. Detecon, Inc*., 515 F.3d 334, 343 (4th Cir. 2008), the court held that "filing a lawsuit alleging fraud with a retaliatory motive and without a reasonable basis in fact or law" constitutes adverse employment action required to support a claim of retaliation for bringing a suit under the FLSA against an employer.
d. In *Hernandez v. Crawford Bldg. Material Co.,* 321 F.3d 528, 532 (5th Cir. 2003), plaintiff sued for race discrimination and employer counterclaimed for theft, employee counterclaimed for retaliation based on employer's counterclaim and trial judge dismisses employee's counterclaim for lack of lack of proof.
e. Fifth Circuit reverses and dismisses, noting that district courts in other circuits have held that filing a suit or counterclaim can support a lawsuit premised on a

theory of retaliatory employment action. *See Beckham v. Grand Affair of N.C., Inc.*, 671 F. Supp. 415, 419 (W.D.N.C. 1987); *EEOC v. Va. Carolina Veneer Corp.*, 495 F. Supp. 775 (W.D. Va. 1980)

f. In *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106 (10th Cir. 2007), the court that a meritorious counterclaim, based on plaintiff's directing bank funds to her own account, would not support a retaliation claim, relying on *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (refusing to enjoin a "well founded lawsuit . . . even if it would not have been commenced but for plaintiff's desire to retaliate against [defendant] for exercising [his/her] rights").
g. In *Walsh v. Irvin Stern's Costumes*, No. 05-2515, 2006 WL 2380379 (E.D. Pa. Aug. 15, 2006), the court held that threatening to accuse plaintiff of a crime is an adverse employment action.
h. In *Zakzrewska v. New School*, 543 F. Supp. 2d 185 (S.D.N.Y. 2008), plaintiff, in a discrimination case, sought to amend her complaint to add a retaliation claim because she learned in discovery that Defendant had been covertly monitoring her personal e-mails. Court allowed the amendment on grounds that a jury might conclude that such activity (even if unknown to plaintiff at the time of the monitoring) might persuade a reasonable person not to file a discrimination complaint.
i. In evaluating whether a claim by an employer against an employee constitutes actionable retaliation, the courts often look to the *Noerr-Pennington* doctrine. *California Motor Transp. Co. v. Trucking Unlimited,* 404 U.S. 508, 511 (1972); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

39. **Total Absence of Statutes of Limitations**

a. Section 1553 nowhere sets forth a time limit within which to submit a complaint to the appropriate Inspector General.
b. And, nowhere does § 1553 set forth a time limit within which a civil action must be filed after the employee has exhausted administrative remedies.
c. Some have suggested that for one or both time limits, the courts should look to the four year federal catch-all statute of limitations which was last discussed by the Supreme Court in *Jones v. R.R. Donnelly & Sons Co*., 541 U.S. 369 (2004) (construing 28 U.S.C. § 1658 which reads as follows: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 USC § 1658(a)). Clearly, § 1658 would only apply to a civil action, and would not resolve the time period for filing with the IGs.

40. **Total Absence of Statutes of Limitations**

a. Others have suggested that the ongoing debate among the federal courts regarding the time limits for federal ADEA may provide some answers. *See Price v.*

Bernanke, 470 F.3d 384 (D.C. Cir. 2006); *Burzynksi v. Cohen*, 264 F.3d 611 (6th Cir. 2001).

41. ***Garcetti* Trumped**

a. *Garcetti v. Ceballos*, 547 U.S. 410 (2006), involved the First Amendment free speech protections for government employees. The plaintiff was a district attorney who claimed that he had been passed up for a promotion by criticizing the legitimacy of a warrant. The Court ruled that because his statements were made pursuant to his position as a public employee, rather than as a private citizen, his speech had no First Amendment protection.
b. Section 1553(a) specifically states that an employee who makes a disclosure "in the ordinary course of an employee's duties" is a protected disclosure.
c. Thus, the lawyer in the employer's office of general counsel who blows the whistle is protected, and some rather troubling ethical issues shall have to be resolved.
d. Internal auditors and compliance officers, who make disclosures, are protected, and similarly there are some troubling "ethical" issues to be resolved.

42. **Federal Acquisition Regulation (FAR): Contractor Business Ethics Compliance Program and Disclosure Requirements**

a. On Nov. 12, 2008, the new FAR rule (73 Fed. Reg. 67064), was issued, requiring federal contractors and most subcontractors to make mandatory disclosures to agency Offices of Inspector General and Contracting Officers whenever they have "credible evidence" of criminal violations, a civil False Claims Act violation, or a "significant overpayment" in connection with the award, performance, or close-out of a government contract or subcontract. These requirements took effect December 12, 2008. In addition they contain a "look back" requirement for certain criminal or civil False Claims Act violations and significant overpayments that occurred before that date.

43. **Reinstatement**

a. Section 1553(c)(2)(B), which provides that an agency head's order may include reinstatement, makes no reference to front pay as an alternative.
b. Presumably, the courts will read that alternative into the statute as they did under Title VII of the 1964 Civil Rights Act with the proviso that reinstatement is the preferred remedy. Like Title VII, there may be a dispute as to whether judge or jury determines the amount of front pay.

44. **Compensatory Damages**

a. Section 1553(c)(3) provides that the complainant in a civil action may seek "compensatory damages."
b. Compensatory damages are nowhere defined in the statute.

c. Thus, the agencies and the courts shall have to determine whether so-called hedonic or loss of enjoyment of life damages are awardable; whether tax bump relief is encompassed; whether lost opportunity damages are obtainable; and whether lost future earnings are permissible.
d. Some guidance may be gleaned from the courts' interpretation of similar language in other statutes. For example, the whistleblower protection provisions of the Energy Reorganization Act, 42 U.S.C. § 5851, and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121, also provide for compensatory damages and do not define the term. DOL has construed the term to include damages for emotional distress, humiliation, and loss of reputation. *See, e.g., Hobby v. Georgia Power Co*., ARB No. 98- 166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001).

45. **Attorneys' Fees**

a. Section 1553(c)(3), in describing the relief available to the plaintiff in a *de novo* civil action, states that "the complainant may bring a *de novo* action at law or equity against the employer to seek compensatory damages, *and other relief available under this section…*" (*italics supplied*).
b. The question naturally arises as to what does the reference to "other relief available under this section" mean. Does this sweep in the full panoply of relief described in § 1553(c)(2) and § 1553(c)(4)? Unquestionably, there will be major battles regarding the remedies available to plaintiffs in (c)(3) actions.
c. Section 1553(c)(2)(C) also contains yet another oddity
d. It states that the "aggregate amount of all costs and expenses . . . that were reasonably incurred by the complainant . . . [shall be] determined by the head of the agency or a court of competent jurisdiction"
e. The addition of the latter phrase seems odd and potentially suggests that fee fights alone may be taken to federal district court for resolution.
f. A similar issue arose in anti-discrimination litigation against the federal government where the plaintiff did not want to challenge a favorable finding of liability, but only wanted to challenge the adequacy of the fee award. *See, e.g., Scott v. Johanns*, 409 F.3d 406 (D.C. Cir. 2005).

46. **Interplay Between Civil Actions and Petitions for Review to the Court of Appeals**

a. It is unclear whether the party dissatisfied with the agency head's order can seek *de novo* proceedings in federal district court and/or and an APA review in the Court of Appeals.
b. It seems clear that only the complainant can bring a *de novo* in federal district court. But, any person "adversely affected or aggrieved by an" agency head's order may obtain review in the Court of Appeals.
c. It is not clear how it would play out if the employer petitioned to the Court of Appeals before the complainant initiated a civil action.
d. And, it is not clear whether the complainant has two choices in certain circumstances. If the complainant is dissatisfied with an agency head's order that

denies relief, in whole or in part, it is clear that the complainant can sue *de novo* in federal district court, and, as he/she is seemingly "adversely affected or aggrieved by an order," seemingly also able to file a petition for review to the Court of Appeals. Thus, there may be circumstances where complainant does not want full *de novo* review, but only legal review (e.g., the legal propriety of the fee award), and therefore a petition to the Court of Appeals may be the wiser course of action.

47. **Camel's Nose Under the Tent**

a. Section 1553(d)(2) prohibits pre-dispute arbitration agreements to resolve disputes involving alleged reprisals under this statute except in the circumstance where there is a collective bargaining agreement.
b. Is this the first volley in the battle to come to eliminate pre-dispute arbitration agreements generally in employment cases? *See* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009), *available at* http://www.opencongress.org/bill/111-h1020/text.

48. **Settlement**

a. In light of the extraordinarily sweeping language of § 1553(d)(1) stating that "the rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment . . .", a question arises regarding settlements.
b. That language is so broad that, on its face, it would seem to prohibit settlement agreements wherein, in exchange for consideration, the complainant waives all rights and remedies under this statute.
c. Immediate guidance on this language would seem to be needed.

49. **General Release's Effect on Qui Tam Claims**

a. *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 2009 U.S. App. LEXIS 5269 (10th Cir. Mar. 6, 2009) (Court enforced release where the allegations of fraud had been disclosed to the government before the relator signed the general release; Judge Briscoe dissented on the release issue)
b. *U.S. ex rel. Al-Amin v. George Washington Univ.*, 2007 WL 1302597 (D.D.C. May 2, 2007) (Court held that a general release, which became effective two days after the relator filed her qui tam complaint, was unenforceable because it was contrary to public policy concerns reflected in the False Claims Act.)
c. *United States ex rel. Radcliffe v. Purdue Pharma L.P.*, 2008 U.S. Dist. LEXIS 81688 (W.D. Va. Oct. 14, 2008) (holding that general release did not bar qui tam action). *See also United States ex rel. Gebert v. Transp. Admin. Servs.*, 260 F.3d 909, 916 (8th Cir. 2001); *United States ex rel. Hull v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1997); *United States ex rel. Green v. Northrop*

Corp., 59 F.3d 953 (9th Cir. 1995); *United States ex rel. Longhi v. Lithium Power Techs., Inc.* 481 F. Supp. 2d 815 (S.D. Tex. Mar. 23, 2007) (declining to enforce the general release to preclude the qui tam claim); *United States ex rel. Bahrani v. Conagra, Inc.*, 183 F. Supp. 2d 1272, 1275-78 (D. Colo. 2002); *United States ex rel. DeCarlo v. Kiewit/AFC Enters., Inc.*, 937 F. Supp. 1039, 1043-47 (S.D.N.Y. 1996).

50. **Tolling Agreements**

a. Unlike the Department of Labor (OSHA) in SOX cases, will tolling agreements be honored by the IG's? At least one ALJ has held that a tolling agreement entered into by the parties in furtherance of settlement negotiations in a SOX case was ineffective. *See Szymonik v. TyMetrix, Inc*., 2006-SOX-50 (Mar. 8, 2006).
b. The EEOC in its Compliance Manual specifically states that such tolling agreements are to be respected. *EEOC Compliance Manual*, ch. 2-IV(D)(3) (May 12, 2009), *available at* http://www.eeoc.gov/policy/docs/threshold.html ("The time requirements for filing a charge may be waived by the parties by mutual agreement, thereby allowing a charging party to file a charge beyond the 180/300-day statutory time limit. For example, the parties may agree to waive the limitations period so they may engage in private negotiations . . .").

51. **Are Inter-State Agencies Covered?**

a. Section 1553(g)(5) is silent with respect to inter-state agencies like the New York Port Authority, the Delaware River Basin Commission, the Great Lakes Basin Compact, the Interstate Water Commission on the Potomac River Basin, the Appalachian Regional Commission, the Chesapeake Bay Commission, Metropolitan Washington Airports Authority, and the Susquehanna River Basin Commission.

II. FRANKEN AMENDMENT TO THE 2010 DEPARTMENT OF DEFENSE ACT

1. **Franken Amendment (S.Amdt. 2588) to the Dep't of Defense Appropriations Act Pub. L. No. 111-118 (2009)**

   a. The actual text of the amendment as enacted reads as follows:

Sec. 8116.

(a) None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of $1,000,000 that is awarded more than 60 days after the effective date of this Act, unless the contractor agrees not to:

(1) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or

(2) take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.

(b) None of the funds appropriated or otherwise made available by this Act may be expended or any Federal contract awarded more than 180 days after the effective date of this Act unless the contractor certifies that t requires each covered subcontractor to agree not to enter into, and not to take any action to enforce any provision of, any agreement as described in paragraphs (1) and (2) of subsection (a), with respect to any employee or independent contractor performing work related to such subcontract. For purposes of this subsection, a ''covered subcontractor'' is an entity that has a subcontract in excess of $1,000,000 on a contract subject to subsection (a).

(c) The prohibitions in this section do not apply with respect to a contractor's or subcontractor's agreements with employees or independent contractors that may not be enforced in a court of the United States.

(d) The Secretary of Defense may waive the application of subsection (a) or (b) to a particular contractor or subcontractor for the purposes of a particular contract or subcontract if the Secretary or the Deputy Secretary personally determines that the waiver is necessary to avoid harm to national security interests of the United States, and that the term of the contract or subcontract is not longer than necessary to avoid such harm. The determination shall set forth with specificity the grounds for the waiver and for the contract or subcontract term selected, and shall state any alternatives considered in lieu of a waiver and the reasons each such alternative would not avoid harm to national security interests of the United States. The Secretary of Defense shall transmit to Congress, and simultaneously make public, any determination under this subsection not less than 15 business days before the contract or subcontract addressed in the determination may be awarded.

2. For information on the history of the amendment, a list of its co-sponsors in the Senate, and transcripts of the discussion & debate over the amendment in the Senate, *see*:

    a. http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SP2588.
    b. For the text of the entire 2010 Department of Defense Appropriations Act, *see*: http://thomas.loc.gov/cgi-bin/query/D?c111:8:./temp/~c111IM78y1.

3. On May 19, 2010, DoD issued an interim rule (DFARS, Restrictions on the Use of Mandatory Arbitration Agreements, *available at* http://edocket.access.gpo.gov/2010/pdf/2010-11966.pdf) implementing the Franken Amendment.

    a. Closely mirroring the language of the Franken Amendment, the interim rule "prohibits the use of funds appropriate or otherwise made available by the FY 10 DoD Appropriations Act for any contract (including task or delivery orders and bilateral modifications adding new work) in excess of $1 million, if the contractor restricts its employees to arbitration for claims under Title VII of the Civil Rights Act of 1964, or tort related to or arising out of sexual assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention."
    b. The interim rule provides a number of examples of contracts that would or would not be covered.
    c. DoD will be accepting public comments on the interim rule until July 19, 2010, especially comments from small business "entities."

4. For further discussion of the Amendment, *see* the following:

    a. National Employment Lawyers Association, Special Change Report, "The Franken 'Jamie Leigh Jones' Amendment Enacted into Law! Forced Arbitration Prohibited in Defense Contracts," Jan. 14, 2010, *available at* http://www.nela.org/temp/ts_47AA83A7-0DBA-0B46-

8599C48D81BE5CBF47AA83B6-006C-AA48-7704DC6C303203A1/NELAWorkingforChangeSpecialReportJan142010.pdf.

b. Shaw Valenza, LLP Blog, "Arbitration of Employment Law Claims – Going Away," Jan. 10, 2010, *available at* http://shawvalenza.blogspot.com/2010/01/arbitration-of-employment-law-claims.html.
c. Gregory Fischer, Alaska Employment Law Blog, "The Breadth of the Franken Amendment," Dec. 29, 2009, *available at* http://www.akemplaw.com/wiki/2009/12/29/the-breadth-of-the-franken-amendment/.
d. Maine Employment Lawyer Blog, Peter Thompson & Associates, "President Signs Bill Guaranteeing Day in Court for Defense Contractors' Employees Subjected to Harassment and Discrimination on the Basis of Sex, Race, Color, National Origin, or Religion," Dec. 29, 2009, *available at* http://www.maineemploymentlawyerblog.com/2009/12/president-signs-bill-guarantee.html.
e. Mediation's Place Blog, "The End of Employment Arbitration?" Dec. 22, 2009, *available at* http://www.mediate-la.com/2009/12/end-of-employment-arbitration.html.
f. Christopher McKinney, The McKinney Law Firm HR Lawyer's Blog, "Franken Amendment Signed Into Law," Dec. 22, 2009, *available at* http://www.hrlawyersblog.com/2009/12/articles/hr-management/franken-amendment-signed-into-law/.
g. Richard Renner, Whistleblower's Protection Blog, "Franken Amendment Passes Both Houses of Congress," Dec. 18, 2009, *available at* http://www.whistleblowersblog.org/2009/12/articles/legislation/franken-amendment-passes-both-houses-of-congress/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+WhistleblowerProtectionBlog+%28Whistleblower+Protection+Blog%29.

III. LACTATION PROVISIONS IN THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

1. Of the many provisions in the recently enacted Patient Protection and Affordable Care Act ("PPACA"), one that went largely overlooked by the media grants new rights to breastfeeding mothers in the workplace via an amendment to the Fair Labor Standards Act. Under the provision, employers with more than 50 workers will have to provide new mothers, for up to one year after birth, with "reasonable" time to take unpaid breaks to express breast milk for their nursing children. Such employers will also be required to provide a private space for the employee to do so. The Department of Labor is supposed to hammer out the regulatory details sometime in the near future. This provision will not preempt state laws to the extent that they provide greater protections.

    a. For a summary of state breastfeeding legislation in the U.S., *see* National Conference of State Legislatures, *Breastfeeding Laws*, last updated Mar. 2010, *available at* http://www.ncsl.org/default.aspx?tabid=14389.

2. Section 4207 of the PPACA, now codified as 29 U.S.C. § 207(r)(1)-(4), is the new federal mandate, requiring that employers provide reasonable break time for nursing mothers to express breast milk. The full text of the FLSA amendment is as follows:

    SEC. 4207. REASONABLE BREAK TIME FOR NURSING MOTHERS.
    Section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) is amended by adding at the end the following:
    ''(r)(1) An employer shall provide—
    ''(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and
    ''(B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.
    ''(2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.
    ''(3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.
    ''(4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.''

3. There are a number of important takeaways:

a. Employers must furnish a private place, not a bathroom.

b. The place must be shielded from view and shielded from intrusion by coworkers and the public.

c. The mandate applies to all nursing mothers of infants aged 12 months or less.

d. The federal mandate only mandates the right to express breast milk, and does not a right to breast feed the infant at work.

e. But, state law may mandate not only greater lactation rights, but also may mandate breastfeeding rights. So, be sure to check your state law. Connecticut, for example, since 2001 has by statute provided that employees can express breast milk or breastfeed on the job during meals or break periods, and that employers must make reasonable efforts to provide a place nearby the work area that is not a toilet stall to express milk in private as long as it would not impose an undue hardship on the operation of the employer. Conn. Stat. Gen. Stat. § 31-40w.

f. Employers of 50 or more employees have no exemptions; whereas employers of less than 50 employees are only exempt if they can meet the Section 207(r)(1)(3) "undue hardship" test.

g. The amendment contains no effective date.

h. The amendment contains no penalties for non-compliance, and no explicit private right of action.

i. Presumably, the Department of Labor will issue regulations or some form of guidance regarding, although the amendment does not require DOL to do so.

   David S. Fortney, Esq. of Fortney Scott in D.C., recently blogged on the amendment on Fortney Scott's "What's New" blog, *available at* http://www.fortneyscott.com/index.php?option=com_content&task=view&id=240&Itemid=209, posing the following questions confronting employers:

   i. Are the breaks to be counted towards hours worked that must be compensated? Short breaks running from 5 to 20 minutes generally are counted as hours worked under the FLSA regulations (29 CFR § 785.18) and subject to compensation for non-exempt employees. The amendment states that the employer shall not be required to compensate an employee receiving "reasonable" break time. Mr. Fortney asks whether "reasonable" means breaks of 20 minutes or less, or is this a different standard? The DOL regulation reads as follows:

      "Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the

employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time."

1. The federal government's source for women's health, WomensHealth.gov, provides the following guidance for nursing mothers in the workplace:

   Express milk for 10-15 minutes approximately 2-3 times during a typical 8-hour work period. Remember that in the first months of life babies need to breastfeed 8-12 times in 24 hours. So you need to express and store milk during those usual feeding times when you are away from your baby. This will maintain a sufficient amount of milk for your childcare provider to feed your baby while you are at work. The number of times you need to express milk at work should be equal to the number of feedings your baby will need while you are away. As the baby gets older, the number of feeding times may decrease . . . It usually takes 10 minutes to express milk, plus time to get to and from the lactation room.

   Employees' Guide to Breastfeeding and Working, *The Business Case for Breastfeeding: Steps for Creating a Breastfeeding Friendly Worksite*, WomensHealth.gov, *available at* http://www.womenshealth.gov/breastfeeding/programs/business-case/employees-guide.pdf.

ii. Will travel time between the work location and the private location for expressing milk be compensable?

iii. For employers with fewer than 50 employees, what constitutes the "undue hardship" that would qualify for the exemption? Note that the exemption is not automatic, but instead only available if employers with fewer than 50 employees can meet the "undue hardship" requirement.

IV. SUBSIDY IN THE AMERICAN RECOVERY AND REINVESTMENT ACT FOR INVOLUNTARILY TERMINATED EMPLOYEES

1. **Overview**

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (H.R. 1, S. 1) (the "ARRA"), which, among other things, amends the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") to provide a government subsidy of up to 65 percent of the COBRA premiums (including state and D.C. "mini-COBRA" coverage) to certain eligible individuals, known as "assistance eligible individuals".[2] These funds will be reimbursed by means of a payroll tax credit to the employer (in the case of a self-funded plan), the plan (in the case of a multi-employer plan), or the insurer (in the case of an insured plan). The "assistance eligible individuals" will only be required to pay 35 percent of the total cost of their former health insurance premium.[3] Prior to the passage of this new subsidy, terminated employees were responsible for 100% of their health insurance premium if they wished to maintain COBRA coverage. The COBRA subsidy applies to individuals, and their spouses and dependents, who are eligible for COBRA due to an involuntary termination from employment from September 1, 2008, through December 31, 2009.[4] The COBRA subsidy applies for a maximum of nine (9) months of coverage beginning on March 1, 2009. If a group health plan refuses to treat a former employee as an "assistance eligible individual", the ARRA requires the Department of Labor to expeditiously review said denial. Under this provision, the Department of Labor is required to make its determination within 15 business days of the date it receives the individual's application for review.[5] The ARRA does not extend the otherwise applicable COBRA coverage period, nor does it adopt the proposal in the House bill to continue coverage through Medicare eligibility.

Update: On December 19, 2009, via the Department of Defense Appropriations Act of 2010 (the "2010 DOD Act"),[6] Congress extended the 65 percent subsidy provided for in the ARRA. In light of the 2010 DOD Act, the Department of Labor's Employee Benefits Security Administration's website has updated to include new information, which can be accessed at http://www.dol.gov/ebsa/cobra.html.

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[2] American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong. § 3001(a)(1)(A) and (a)(12) (2009). COBRA refers to sections of the Consolidated Omnibus Budget Reconciliation Act of 1985 that require employers to allow terminated employees to remain enrolled in the employer's health insurance plan for up to 18 months after the employee's termination. Under COBRA, employees are responsible for paying a portion of their health insurance premium.

[3] H.R. 1, § 3001(a)(1)(A) (2009).

[4] H.R. 1, § 3001(a)(3) (2009).

[5] H.R. 1, § 3001(a)(5) (2009).

[6] Pub. L. No. 111-118 (2009).

2. **Eligibility**

An individual is eligible for the COBRA premium subsidy if he/she is involuntarily terminated between September 1, 2008, and December 31, 2009, elects COBRA coverage (when first offered or during the Special Election Period described below), and has a modified adjusted gross income not exceeding $145,000 per year ($290,000 for couples filing jointly).[7] The subsidy is phased out starting at modified adjusted gross income of $125,000 ($250,000 for couples filing jointly). Employees terminated for gross misconduct continue to be ineligible for COBRA and the subsidy.

Update: The 2010 DOD Act extended the eligibility period for two months, December 31, 2009 until February 28, 2010.

Update II: On March 2, 2010, President Obama signed into law the Temporary Extension Act of 2010 (P.L. 111-444), which, *inter alia*, amends the ARRA to extend, through March 31, 2010, the eligibility of qualified beneficiaries for COBRA continuation coverage and premium assistance.

The Temporary Extension Act also redefines the ARRA's eligibility requirements to include as eligible for COBRA continuation coverage those individuals who were involuntarily terminated and who "did not make (or who made and discontinued) an election of COBRA continuation coverage on the basis of [a] *reduction of hours of employment*." (Emphasis added). This addition is critical for many employees whose employers' response to the current economic downturn has been to cut back employees' hours worked. As a result, the Temporary Extension Act extends the ARRA's COBRA continuation coverage to those employees who lost health insurance as a result of a cut in their hours (e.g., reduced to part-time employment) and who were subsequently laid off.

3. **Special Election Period**

Any eligible individual who became eligible for COBRA coverage on or after September 1, 2008, but did not elect to receive COBRA coverage at that time, is eligible for the COBRA premium subsidy and must be given notice of his/her opportunity to elect coverage. This extended election period begins on the date of the ARRA's enactment and ends no sooner than 60 days after an extended election notice is provided to the individuals.[8] The ARRA requires employers to locate former employees who previously declined COBRA and provide notice of the right to COBRA coverage with the government subsidy.[9] If an eligible individual elects COBRA continuation coverage during the special extended election period, COBRA coverage will commence with the first period of coverage beginning on or after the enactment of the ARRA.[10] However, for purposes of determining the maximum COBRA coverage period, the date of the individual's involuntary termination of employment (or the date of the loss of

[7] H.R. 1, § (a)(3) (2009).
[8] H.R. 1, § 3001(a)(4)(A) (2009).
[9] H.R. 1, § 3001(a)(7)(C) (2009).
[10] H.R. 1, § 3001(a)(4)(B)(i) (2009).

coverage resulting from such termination, if applicable) will continue to be treated as the "qualifying event."[11] This means that the COBRA continuation coverage period available to an individual who makes an election during the extended election period will be determined based on the date of the qualifying event as described above. For example, an assistance eligible individual terminated on September 30, 2008, who makes a timely election during the extended election period, generally will be entitled to COBRA continuation coverage *prospectively* beginning March 1, 2009, though the 18-month maximum coverage period is measured from October 1, 2008.

4. **COBRA Subsidy**

The government subsidy is not paid to the individual electing COBRA coverage. Rather, eligible individuals (or anyone else on behalf of the individual other than the individual's employer) are to pay 35 percent of the required COBRA premium. The entity that provides the coverage and collects the individuals' premiums must cover the remaining COBRA premium (*i.e.*, 65 percent). That entity thereafter will receive reimbursement through a payroll tax credit in a manner depending on the type of plan it offers. If the group health plan is a multi-employer plan, the plan will be entitled to reimbursement. If the group health plan is not a multi-employer plan and some or all of the coverage is not provided by insurance, the employer will be entitled to reimbursement. If the group health plan is not a multi-employer plan and all of the coverage is provided by insurance, the insurer will be entitled to reimbursement.[12]

The COBRA subsidy ends on the earliest of the date the individual becomes eligible for health coverage under another group health plan or Medicare, nine (9) months after the first day of the first month to which the COBRA subsidy applies, or the end of the maximum COBRA coverage period required by law.

Update: The 2010 DOD Act increased the subsidy period from nine (9) to 15 months. The Department of Labor advises those individuals whose nine (9) months of subsidy expired before the 2010 DOD Act extension to contact their plan administrator to discuss either a credit for future payments or a reimbursement for any overpayments. Those individuals who discontinued COBRA after their subsidy eligibility expired can pay their missed premiums to resume coverage, so long as their 35 percent share of the missed premiums is received by February 17, 2010 or 30 days after receipt of notice of the extension from their plan administrator, whichever is later.

Recipients of the COBRA subsidy are required to notify their former employers of the events that would cause the subsidy to cease. Failure to provide this notice, absent reasonable cause and willful neglect, will result in a penalty on the individual of 110 percent of the premium reduction provided.[13]

If an employer has offered to pay a terminated employee's COBRA premiums as part of a severance agreement, the employer loses the right to a tax credit and/or reimbursement.

[11] H.R. 1, § 3001(a)(4)(B)(ii) (2009).
[12] H.R. 1, § 3001(a)(12) (2009).
[13] H.R. 1, § 3001(a)(13) (2009).

Likewise, if an employer pays an employee's entire COBRA premium, the employer is not entitled to a tax credit or reimbursement.

Many employers currently provide a COBRA subsidy to employees who are involuntarily terminated pursuant to the terms of their severance plans or individual agreements. Given that the ARRA requires the individual to pay 35 percent of the premium for the reimbursement to be claimed, it is not clear whether the reimbursement is available if the eligible individual pays less than 35 percent of the premium.

The ARRA also provides that employers may allow (but are not required to allow) an individual eligible for the COBRA premium subsidy to elect a different COBRA coverage option than the one the eligible individual originally elected at the time of termination from employment.[14] If offered, however, the other option cannot be more expensive than the option which the individual originally elected and must be an option offered to active employees.

5. **Notice Requirements**

On or before April 18, 2009, employers must provide notice advising of the availability of the COBRA premium subsidy to all individuals who became entitled to elect COBRA coverage during the period beginning on September 1, 2008, and ending on the day before enactment (February 16, 2009); and to all individuals who became eligible for the Special Election Period described above.[15]

Specifically, the notices must include:[16]

1. The forms necessary for establishing eligibility for the premium subsidy;

2. Contact information of the plan administrator and any other person with information regarding the premium subsidy;

3. A description of the extended election opportunity for those who previously declined COBRA continuation coverage;

4. A description of an assistance eligible individual's obligation to notify the plan when he or she becomes eligible for coverage that would cause eligibility for the subsidy to cease and the penalty for the failure to do so;

5. A prominent description of the qualified beneficiary's right to the COBRA subsidy and any conditions on such right; and

6. A description of the option to enroll in different coverage under the health plan, if applicable.

[14] H.R. 1, § 3001(a)(1)(B)(i) (2009).
[15] H.R. 1, § 3001(a)(7)(A)(i) (2009).
[16] H.R. 1, § 3001(a)(7)(B) (2009).

All individuals who have a COBRA qualifying event between February 17, 2009, and December 31, 2009, must receive an updated COBRA notice (or the inclusion of a separate document with the COBRA notice) reflecting the availability of the COBRA premium subsidy. This notice must be provided within the usual COBRA notice deadline (generally 44 days after the qualifying event).

The Department of Labor has provided model notices which can be accessed at http://www.dol.gov/ebsa/COBRAmodelnotice.html.

Update: Under the 2010 DOD Act, plans subject to Federal COBRA provisions must continue to transmit the General Notice to all qualified beneficiaries who experienced a qualifying event, now through February 28, 2010. The 2010 DOD Act also provides that certain individuals who have already received COBRA election notice must receive additional notice including information regarding ARRA, as amended by the 2010 DOD Act. Specifically, the following individuals must receive the following notices:

- Individuals who were "assistance eligible individuals" as of October 31, 2009 (unless they are in a "transition period" – see below) and individuals who experienced a termination of employment on or after October 31, 2009 and lost health coverage (unless they were already provided a timely, updated General Notice), must be provided notice of the changes made to the premium reduction provisions of the ARRA by the 2010 DOD Act by February 17, 2010; and

- Individuals who are in a "transition period" (the period beginning immediately after the end of the nine (9) months of premium reduction in effect under ARRA before the amendments made by the 2010 DOD Act, as long as the premium reduction provisions of the 2010 DOD Act would apply due to the extension from nine (9) to 15 months) must be provided notice of the changes to the ARRA by the 2010 DOD Act within 60 days of the first day of their "transition period."[17]

6. **Alleged Wrongful Denial of ARRA COBRA Premium Subsidy—Court Holds that Employees Cannot Immediately Sue**

- In *Dorsey v. Jacobson Holman, PLLC*, 2010 U.S. Dist. LEXIS 41295 (D.D.C. Apr. 27, 2010), the plaintiff's employment ended on September 16, 2007, after which she continued her health insurance coverage via COBRA. On April 10, 2009, the plaintiff , claiming that she was terminated, requested that defendant-employer provide her the ARRA premium subsidy, to which defendant refused, arguing that she voluntarily resigned.

- Plaintiff then sought assistance from the DOL, and a DOL representative contacted the defendant to advise them that plaintiff was entitled to the subsidized premium. Defendant, however, again denied plaintiff's right to the premium. Subsequently, the plaintiff filed the instant action in federal district court, alleging a violation of the ARRA

[17] *See* U.S. Department of Labor, Employee Benefits Security Administration, "COBRA Premium Reduction" Fact Sheet (January 8, 2010), *available at* http://www.dol.gov/ebsa/newsroom/fscobrapremiumreduction.html.

COBRA subsidy provisions; plaintiff never filed an official appeal with the DOL, challenging the defendant's denial of the premium subsidy.

- The court dismissed the plaintiff's case, holding that she failed to exhaust her administrative remedies with the DOL, prior to filing with the court. The court noted that, under ARRA § 3001(a)(5), "[t]he Secretary [of Labor] is directed to decide any appeal within 15 business days of receipt of a completed application, and the courts are directed to give deference to the Secretary's decision," which, as the court continued in noting, "is entirely consistent with the emergency nature of the legislation that Congress established a swift and sure administrative review process of any plan or employer or insurer's denial of COBRA premium reduction." The court concluded that "[i]t blunts that purpose to require—or allow—individuals to turn in the first instance to the courts."

7. **Action Items**

The COBRA provisions in the ARRA are effective for most employer-sponsored health plans beginning March 1, 2009. Accordingly, employers should immediately begin to:

- Revise and update COBRA communication materials.

- Take prompt action to implement the new procedures. Some of the decisions and procedures to be made by employers and benefit administrators, such as the payroll and human resources departments, include:

    - Identifying eligible employees (and their covered dependents/spouses) who were covered by the group health plan and whose employment was involuntarily terminated since 9/1/2008, including their last known addresses.
    - Identifying which terminated employees are currently receiving COBRA coverage and which are entitled to the special enrollment period. According to the Department of Labor, plan administrators must provide notice about the premium reduction to individuals who have a COBRA qualifying event during the **period from September 1, 2008 through December 31, 2009. Plan administrators** may provide notices separately or along with notices they provide following a COBRA qualifying event. This notice must go to all individuals, whether they have COBRA coverage or not, who had a qualifying event from September 1, 2008 through December 31, 2009.

- Provide written notice as required by the ARRA to individuals who are eligible for the subsidy by April 18, 2009.

- Identify individuals entitled to the special enrollment period and provide notice allowing them to elect to receive the COBRA coverage and the premium subsidy.

- Implement administrative procedures to provide the subsidy (as applicable) and obtain the payroll tax credit.

- Decide whether to allow eligible individuals to change their health plan options.

- Develop procedures to reinstate the 100 percent COBRA premium charge if the individual continues to be eligible for COBRA coverage after termination of the subsidy.

- Review severance plans and other agreements that provide an employer paid COBRA subsidy in light of the new government subsidy.

V. ADDITIONAL ENACTED AND PROPOSED FEDERAL LEGISLATION

I. 111th Congress, 2009-2010—Enacted Federal Legislation

1. **Lilly Ledbetter Fair Pay Act of 2009** (Pub. L. No. 111-2)

    a. The Act amends Title VII—specifically 42 U.S.C. § 2000e-5(e)(3)—by adding the following provision:

    > [A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5-6.

    b. For the full text of the Act, see http://www.govtrack.us/congress/billtext.xpd?bill=s111-181.

    c. For the full legislative history of the Act, see http://www.govtrack.us/congress/bill.xpd?bill=s111-181.

    d. For debate and discussion on this Act before its passage in the Senate, see http://www.govtrack.us/congress/bill.xpd?bill=s111-181&tab=speeches.

    e. For debate and discussion on this Act before its passage in the House, see http://www.govtrack.us/congress/bill.xpd?bill=h111-11&tab=speeches.

2. **Fraud Enforcement and Recovery Act of 2009** (P.L. 111-21)

    a. For analysis of the Act, *see, e.g.*:

        i. Syed D. Ali, et al., K&L Gates Newsstand, *Fraud Enforcement and Recovery Act of 2009 – Government Contracts and White Collar Alert*, May 26, 2009, *available at* http://www.klgates.com/newsstand/Detail.aspx?publication=5665.

        ii. Craig A. Conway, *Newly Enacted Fraud Enforcement and Recovery Act Expands Liability for Healthcare Providers Under the False Claims Act*,

Univ. of Houston Law Ctr. (June 2009), *available at* http://www.law.uh.edu/healthlaw/perspectives/2009/(CC)%20FERA.pdf.

3. **Mental Health Parity and Addiction Equity Act of 2008** (P.L. 110-343)

    a. "The MHPAEA requires private group health benefit plans that provide mental health and/or substance use disorder benefits to offer them on a basis equivalent to the medical and surgical benefits provided. In order to ensure coverage parity, the act imposes several plan design requirements upon group health benefit plans that offer mental health and/or substance use disorder benefits. The bill exempts certain small group health benefit plans and those that would incur a particular level of increased costs for all benefits due to compliance with the parity rule. These exemptions are specific and narrow." Posting of Jay Sumner to DC Employment Law Update (Sept. 29, 2009), http://www.dcemploymentlawupdate.com/2009/09/articles/employee-benefits/two-laws-affecting-group-health-plans-will-take-effect-in-october/.

    b. *See also* Joelle Sharman, *Where 'O Where are the Regulations for the Mental Health Parity Act?*, Ford & Harrison Legal Alert, Oct. 9, 2009, *available at* http://www.fordharrison.com/shownews.aspx?Show=5356.

4. **Michelle's Law** (P.L. 110-381)

    a. "Michelle's Law [] imposes certain coverage requirements on group health benefit plans. In essence, this law extends the health plan benefits coverage to a dependent child who is over the age of 18 and enrolled in college and would otherwise lose coverage in the event a medically necessary leave of absence would cause the child to lose full-time student status." Posting of Jay Sumner to DC Employment Law Update (Sept. 29, 2009), http://www.dcemploymentlawupdate.com/2009/09/articles/employee-benefits/two-laws-affecting-group-health-plans-will-take-effect-in-october/.

5. **Fair Treatment for Experienced Pilots Act** (P.L. 110-135, 121 Stat. 1450-1452)

II. 111th Congress, 2009-2010—Proposed Legislation

1. **Notice Pleading Restoration Act of 2009** (S. 1504)

    a. On July 22, 2009, Sen. Specter (D-Pa.) introduced the bill, which provides: "Except as otherwise expressly provided by an Act of Congress of by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rule of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)."

2. **Federal Judgeship Act of 2009** (S. 1653)

    a. The Act would add 13 circuit court judgeships (10 permanent, 3 temporary) and 51 district court judgeships (39 permanent, 12 temporary).

3. **Non-Federal Employee Whistleblower Protection Act of 2009** (S. 1745)

    a. Introduced by Sen. McCaskill (D-Mo.), the legislation proposes to extend whistleblower protections to employees of companies receiving government contracts.

4. **The Paycheck Fairness Act of 2009** (H.R. 12 & S. 182)

    a. Would require employers to show that differences in pay between males and females are employment-related, as well as prohibit employer retaliation against employees for inquiries into, discussions, or disclosures about wages.

    b. In Section 3 of the proposed Paycheck Fairness Act (H.R. 12, S. 182), *available at* http://www.opencongress.org/bill/111-h12/show, the bill in Section 3(b) proposes to radically amend Section 215 of the FLSA (29 U.S.C. § 215(a)), including language that would appear to generally legalize discussions and disclosures amongst employees of their wages. The language proposes to add to Section 215(a)(3) language so that it would read, in part, as follows: "it shall be unlawful for any person-- . . . (3) to discharge or in any manner discriminate against any employee because such employee has *inquired about, discussed or disclosed the wages of the employee or another employee*."

    c. As the proposed amendment contains no language that relates the inquiry about wages or the discussion of wages or a disclosure of wages to gender discrimination issues, it would appear to be a general prohibition, making employer action predicated upon such inquiry, disclosure, or discussion a wrongful discharge. And, the proposed Paycheck Fairness Act would substantially enhance the damages available to a wrongfully discharged employee—such damages could now include compensatory and punitive damages, as well as "make whole" damages and attorneys' fees.

    d. The NLRB and the federal courts, applying the NLRA, have consistently held that company rules prohibiting employees from discussing their pay with others are unlawful. *See* Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. Pa. J. Lab. & Emp. L. 121 (2003), *available at* http://www.law.upenn.edu/journals/jbl/articles/volume6/issue1/GelyBierman6U.Pa.J.Lab.&Emp.L.121%282003%29.pdf.

    e. For additional discussion of the Paycheck Fairness Act and related issues, *see, e.g.*:

i. The Employment Law Post, *Movement on Paycheck Fairness Act?*, Post by John Phillips at 10:41 A.M., Feb. 4, 2010, *available at* http://employmentlawpost.com/theword/2010/02/04/movement-on-paycheck-fairness-act/.

ii. CCH Workday, *Will Ledbetter Act's Anniversary Breathe New Life into the Paycheck Fairness Act?*, Feb. 3, 2010, *available at* http://cch-workday.blogspot.com/2010/02/will-ledbetter-acts-anniversary-breathe.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+CCH-Workday+%28CCH+WorkDay%29.

iii. Womenstake.org, *Secretary Solis on the Ledbetter Act Anniversary*, Jan. 29, 2010, *available at* http://www.womenstake.org/2010/01/secretary-solis-on-the-ledbetter-act-anniversary.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Womenstake+%28Womenstake%29.

iv. California Employment Lawyers Blog, *Equal Pay for Women—Third Circuit Reverses Decision in Pay Discrimination Case*, Post by Howard/Nasiri, PC at 12:00 P.M. on Sept. 25, 2009, *available at* http://www.californiaemploymentlawyersblog.com/2009/09/equal-pay-for-women--third-circuit-court-reverses-decision-in-pay-discrimination-case.html.

v. CCH Workday, *Pending Paycheck Fairness Act Would Resurrect Controversial EO Survey*, Aug. 5, 2009, *available at* http://cch-workday.blogspot.com/2009/08/pending-paycheck-fairness-act-would.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+CCH-Workday+%28CCH+WorkDay%29.

5. **Arbitration Fairness Act of 2009** (H.R. 1020 & S. 931)

a. The legislation would amend the Federal Arbitration Act to prohibit, *inter alia*, agreements requiring arbitration of employment disputes.

b. The House Judiciary Committee's Subcommittee on Commercial and Administrative Law held a hearing on September 15, 2009, entitled "Mandatory Binding Arbitration – Is it Fair and Voluntary?", *available at* http://judiciary.house.gov/hearings/hear090915.html.

c. The Senate bill contains a provision that would expressly overturn the Supreme Court's decision in *14 Penn Plaza L.L.C. v. Pyett*.

6. **Employee Free Choice Act** (H.R. 1409 & S. 560)

a. Under the initial proposal, the legislation would permit union formation via card check, would mandate mediation or arbitration of initial contracts, and increase penalties. However, compromises abound, including shorter election periods, increased access to employees, and mail voting. See*, e.g.,* Peter D. Conrad, *Fast Track Elections Likely to Replace Card-Check in EFCA*, Metropolitan Corporate Counsel, Oct. 4, 2009, *available at* http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=October&artYear=2009&EntryNo=10190

7. **The Border Control & Contractor Accountability Act of 2009** (H.R. 1668)

    a. The Act proposes to suspend or debar federal contractors who employ directly or through a subcontractor an alien who is not authorized to work. The Act also proposes to prohibit DHS from contracting with employers who fail to use the E-Verify system.

8. **The Protecting America's Workers Act of 2009** (H.R. 2067)

    a. The Act proposes to amend the OSH Act to expand its scope and coverage to federal, state, and local government employees.

    b. For a full discussion, *see* Jay Sumner, *Protecting America's Worker's Act is Reintroduced*, DC Employment Update, April 27, 2009, *available at* http://www.dcemploymentlawupdate.com/2009/04/articles/workplace-safety/protecting-americas-workers-act-is-reintroduced/.

9. **The Alert Laid Off Employees in Reasonable Time (ALERT) Act of 2009** (H.R. 2077)

    a. The bill proposes to require employers to provide 60-day written notice to employees and to state and local officials prior to ordering qualifying mass layoffs. Employers that violate the notice requirement would be liable for double back pay for each day of violation, up to 60 days.

10. **Healthy Families Act** (H.R. 2460, S. 910)

    a. The bill proposes to require certain employers to provide one hour of sick leave for every 30 hours of work, up to 56 hours per year. "Sick leave" includes an employee's own illness, preventative care, care for a family member (broadly defined), and care relating to stalking, domestic violence, and sexual assault.

11. **The Fair Pay Act of 2009** (H.R. 2151 & S. 904)

    a. The Act would amend the FLSA prohibit discrimination in the payment of wages on account of sex, race, or national origin.

12. **The Paid Vacation Act of 2009** (H.R. 2564)

a. The Act would amend the FLSA to require employers who employ 100 or more employees to provide paid vacation during each 12-month pay period; and, three years after enactment, it would require employers employing 50 or more employees to provide one week paid vacation during each 12-month period, and employers employing 100 or more employees to provide two weeks paid vacation.

13. **The Working Adequate Gains for Employment in Services (WAGES) Act of 2009** (H.R. 2570)

    a. The Act proposes to amend the FLSA to establish a base minimum wage for tipped employees, not counting tip credits.

14. **The Rewarding Achievement and Incentivizing Successful Employees (RAISE) Act of 2009** (H.R. 2732 & S. 1184)

    a. The Act would amend the NLRA to declare that neither its prohibition against interference by an employer with employees' right to bargain collectively, nor the terms of a collective bargaining agreement entered into between employees and an employer after enactment of this Act, shall prohibit an employer from paying an employee higher wages, pay, or other compensation than the agreement provides for.

15. **The Truth in Employment Act of 2009** (H.R. 2808 & S. 1227)

    a. The Act would amend the NLRA to provide that nothing in specified prohibitions against unfair labor practices by employers shall be construed as requiring an employer to employ any person who seeks or has sought employment with the employer in furtherance of other employment or agency status ("salts").

16. **Employee Non-Discrimination Act (ENDA)** (H.R. 3017 & S. 1584)

    a. ENDA would ban employee discrimination on the basis of sexual orientation and gender identity.

    b. The House Education & Labor Committee held a hearing on ENDA on September 23, 2009, entitled "The Employee Non-Discrimination Act of 2009" (*see* Testimony of Mr. William Eskeridge and Mr. Brad Sears regarding discrimination on the part of state and local governments), *available at* http://edlabor.house.gov/hearings/20 09/09/hr-3017-employment-non-discrim.shtml.

    c. Since 2007, there has been ongoing debate over whether there is sufficient support in Congress for the bill to protect transgender persons. *See, e.g.*, John Aravosis, Barney on ENDA Transgender controversy. And, he's right., Sept. 28,

2007, *available at* http://www.americablog.com/2007/09/barney-on-enda-transgender-controversy.html.

17. **Civil Rights Tax Relief Act of 2009** (H.R. 3035 & S. 1360)

    a. The Act proposes to amend the IRC to (1) allow an exclusion from gross income from amounts received (backpay, frontpay, or punitive damages) on account of an unlawful discrimination claim, and (2) allow income averaging for backpay and front pay amounts received from such claims.

18. **The Living American Wage Act of 2009** (H.R. 3041)

    a. The Act proposes to index the minimum wage to 15% above the poverty line for full-time workers, with increases every four years thereafter to maintain wages at least at 15% above the poverty line.

19. **The Strengthen and Unite Communities with Civics Education and English Skills Act of 2009** (H.R. 3249 & S. 1478)

    a. The Act would amend the Adult Education and Family Literacy Act to provide, *inter alia*, $1,000 in subsidies to employers that provide English courses to their employees.

20. **The Defund ACORN Act of 2009** (H.R. 3571) (adopted as § 602 of the Student Aid and Fiscal Responsibility Act of 2009 (H.R. 3221))

    a. The Act proposes to prohibit the federal government's ability from awarding contracts, grants, or other agreements to, providing any other federal funds to, or engaging in activities that promote the organization.

    b. Fried Frank FraudMail Alert No. 09-10-05, *The Unintended Consequences of the "Defund ACORN Act",* Oct. 5, 2009, *available at* http://www.ffhsj.com/site Files/Publications/FCB526 E26232AC72F57B4BD70A6BEFE.pdf.

21. **The Citizen Participation Act** (H.R. 4364)

    a. Congressman Steve Cohen (D.-Tennessee) introduced H.R. 4364, The Citizen Participation Act, which he described as federal anti-SLAPP legislation—legislation designed to prevent meritless lawsuits. A SLAPP suit is "Strategic Lawsuit Against Public Participation." California has such legislation. *See* Cal. Code Civ. Pro. 425.16.

22. **The Employee Misclassification Prevention Act** (S. 3254 and H.R. 5107)

    a. The Act proposes to do the following:

i. Amend the FLSA to render worker misclassifications a violation of federal law.
ii. Require employers to maintain records reflecting hours worked and wages paid for employees and non-employee workers.
iii. Require employers to provide workers a notice identifying the workers' classification, a DOL website (to be created), contact information for the appropriate DOL office, and any other information as to be required by regulation.
iv. Additionally, for workers classified as non-employees, the notice would be required to include the following: "Your rights to wage, hour, and other labor protections depend upon your proper classification as an employee or non-employee. If you have any other questions or concerns about how you have been classified or suspect that you may have been misclassified, contact the U.S. Department of Labor."
v. Employees who violate the notice and/or recordkeeping requirements or misclassify a worker would be subject to a civil penalty of up to $1,100 per work on the first offense and up to $5,000 for willful or repeated violations.
vi. Employers misclassifying workers and violating minimum wage/overtime requirements could be subject to treble damages.
vii. Provide broad anti-retaliation and discrimination protections.

b. On June 17, 2010, the Senate Committee on Health, Education, Labor, and Pensions held a hearing on the Employee Misclassification Prevention Act, entitled, "Leveling the Playing Field: Protecting Workers and Businesses Affected by Misclassification." Testifying were Seth Harris, the Deputy Secretary of Labor; Frank Battagliano of Metro Test and Balance; Catherine Ruckelshaus of the National Employment Law Project; and Gary Uber of Family Private Care, a home health caregivers referral service. The hearing's prepared testimony and video replay are *available at* http://help.senate.gov/hearings/hearing/?id=225aa689-5056-9502-5d83-96cd13339413.

23. **Additional Legislative Development Compilations**

a. Ford & Harrison LLP, "A Look Back at 2009 and What 2010 May Hold for Employers", Feb. 2010, *available at* http://www.fordharrison.com/files/Final%20A%20Look%20Back%20at%202009%20and%20What%202010%20May%20Hold%20for%20Employers.pdf.

b. Victoria Van Buren, "U.S. Arbitration and Mediation Legislative Update", January 25, 2010, *available at* http://www.karlbayer.com/blog/?p=7086.

c. Chad C. Almy, "Legislative Update – Labor & Employment", December 2, 2009, *available at* http://www.troutmansanders.com/lefall2009-04/.

d. Dennis Westlind, "2009 Mid-Term Federal Legislative Update", September 24, 2009, *available at* http://www.worldofworklawblog.com/2009/09/articles/news/2009-midterm-

federal-legislative-update/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+WorldOfWork+(World+of+Work).

e. E. Jason Tremblay, "More employer related pending federal legislation added to E. Jason Tremblay's Summary", July 23, 2009, *available at* http://legalnews.arnstein.com/2009/07/23/more-employer-related-pending-federal-legislation-added-to-e-jason-tremblays-summary/.

f. E. Jason Tremblay, "Pending Federal Employment Legislation Update: Employers Beware!", July 7, 2009, *available at* http://legalnews.arnstein.com/2009/07/07/pending-federal-employment-legislation-update-employers-beware/.

g. Ford & Harrison LLP, "Legal Alert: Legislative Update – Recently Introduced Legislation that Could Impact Employers, May 13, 2009", *available at* http://www.fordharrison.com/shownews.aspx?show=4841.

h. Roy Ginsburg, "Changes to Nation's Employment Laws", April 24, 2009, *available at* http://www.quirkyemploymentquestions.com/qq/blog.aspx?entry=262.

i. Daniel Schwartz, "Upcoming Articles Summarize New Federal Labor & Employment Laws and Legislation", December 1, 2008, *available at* http://www.ctemploymentlawblog.com/2008/12/articles/laws-and-regulations/upcoming-articles-summarize-new-federal-labor-employment-laws-and-legislation/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+ConnecticutEmploymentLawBlog+(Connecticut+Employment+Law+Blog)