

Chapter B

## **2012 Employment Law Update**

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Chapter B:

## 2012 Employment Law Update

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## **2012 EMPLOYMENT LAW UPDATE**

**By**

**Catherine E. Walters, Esquire \***

2012 saw several changes in the employment law arena. Although the United States Supreme Court issued only a handful of employment-related cases during its 2011-2012 Term, several of them will have important impacts on employers. In addition, courts in the Third Circuit were fairly active in the wage and hour, class action and discrimination arenas. Meanwhile, several Department of Labor agencies engaged in rulemaking and/or issued guidances pursuant to established regulatory agendas, including catching up on statutory and caselaw changes from prior years. Much of the administrative activity this year was also focused on audit and collection, that is, compliance audits, complaint enforcement and other enforcement activities.

### **I. SELECTED SUPREME COURT CASES**

#### **A. Religion Discrimination**

**1. *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694 (2012) (“ministerial exception” applies as to individuals who “personify” religious organization’s beliefs).**

##### **a. Background**

In January 2012, the U.S. Supreme Court issued a unanimous decision barring application of federal and state employment discrimination statutes to certain employment decisions made by religious organizations. Specifically, the Court held that religious organizations are absolutely protected in their employment decisions related to individuals who “personify” the religious organization’s beliefs. The Court’s decision was premised upon the First Amendment’s Free Exercise and Establishment Clauses.

##### **b. Analysis**

The plaintiff, a religious teacher who worked at an Evangelical Lutheran Church, sued the church for employment discrimination under the Americans with Disabilities Act. The church moved to dismiss the employment discrimination claims, arguing that the employment decision was protected by the “ministerial exception.” In response, the Equal Employment

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Opportunity Commission argued that the “ministerial exception” should be abandoned, and that the rules applicable to religious organizations should be the same as those applicable to private associations.

Prior to *Hosanna-Tabor*, the federal courts had established a “ministerial exception” to the enforcement of employment discrimination statutes as to religious employers. Under that exception, the employment discrimination statutes did not apply to a religious organization’s hiring and firing of “ministers.”

In *Hosanna-Tabor*, the Court specifically grounded the ministerial exception to employment discrimination statutes as a *constitutional* right. The First Amendment’s Free Exercise and Establishment Clauses establish an affirmative right for religious organizations to have complete autonomy in the employment decisions of individuals who “personify” the religious organization’s beliefs and practices. The Court specifically grounded its holding in “the test of the First Amendment itself,” which “gives special solicitude to the rights of religious organizations.”

In short, *Hosanna-Tabor* protects “a religious group’s right to shape its own faith and mission through its appointments.” Thus, anyone who “personifies” the religious organization falls outside the protection of federal and state employment discrimination statutes, and the employment decisions related to that individual are absolutely protected.

This rule applies to more than just “ministers” in a traditional sense; it applies to any person who “personifies” the religious organization’s beliefs and practices. This is a broader and more flexible classification of persons than traditional notions of who qualifies as a “minister.” Notably, the plaintiff in *Hosanna-Tabor* was not a minister in the traditional sense, but a teacher in a religious school teaching secular and religious subjects.

The rule established in *Hosanna-Tabor* is not a “jurisdictional bar” to employment discrimination lawsuits—that is, it does not prevent the filing of discrimination lawsuits—but it provides the employer with a “defense on the merits” as to a discrimination claim. The religious organization must demonstrate that the employee “personified” the beliefs of the religious organization through an examination of their functions and relationship to the organization.

### **c. Impact**

Religious employers are protected in their hiring and firing of employees who “personify” the beliefs of the organization. For example, a church or synagogue would be protected in its hiring and firing of teachers because those teachers “personify” the beliefs and practices of the religious organization. In contrast, a janitor does not “personify” the beliefs and practices of the organization, thus employment decisions involving the janitor would not be protected by the First Amendment, and federal and state employment discrimination statutes would apply to employment decisions related to the janitor.

Again, the rule established in *Hosanna-Tabor* is not a jurisdictional bar. Consequently, *Hosanna-Tabor* will not prevent employment discrimination lawsuits from being filed; however,

it will lead to a greater likelihood of dismissal of those lawsuits. As long as the religious organization can demonstrate that the employee or applicant personifies the beliefs and practices of the religious organization, the employer's decision will be protected by the First Amendment.

In these situations, it is likely that courts will be hesitant to second-guess the sincerity of a religious organization's belief that an individual personifies its beliefs and practices. As set forth in a concurring opinion by Justice Clarence Thomas—in which he argued that the First Amendment *should* operate as a jurisdictional bar to the filing of employment discrimination lawsuits—the First Amendment's protection of employment decisions “would be hollow . . . if secular courts could second-guess the organization's sincere determination that a given employee is a ‘minister’ under the organization's theological tenets.” While the rest of the Court did not embrace Justice Thomas' position regarding the First Amendment operating as a jurisdictional bar, Justice Thomas did highlight some practical difficulties that district courts will confront in evaluating whether the “ministerial exception” applies.

## **B. Family and Medical Leave Act**

**1. *Coleman v. Court of Appeals of Maryland*, 132 S.Ct. 1327 (2012) (self-care provision of the FMLA does not subject otherwise immune sovereign States to lawsuits as do the FMLA's family-leave provisions).**

### **a. Background**

Daniel Coleman was employed by the Court of Appeals of Maryland. Upon Coleman's request for sick leave, he was informed that he would be terminated if he did not resign. Coleman initiated a lawsuit in the United States District Court for the District of Maryland, alleging that his former employer violated the self-care provision of the Family and Medical Leave Act (FMLA) by denying his leave request.

The District Court dismissed the suit on grounds that his employer, as a sovereign State, was immune from suit. On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the lower court's decision, reasoning that the self-care provision, unlike the FMLA's family-care provisions, was not intended to alleviate an identified pattern of gender-based discrimination. The United States Supreme Court granted certiorari.

### **b. Analysis**

The Supreme Court commenced its analysis by referencing *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003), in which the Court determined that employees could recover damages from States for violations of the FMLA's family-leave provisions. The Court distinguished *Hibbs* from the instant case by pointing out that the family-leave provisions of the FMLA were enacted with a Congressional purpose intended to eradicate decades of “pervasive sex-role stereotype[s.]” The self-care provision, the Court reasoned, was conceived with no such social purpose. Specifically, the self-care provision lacked evidence of a pattern of state constitutional violations that summarily characterized women as utilizing family-leave to a greater extent than men.

Unlike the FMLA’s family-leave provisions, the enactment of the self-care provision was wholly detached from any intention to correct historical gender-based discrimination.

**c. Impact**

*Coleman* explicitly and forcefully closes the door on the possibility of future self-care FMLA actions against sovereign governmental entities. The Court makes very clear that the self-care provision is fundamentally different from the family-leave provisions within the FMLA. After *Coleman*, sovereign employers immune from damages suits can more accurately assess their total risk exposure.

**C. Fair Labor Standards Act**

**1. *Christopher v. Smithkline Beecham Corp.*, 132 S.Ct. 2156 (2012)  
(pharmaceutical sales representatives whose primary responsibilities were to obtain nonbinding prescription commitments from physicians qualified as “outside salesmen” who were exempt from FLSA minimum wage and maximum hours requirements).**

In *Christopher v. Smithkline Beecham Corp.*, the United States Supreme Court assessed whether pharmaceutical sales representatives (PSRs) otherwise known as “detailers” were exempt under the Fair Labor Standards Act’s (FLSA) minimum wage and maximum hours provisions, in light of the fact that PSRs are restricted from actually selling pharmaceuticals to physicians. The Court held that PSRs are exempt and suggested that the FLSA is best applied by employing a *functional* rather than *formalistic* approach.

**a. Background**

In June of 2009, a pair of former PSRs employed by SmithKline Beecham (now “GlaxoSmithKline”) (herein Glaxo) filed a lawsuit in federal District Court alleging that their former employer violated the FLSA by failing to pay overtime. The former employees argued that they were owed compensation for time regularly worked in excess of forty hours per week. Glaxo moved for summary judgment contending that the employees, and PSRs generally, were not entitled to overtime pay because their role fell within the FLSA’s exemption for “outside salesmen.” The District Court granted summary judgment and the employees petitioned to the Ninth Circuit. The Ninth Circuit affirmed, and the United States Supreme Court subsequently granted certiorari.

**b. Analysis**

In affirming the Ninth Circuit’s decision the Supreme Court considered two principal issues: 1) whether a pharmaceutical sales rep falls within the “outside salesman” exception as defined in the FLSA; and 2) the degree to which the Department of Labor’s interpretation of the FLSA is entitled to deference by federal courts.

(1) *A PSR is an “Outside Salesman”*

The term “outside salesman” arises from § 213(a)(1) of the FLSA—the provision that removes an employer’s obligation to pay overtime to qualifying employees. In assessing whether PSRs are “outside salesmen,” the Court turned to the Department of Labor’s (DOL) FLSA regulations for guidance. 29 C.F.R. § 541.500 defines “outside salesman” as, “any employee . . . [w]hose primary duty is . . . making sales[.]” A “sale” is defined by FLSA § 203(k) as any “exchange, contract to sell, consignment for sale, shipment for sale, or *other disposition*.” (emphasis added). Finally, 29 C.F.R. § 541.503 provides that promotion work “performed incidental to and in conjunction with an employee’s own outside sales or solicitations is exempt work,” whereas promotion work “incidental to sales made, or to be made, by someone else is not.”

The Court determined that the duties assigned to a PSR “comfortably fall[] within the [meaning] of ‘other disposition.’” The Court reaches this conclusion by considering the restrictions bearing on PSRs prohibiting them from actually making sales of the drugs they promote. The Court was cognizant of the fact that the nearest a PSR could get to making an actual sale was by securing nonbinding commitments from physicians to prescribe their drugs.

In addition to the foregoing considerations, the Court commented that the Appellants were “hardly the kind of employees that the FLSA was intended to protect.” This characterization is based on the Court’s recognition that the employees pursuing the lawsuit earned far more than the minimum wage for performing job functions that are particularly difficult to confine to a particular time frame.

(2) *Refusal to defer to the Department of Labor’s Interpretation*

The Supreme Court refused to defer to the FLSA interpretation propounded by the DOL. The DOL occupied a range of positions throughout the litigation—at one time arguing that a “sale” took place only when the employee seeking the exemption was directly involved in a consummated transaction. Later in the litigation, the DOL changed its position and argued that a “sale” required the employee to actually transfer title to the property at issue.

The Court disposed of each of the DOL’s arguments and determined that deference was inappropriate in this case. The Court emphasized that prior to this litigation, the DOL had not challenged the treatment of PSRs as outside salesmen. The Court noted how the DOL had never initiated enforcement actions or otherwise provided notice that the PSR classification violated the FLSA. The Court determined that adopting the DOL’s view in the instant case would potentially uproot the pharmaceutical industry’s decades-long practice and invoke “unfair surprise” by “impos[ing] potentially massive liability” on Glaxo.

**c. Impact**

*Christopher* is significant in at least two principal ways. First, the decision is likely to impact the pharmaceutical and similar industries that rely on representatives to call on customers by enabling them to strengthen their practices and procedures.

Second, the case may have an impact on the extent to which courts are willing to defer to the DOL's frequently evolving interpretation of federal employment statutes and regulations going forward. This issue is certain to arise with more frequency in the near future, particularly as to recent National Labor Relations Board (NLRB) activities relevant to social media and free speech, and Equal Employment Opportunity Commission (EEOC) activities relevant to criminal history and other disparate impact issues.

**II. SELECTED CIRCUIT AND DISTRICT COURT CASES**

**A. Fair Labor Standards Act**

**1. *Hickton v. Enterprise Holdings, Inc.*, 683 F.3d 462 (3d Cir. 2012) (employees of a national business may only litigate overtime pay claims against the local franchise office in which they worked).**

*Hickton v. Enterprise Holdings, Inc.*, is a case of first impression in the United States Court of Appeals for the Third Circuit. In *Hickton*, the Court considered the appropriate standard for determining whether an entity is a claimant's "employer" within the context of the FLSA. The appropriate standard, as announced by the Court, involves an "economic reality" test as opposed to "technical concepts."

**a. Background**

Enterprise Holdings, Inc. ("Enterprise Holdings") is the sole shareholder for a host of branch offices operating as local Enterprise Rent-A-Car installments. In 2007, a former assistant branch manager of the Enterprise Rent-A-Car Co. of Pittsburgh sought to pursue a nationwide collective action on behalf of all Enterprise assistant managers. The Plaintiffs alleged that the company had misclassified assistant managers as exempt, thus making them ineligible for overtime pay. In the litigation, the Plaintiffs alleged that Enterprise Holdings was a joint employer and therefore liable under the FLSA.

Similar lawsuits were filed across the country in response to the Plaintiffs' filing. A judicial panel on multidistrict litigation consolidated and transferred fourteen cases to the District Court for the Western District of Pennsylvania, the consolidated forum. After considering such facts that Enterprise Holdings did not actually sell vehicles, but instead merely provided administrative support to its subsidiaries, the Court held that Enterprise Holdings was not a "joint employer." The Court subsequently excused the parent company from the litigation.

Plaintiffs appealed to the Third Circuit. Plaintiffs argued that Enterprise Holdings was in fact their "joint employer," and was thus liable for unpaid overtime stemming from the alleged misclassification as exempt.

## b. Analysis

In affirming the District Court’s decision the Third Circuit focused on the relationship between the holding company and its subsidiaries. As part of its assessment, the Court considered the nature of the services provided by the holding company. Among others, the holding company offered business guidelines, employee benefit plans, rental reservation tools, centralized customer contacts, insurance, technology, and legal services. The District Court had previously characterized the foregoing services as “optional” and the Third Circuit confirmed this conclusion on appeal. The Third Circuit characterized the policies set forth by the holding company as merely advisory.

During its analysis, the Third Circuit announced the standard by which courts within its jurisdiction should analyze joint employer cases in the future. The Court identified the following non-exhaustive list of factors to consider with regard to the alleged employer’s relationship with the subsidiary: the ability to hire and fire, the authority to set forth work rules, discipline, and general conditions of employment, actual control of employee records, and any day-to-day supervision responsibilities. The Court named the preceding test the “Enterprise test.” Tempering the risk of a rigid application of the newly-minted test, the Court added that any “indicia of ‘significant control’” is persuasive in determining that an employer might be a joint employer within the meaning of the FLSA.

In addition to the foregoing test, the Court called for a comprehensive approach when determining whether a defendant is a joint employer – one that considers the “total employment situation and the economic realities of the work relationship.” Finally, the Court warned against employing “narrow legalistic definitions” and instead called for consideration of “all the relevant evidence.”

## c. Impact

As a case of first impression, *Hickton* is poised to provide clarity and certainty to both employers and would-be plaintiffs moving forward. By applying the factors enumerated by the Court, and by remaining perceptive to indicia of “significant control,” employers can more accurately assess their exposure to FLSA claims. Also of interest to employers is the fact that *Hickton* demonstrates that employers need not satisfy the Enterprise test with perfection; neutrality on one of the four factors is insufficient to defeat summary judgment. Finally, the case establishes a benchmark for the types of services that an employer may provide to its subsidiaries without running the risk of becoming classified as a joint employer.

**2. *Knepper v. Rite Aid Corp.*, 675 F.3d 249 (3d Cir. 2012) ((1) FLSA does not preempt state laws affording parallel protections; (2) federal jurisdiction over Rule 23 class actions based solely on diversity under the Class Action Fairness Act is not “inherently incompatible” with jurisdiction over an FLSA action)**

In *Knepper v. Rite Aid Corp.*, the United States Court of Appeals for the Third Circuit assessed the propriety of federal courts exercising jurisdiction over “hybrid actions” – those cases concurrently involving a state law opt-out class action in conjunction with an FLSA opt-in

class action. The Court considered a body of case law that characterized the contrasting forms of class relief as “inherently incompatible,” but ultimately joined four Circuit Courts of Appeal which had previously determined that hybrid actions are *not* inherently incompatible.

An additional issue considered by the Court was whether the FLSA preempted state laws whose provisions mirror those of the FLSA. Reasoning that such state laws afford identical protections to workers, the Court held that such state laws are *not* preempted by the FLSA.

**a. Background**

In June of 2009, a pair of former assistant store managers employed at Rite Aid stores in Maryland and Ohio joined a nationwide opt-in class action suit seeking back pay for an alleged misclassification of assistant managers’ overtime pay. Filed in the United States District Court for the Middle District of Pennsylvania, the opt-in class arose pursuant to § 216(b) of the FLSA.

One month later the pair initiated Rule 23(b)(3) class action lawsuits in federal District Courts in Maryland and Ohio. Collectively, the class actions implicated the Maryland Wage Payment and Collection Law, the Maryland Wage and Hour Law (MWHL), and the Ohio Minimum Fair Wage Standards Act (OMFWSA). Through a series of procedural gymnastics, both cases made their way to the Middle District of Pennsylvania.<sup>1</sup>

Noting the similarities between the two cases, and that “[both] actions shared nearly the same determinative issue,” the Middle District of Pennsylvania issued nearly identical opinions granting motions to dismiss in each. The District Court determined that the Ohio state law was not preempted because the FLSA included a “savings clause” which established Congress’s intent not to preempt state law. Additionally, the District Court determined that Rule 23 opt-out class actions based on state employment laws paralleling the FLSA were “inherently incompatible” with the opt-in procedure employed by the FLSA.

Plaintiffs appealed the District Court’s ruling in each case. Since both actions shared the same legal issue—presenting no meaningful factual distinctions, the Third Circuit consolidated them.

**b. Analysis**

The Third Circuit commenced its analysis by engaging in a thorough history of the FLSA, commenting on the reasons for which it has evolved.

**(1) *Inherent Incompatibility***

The Court considered the concept of “inherent incompatibility” tracing its origin to dual-filed FLSA opt-in and state law opt-out class actions, where a federal court was asked to exercise

<sup>1</sup> The Maryland court dismissed the Wage Payment and Collection claim with prejudice, reasoning that the law did not govern claims for overtime pay. The Court also dismissed the MD Wage and Hour claim without prejudice under the “first-filed” rule, deferring to the Middle District of Pennsylvania. Plaintiff then refiled in the Middle District of Pennsylvania. The Ohio case was transferred to the Middle District of Pennsylvania due to a forum selection clause in the Plaintiff’s employment contract.

supplemental jurisdiction over the state law claims. The Court then evaluated the viability of hybrid actions in the wake of prior decisions which determined that the differences between opt-in and opt-out class actions bar federal courts from considering them together. The Court also considered the issue in the shadow of four other federal appellate courts (Second, Seventh, Ninth, and D.C. Circuits) that previously condemned the application of the “inherent incompatibility” doctrine to hybrid actions.

In conducting its analysis the Court performed a textual analysis of § 216(b) and concluded that the text did not support the concept of “inherent incompatibility.” The Court considers § 216(b) unambiguous, and identified how the statute makes no mention of its applicability to state law relief. Accordingly, the Court reasoned that the text merely limits its scope to the provisions of the FLSA, and summarily concluded that neither § 216(b) as written, nor the legislative history preceding it, establishes a clear intent to bar opt-out class actions.

## (2) *Preemption*

Next, the Court considered whether the FLSA preempts state laws affording protections equal to the FLSA. The Court analyzed the text of the FLSA’s savings clause,<sup>2</sup> and determined that it was intended to preserve rather than supplant state law. Given this, the Court concluded that Congress “explicitly contemplated dual enforcement of the FLSA.” The Court pointed out that a finding of preemption would have the effect of barring enforcement of any state wage and hour law that did not exceed the standards set forth in the FLSA, which notion it dismissed.

The Court also addressed Rite Aid’s contention that permitting hybrid actions, which involve a Rule 23 class certification, would run afoul of the Rules Enabling Act due to an abrogation of a substantive right held by employers. Rite Aid contended that the FLSA created a substantive right for employers *not* to be sued in representative actions (the format typical of state law opt-out class actions). The Court disposed of this argument by pointing to a lengthy line of federal District Court cases unanimously holding that the Rules Enabling Act does not bar certification of an opt-out class action in the context of a hybrid action.

### c. Impact

By permitting state law opt-out class actions to be adjudicated in conjunction with FLSA actions in federal court, this case makes clear that employers *are* subject to representative actions in tandem with FLSA actions. The effect of this decision is likely to provide aggrieved employees with an additional and generally viable pathway to class-based relief.

### 3. *Foster v. Kraft Foods Global, Inc.*, Civ. Action No. 09-453, 2012 WL 3704992 (Aug. 27, 2012) (Pennsylvania Minimum Wage Act does not allow overtime payment at less than one-and-one-half times an employee’s regular rate).

<sup>2</sup> § 218(a) – “No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter.”

In *Foster v. Kraft Foods Global, Inc.*, the United States District Court for the Western District of Pennsylvania analyzed the fluctuating workweek method (FWWM) in the context of the Pennsylvania Minimum Wage Act (PMWA) and rendered impermissible the FWWM or any other formula resulting in overtime payment less than one-and-one-half times an employee's regular rate.

**a. Background**

The FWWM traces its origin to a 1942 Supreme Court case that has since been codified in federal regulations at 29 C.F.R. § 778.114. Conceptually, the FWWM functions on the premise that an employee is paid a fixed, weekly salary regardless of the number of hours worked. This fixed salary is intended to compensate the employee up front for some overtime. Actual overtime – those hours worked in excess of forty, are subsequently paid at half the employee's regular rate. Under the FWWM, an employee's regular rate is determined weekly by dividing the employee's fixed salary by the number of hours actually worked; this results in a different rate from week to week, depending on the number of hours worked. In essence, the more hours worked, the lower the regular rate; the lower the regular rate, the lower the overtime, or half-time rate.

Plaintiff was a sales representative at Defendant, Kraft Foods (Kraft). Plaintiff brought suit in July of 2007, alleging that she was regularly required to work overtime in excess of forty hours, and that she was paid only half of her regular rate due to her employer's implementation of the FWWM. Plaintiff also sought class certification to represent a class of current and former Kraft sales representatives in Pennsylvania who collectively claimed to have been deprived of time-and-one-half payment for overtime hours worked.

Defendant-Kraft moved for summary judgment based on its position that its use of the FWWM was entirely compliant with the PMWA.

**b. Analysis**

At issue in this case was the propriety of the FWWM under the PMWA and those regulations promulgated thereunder. The Court analyzed federal and state regulations while considering this case.

Section 778.114 of the FLSA Regulations codifies the FWWM. In essence, Section 778.114 permits an employer to pay an employee a fixed salary regardless of the number of hours worked each week, with the caveat that the employees work week must indeed fluctuate, that is, the employee's schedule must vary on a regular basis. In addition, employees who are paid on an hourly basis do not qualify for the FWWM. The salary must be large enough so that the regular rate for straight time hours does not drop below the minimum wage, and the employee must be paid overtime for any hours worked over 40 in the work week. The overtime pay is 50% of the regular rate of pay for that specific work week, which varies based on the number of hours worked in the work week.

PMWA § 231.43(d)(3) states that an employer is not in violation of the statute if an employee's overtime pay is "computed at a rate not less than [one-and-one-half] times the rate

established by a prior agreement or understanding” between the employer or employee as the “basic rate to be used in computing overtime compensation thereunder.”

In reaching its conclusion that the one-half-time payment produced by applying the FFWM is impermissible under the PMWA, the Court relied on *Cerutti v. Frito Lay Inc.*, 777 F. Supp. 2d 920 (W.D. Pa. 2011). *Cerutti* held that PMWA § 231.43(d)(3) requires overtime payment at a rate of one-and-one-half times the regular rate. The Court pointed out that Kraft’s FFWM policy was “materially identical” to the employer’s policy in *Cerutti*. Additionally, the Court concluded that Pennsylvania regulators did not intend for the overtime contemplated by § 231.43(d)(3) to be paid at a half-time rate, as evidenced by the absence of express language to that effect within the provision. The Court referred to the text of § 231.43(b) as a prime example of a provision where the regulators specifically intended and provided for one-half time overtime pay.

The Court determined that the *Cerutti* opinion’s harmonious language in conjunction with the absence of express language in § 231.43(d)(3) supported its conclusion that the PMWA mandates one-and-one-half times regular rate overtime compensation. The Court ultimately denied the employer’s motion for summary judgment along with the Plaintiff’s motion for class certification.

Regarding the latter, the Court reasoned that Plaintiff failed to satisfy Rule 23(a) because she did not sufficiently show that her claims bore the same essential factual characteristics as those of potential class members.

**c. Impact**

*Foster* sends a message to employers currently administering a WFFM plan suggesting that potential PMWA violations may exist. While *Foster* directly affects would-be litigants within the jurisdictional bounds of the federal district, the case is persuasive authority for future cases centering on this issue. What *Foster* makes clear is that the WFFM does not conceptually violate the PMWA, but instead it effectuates a violation when the rate paid falls below one-and-one-half times the employee’s regular rate.

**B. ERISA**

**1. *Shaver v. Siemens Corp.*, 670 F.3d 462 (3d Cir. 2012) (legacy employees subject to an asset purchase agreement were not entitled to Permanent Job separation benefits because successor was not plan administrator during transitional period between purchase agreement and commencement of successor’s own plan)**

In *Shaver v. Siemens Corp.*, the United States Court of Appeals for the Third Circuit considered a host of complex Employee Retirement Income Security Act (ERISA) related issues stemming from an asset purchase agreement (APA) between Westinghouse and a successor entity, Siemens. The principal issue was whether legacy employees were entitled to Permanent Job Separation (PJS) benefits. To get to the principal issue, the Court considered whether the program installed during the transition constituted a “plan” within the meaning of ERISA, and also whether the successor had assumed liabilities from the acquired company’s pension plan.

Considered in the context of ERISA § 204(g) and § 208, the Court held that the legacy employees were not entitled to the sought-after benefits because Westinghouse, and not Siemens, continued to serve as plan administrator throughout the transition. The Court also concluded that notwithstanding the plan administrator determination, the legacy employees would not have been eligible for PJS benefits under the pre-APA pension plan.

**b. Background**

In 1997, Siemens entered an agreement with Westinghouse to purchase the assets of its Power Generation Business Unit. Due to a delay, the APA was not executed until August 19, 1998. A condition of the APA was that Siemens agreed to hire Westinghouse employees from the business unit (“legacy employees”). At the time of the APA, Westinghouse maintained a defined benefit pension plan which included PJS benefits for certain qualifying employees. Also a term of the APA was that Siemens would establish its own defined benefit plan for legacy employees “substantially identical” to the Westinghouse plan.

The closing date for the APA was set for September 1, 1998, and the APA was amended so that Westinghouse would offer legacy employees credit for service and compensation from August 19 through August 31, 1998 for benefit accrual purposes. In return, Siemens agreed not to terminate any employee except for cause during the thirteen-day transitional period spanning August 19 to August 31. In the event that Siemens had to terminate an employee within the defined window, Siemens agreed to reimburse Westinghouse for any incurred actuarial pension losses. Siemens, as contracted, developed its own pension plan which took effect on September 1, 1999.

In 1999, Siemens closed portions of the acquired business unit and consequently terminated a number of legacy employees. Three years later, legacy employees submitted claims to Siemens’ plan for PJS benefits. The claims were denied as Siemens’ plan did not provide PJS benefits. A group of aggrieved legacy employees, some of whom had previously signed separation agreements with Siemens, filed suit in U.S. District Court. After review, a magistrate judge determined that Siemens violated ERISA §208 and consequentially had wrongfully denied PJS benefits. An appeal followed.

**b. Analysis**

In considering the parties’ appeals, the Third Circuit focused its analysis on two issues: (1) whether Siemens had created an ERISA “transition” plan for the legacy employees by extending Westinghouse’s plan for the thirteen days from the legacy employees’ actual hiring by Siemens (August 19<sup>th</sup>) until the date on which Siemens’ own plan commenced (September 1<sup>st</sup>); and (2) whether Siemens, by way of the APA, acquired a portion of the Westinghouse Plan’s liabilities that would likely trigger ERISA § 208.

**(1) *ERISA “Transition” Plan***

The Court determined that the plan in effect during the thirteen-day transition period constituted a “plan” within the context of ERISA. The Court, however, determined that

Westinghouse, and not Siemens, maintained the plan as its sponsor during that time. The Court reached this conclusion after an analysis of each party's obligations during the time in question. The Court determined that Siemens was merely required to make payments to Westinghouse if and when certain events arose, and that Westinghouse bore the heavy lifting during the transition. Westinghouse was the party responsible for funding, administering, and otherwise maintaining the pension plan. To support its conclusion, the Court referred to the Supreme Court's holding in *Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12 (1987) ("To do little more than write a check hardly constitutes the operation of a benefit plan.").

**(2) *Siemens' Assumption of Liabilities from the Westinghouse Plan***

The Court analyzed the provisions within the APA and concluded that Siemens in fact had assumed some liabilities from Westinghouse's pension plan. Subsequently, the court analyzed the effects of the APA in the context of § 208 to determine whether the value of the benefits had been diminished. The Court concluded that the value had not been diminished and that the legacy employees were not entitled to PJS. The Court's determination is based on its conclusion that the Plaintiff-Appellees could not have satisfied the eligibility requirements for PJS benefits prior to execution of the APA. Accordingly, the legacy employees were not effectively impacted by any subsequent plan modifications that may or may not have reduced the value of their benefits.

**c. Impact**

This case highlights the depth and complexity of ERISA-triggered considerations when contemplating an acquisition. Accordingly, *Shaver* emphasizes the importance of precision when endeavoring to migrate employees to a subsequent pension plan. *Shaver* also illustrates the tendency of courts to look first to the text of the benefit plan and any accompanying instrument (here the APA) for guidance. Finally, this case makes clear courts' preference to enforce the plans as written.

**C. EEOC Subpoenas**

**1. *EEOC v. Kronos Inc.*, \_\_\_ F.3d \_\_\_, 2012 WL 4040258 (3d Cir. 2012)  
(EEOC's broad investigatory power includes broad subpoena power).**

**a. Background and Analysis**

*Kronos* demonstrates the significant reach of an EEOC-issued administrative subpoena. The case involved an EEOC complaint under the ADA brought by a partially disabled woman who applied for a job at a Kroger supermarket in West Virginia. Kroger did not hire her, in part, because of a low customer service test developed by Kronos. As part of its investigation of the allegations against Kroger, the EEOC issued a subpoena to Kronos that initially sought documents related to Kroger. The EEOC later amended its subpoena "to include the nationwide use of Kronos's assessment tests and the tests' impact on both minority and disabled applicants."

Kronos objected to the subpoena's breadth and claimed that its scope included trade secrets; it filed a petition with the EEOC to strike the subpoena. The EEOC denied the petition, and Kronos did not comply with it. The EEOC then filed a motion in the district court to enforce the subpoena.

Granting the motion in part, the district court limited the subpoena's scope "to documents related to Kroger's West Virginia operations" and limited to the positions for which the applicant applied. The court also refused to enforce the subpoena as it related to racial discrimination because it was not relevant. Kronos requested a confidentiality order, which the court granted. The EEOC then appealed.

Recognizing the EEOC's broad investigatory power, the Third Circuit reversed the district court's restrictions related to job descriptions as well as temporal and geographic limits. But it affirmed the refusal to allow discovery related to racial discrimination. The confidentiality order was vacated and remanded to the district court for further examination.

On remand the district court issued a new subpoena with new restrictions. The court limited the studies sought by the EEOC to those "relied upon [by Kronos] in creating or implementing the test for Kroger." The court also restricted the information to that which "relat[ed] to disabilities, persons with disabilities, or adverse impact upon persons with disabilities." The confidentiality order was modified to include a provision that the EEOC would notify Kronos of any FOIA requests and to refuse the production of documents related to the subpoena if Kronos objected. The EEOC again appealed to the Third Circuit.

Holding that the new order did not satisfy the mandate in *Kronos I*, the court again reversed. The court noted that the order limiting discovery to studies "relied upon" by Kronos in developing its test was too narrow. The court called this language "marginally broader" than the language rejected in *Kronos I*. Documents not linked to Kroger could still be relevant and therefore must be produced. The court also struck down the requirement that the material relate to disabilities. Finally, the court invalidated the confidentiality order's language regarding FOIA requests because it inhibited the EEOC from complying with such lawful requests.

#### **b. Impact**

As *Kronos* demonstrates, the EEOC has broad subpoena power which may be used to investigate discrimination beyond charges raised by a claimant. Thus, employers should be aware that a claim made to the EEOC could result in the forced disclosure of proprietary information about their business or employment processes.

## **D. Disparate Impact Discrimination**

**1. *NAACP v. N. Hudson Reg'l Fire and Rescue*, 665 F.3d 464 (2011)  
(regional fire and rescue company practice of hiring only residents of constituent municipalities resulted in disparate impact discrimination).**

### **a. Background**

North Hudson Fire and Rescue Company (“North Hudson”) is a regional fire company comprised of five (5) New Jersey municipalities. Like its constituent municipalities, North Hudson considered for employment only those applicants who lived within the municipalities it served. Once hired, employees could live wherever they chose; some moved to neighboring counties while others moved up to sixty (60) miles away.

The municipalities North Hudson served included a significant number of Hispanics, but very few African-Americans. African-Americans made up an even smaller portion of North Hudson firefighters and, with the backing of the state and local chapters of the NAACP, a class action was filed against North Hudson, claiming disparate-impact discrimination as a result of the residency requirement.

The district court initially granted a preliminary injunction in favor of the plaintiffs; however, stating that the residency requirement might be lawful because of “business necessity,” the court later vacated the preliminary injunction. The parties filed cross-motions for summary judgment, and the court granted summary judgment in favor of the plaintiffs and entered a permanent injunction in their favor. In doing so, the court found that statistical analyses presented by the parties’ experts “supported a finding of disparate impact” that was indisputable. The district court also rejected North Hudson’s business necessity defense by holding that there was no necessity for firefighters to live in a North Hudson municipality. The employer filed an appeal to the Third Circuit.

### **b. Analysis**

In its decision, the court outlined the steps for a showing of disparate impact. First, a plaintiff must establish a *prima facie* case by showing that the application of a facially neutral standard results in a “significantly discriminatory hiring pattern.” Relying on the statistical information presented in the lower court, the Third Circuit determined that the plaintiffs established their *prima facie* case.

Second, the employer can defend against a disparate-impact case by showing that the practice at issue is a business necessity. This means that the challenged criteria must “define the minimum qualifications necessary to perform the job.” Moreover, the employer “must assert *actual* reasons why the challenged employment practice is important to the position.”

Third, a plaintiff can also prevail if it can establish the existence of “less discriminatory alternative means of selecting for the crucial qualification.”

The court held that North Hudson’s residency requirement was not a business necessity. The reality is that most of North Hudson’s firefighters moved out of the area after being hired because North Hudson did not require its firefighters to reside there *after* being hired. Other business-necessity justifications offered by North Hudson were no more compelling, and the court summarily dismissed them.

**c. Impact**

*North Hudson* serves as a reminder of the difficulty employers may have in establishing a business necessity defense. The Third Circuit has made clear that it will closely scrutinize employers’ claims of business necessity, and only those reasons which actually justify the challenged criteria will suffice. Employers should examine their employment criteria (and related policies) to determine whether they can articulate a business necessity for each.

**E. Age Discrimination**

**1. *Hodczak v. Latrobe Specialty Steel Co.*, 451 F. App’x 238 (3d Cir. 2011) (termination of employment for engaging in prohibited behavior not a pretext for age discrimination).**

**a. Background**

A group of employees were suspended and later terminated for “regularly exchange[ing] emails containing sexually explicit photographs.” The employer’s electronic-communications policy “expressly prohibited” exchanging such materials, although the policy was not in place when some of the e-mails were sent. Two other employees participated in some of the e-mail exchanges, but they were not terminated. The terminated group of employees, who were over the age of 40, sued the company under the ADEA.

The district court entered summary judgment in favor of the company because the employees-plaintiffs could not establish that their firing was due to their age, that is, plaintiffs “failed to demonstrate that ‘but for’ their ages, [the company] would not have terminated their employment.”

**b. Analysis**

The Third Circuit affirmed. Reviewing the *McDonnell Douglas* burden-shifting formula, the court determined that the appeal turned on whether the employees could show that the reason for their firing was pretextual.

Though there were some “stray remarks” made by the company’s supervisors that implicated age, the court found them unpersuasive for establishing discrimination. The two employees who were not fired were not similarly situated with the fired employees: one was a nonsupervisory employee and did not send material to anyone else; the other sent only one

explicit e-mail (from his personal computer), in stark contrast to the nearly daily involvement of the employees who were terminated.

With respect to the company's policy, the court took a common-sense approach. It explained that there was no way the plaintiffs could have "thought it was acceptable to send sexually explicit emails simply because there was no policy expressly prohibiting it."

### **c. Impact**

*Hodczak* provides several reminders for employers. First, employers should not hesitate to terminate the employment of those who engage in inappropriate behavior – regardless of age – so long as all involved are treated consistently and in accordance with reasonable policies. Second, employers may stand on firm ground to terminate employment even though their policies may not cover every conceivable wrong. This is especially true when there is no debate about whether the actions were appropriate in the workplace.

## **F. Family & Medical Leave**

1. ***Haybarger v. Lawrence Cnty. Adult Probation*, 667 F.3d 408 (3d Cir. 2012) (supervisors may be held individually liable under the FMLA).**

### **a. Background**

In a case of first impression, the Third Circuit held that supervisors may be individually liable under the FMLA. *Haybarger* involved the termination of an office manager of the Lawrence County (NJ) probation department. The employee reported to the Director of Probation and Parole, who in turn reported to the Court Administrator. The employee had a history of absences related to her medical condition. Noting the growing number of absences, her supervisor placed her on a six-month probation. The supervisor recommended to the court administrator (and president judge) that the employee be terminated because her job performance had not improved. Both the president judge and court administrator supported the supervisor's decision, and the employee was terminated.

The employee sued her supervisor under the FMLA (and other statutes not the subject of this decision). The district court recognized that the FMLA permits individual liability, but entered summary judgment in favor of the supervisor because he was not an "employer" under the FMLA. According to the Court, the supervisor did not have the "final authority" to fire the employee. The employee then appealed to the Third Circuit.

### **b. Analysis**

The supervisor did not contest that individuals may be liable under the FMLA, and the Third Circuit held that supervisors may be liable under the FMLA. The court relied on FMLA section 2611(4)(A)(ii)(I), which defines "employer" to include "any person who acts, directly or indirectly, in the interest of an employer." This language, the court explained, allows individuals

to be held liable even though that individual is not the plaintiff's "employer" in the traditional sense. Although this case concerned a public agency, the court specifically noted that private employers are to be treated in the same fashion.

Having established that individual supervisors could be held liable under the FMLA, the court turned to the question of whether the supervisor was an employer for FMLA purposes. Answering this question requires examination of the "economic reality" of the "employment situation," which in turn looks to the totality of the circumstances regarding "whether a person functions as an employer."

The court looked to the Second Circuit, which established four (4) nonexclusive factors to aid in answering this question, that is, whether the individual:

- had the power to hire and fire the employee
- supervised and controlled employee work schedules or conditions of employment
- determined the rate and method of payment
- maintained employment records

Considering the circumstances, the Third Circuit held that the supervisor was unable to establish that material issues of fact existed as to whether he was an "employer" under the FMLA. The court noted the supervisor's history of oversight and discipline of the employee, and although the supervisor was not the ultimate authority as to her employment terms and conditions, he "exercised significant control over . . . the conditions of [her] employment prior to her termination." The court therefore vacated the district court's order granting judgment to the supervisor because a reasonable jury could find that he was an "employer" under the FMLA.

### **c. Impact**

Employees in supervisory positions may be found individually liable for FMLA violations regardless of whether they are in the public or private sectors. As a result, employers should consider evaluating the amount of power given to supervisors in an effort to mitigate the likelihood that such individuals will be deemed to be "employers" under the FMLA.

## **2. *Medley v. Cnty. of Montgomery*, No. 12-1995, 2012 WL 2912307 (E.D. Pa. July 17, 2012).**

### **a. Background**

A county employee sought to take intermittent FMLA leave to care for her son, who had serious health conditions. Though she had worked less than the required time in the past year to be eligible for FMLA benefits, officials of her employer, Montgomery County, told her that "she qualified for and was covered by the FMLA." The employee submitted the required leave paperwork.

The county then began to write up the employee for her intermittent absences. A day after the employee inquired about filing a grievance for the write-ups, she was fired. The employee sued the county and sought to recover under three (3) theories: (1) FMLA discrimination; (2) FMLA interference; and (3) equitable estoppel.

With respect to the FMLA discrimination claim, the county filed a motion to dismiss, arguing that the employee could not succeed because she was not FMLA eligible. The employee countered by arguing that the county was equitably estopped from arguing that she was not eligible since it told her otherwise. The court agreed and “conclude[d] that a defendant can be estopped from asserting a non-coverage defense, i.e., from arguing that the plaintiff was not FMLA eligible, if the defendant misinformed the plaintiff about her eligibility and the plaintiff suffered a detriment after relying on the misrepresentation.” Even so, the court dismissed her equitable-estoppel claim.

The court also dismissed her FMLA-interference claim. That claim requires the employee to have FMLA benefits with which the employer interfered. Because the employee in this case did not have any such benefits available to her, her claim failed as a matter of law.

#### **b. Impact**

The key takeaway is self-evident: employers should take care to ensure that representations made as to an employee’s eligibility for FMLA benefits are accurate. As *Medley* demonstrates, mistakes can result in litigation.

### **III. FOCUS ON AN OLD CHESTNUT – CAT’S PAW LIABILITY HEATS UP**

#### **A. Background**

Litigation over “cat’s paw” liability is on the rise. This theory of liability is an alternative to liability flowing from an ultimate decisionmaker’s discriminatory motive. The term “cat’s paw” is attributed to a fable conceived by Aesop, and put into verse by La Fontaine in 1679, in which a monkey influences a cat into burning its paw to scoop chestnuts out of a fire. In the employment discrimination context, “cat’s paw” liability refers to the “subordinate bias” theory of liability for discrimination. It describes a situation where an employee’s direct supervisor is discriminatorily motivated against an employee due to the employee’s protected class, and influences the ultimate decisionmaker to discipline or terminate the employee under legitimate pretenses.

The theory most recently received United States Supreme Court approval in *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011), wherein an employee terminated for rules violations on the recommendation of his supervisor claimed that the supervisor had acted with anti-military animus in effecting his termination through higher levels of management. The Supreme Court held that “if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under . . .” the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The reasoning of the *Staub* court has been applied to discrimination claims under Title VII of the Civil Rights Act of 1964 and other antidiscrimination laws. For example, in the Third Circuit, a plaintiff can “proceed on this theory if he offers evidence that ‘those exhibiting discriminatory animus influenced or participated in the decision to terminate’ him.” *Greenawalt v. Clarion County*, 459 Fed. Appx. 165, 169 (3d Cir. 2012) (quoting *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 286 (3d Cir. 2001)); *see also Palfrey v. Jefferson-Morgan School Dist.*, 355 Fed. Appx. 590, 594 (3d Cir. 2009) (“The cat’s paw theory is a method by which a plaintiff can establish liability against a decisionmaker if the decisionmaker, while not himself harboring any discriminatory animus toward the plaintiff, nevertheless is under the control or influence of one who does.”).

## **B. Recent Cases**

Recent decisions from Pennsylvania and other jurisdictions illustrate how courts are applying the cat’s paw theory to employment discrimination claims. Employers need to be cognizant of the fact that liability for supervisory animus can attach even where supervisors do not have ultimate decision making authority. This means that virtually every employment decision that includes input from supervisors must be independently reviewed to ensure that discriminatory animus is not embedded deep within such decisions.

### **1. *Miller v. Tyco Electric Ltd.*, 2012 WL 4107203 (M.D. Pa. Sept. 18, 2012)**

The “cat’s paw” theory was the subject of a recent decision in the Middle District of Pennsylvania. In *Miller v. Tyco Electric Ltd.*, No. 1:10-cv-2479, 2012 WL 4107203 (M.D. Pa. Sept. 18, 2012), the plaintiff, an assembly line worker, claimed that her supervisor discriminated against her based on her sex and national origin. She alleged that the supervisor told her that women should not be doing her job, called her a “dumb Filipino,” laughed at her accent, and tried to flick her in the head. The supervisor completed a performance review for her and other employees in November 2008 and gave the plaintiff a rating of one – the lowest possible score – and stated that her skills did not meet her job description.

In March 2009, the company conducted layoffs, and selected employees with low scores on performance reviews for the layoff. The supervisor testified that he was aware of the planned layoffs when he conducted the performance review and knew that employees would be selected for termination based on review scores. The plaintiff presented testimony from employees at the plant that “everybody knows that” a performance rating of one would result in termination in the event of a reduction in force, and that the criteria was presented in an employee handbook.

The court denied the employer’s motion for summary judgment, finding that the plaintiff produced sufficient evidence to impute liability to the employer for the supervisor’s alleged discriminatory animus under the cat’s paw theory. The Court specifically cited the supervisor’s knowledge about the upcoming layoffs at the time that he gave the plaintiff a negative review and general knowledge among employees about the impact of a negative performance rating in the event of a layoff. The court concluded that “a reasonable jury could find that [the supervisor]

gave Plaintiff a performance rating of one, intending and knowing that she would be terminated as a result.”

**2. Marez v. Saint-Gobain Containers, Inc., 688 F.3d 958 (8th Cir. 2012)**

In *Marez*, the Eighth Circuit extended “cat’s paw” liability to claims of FMLA retaliation. In *Marez*, the plaintiff took medical leave through the summer of 2007. When the plaintiff notified her supervisor of her need to take FMLA leave, her supervisor was annoyed that she would be unavailable for work over the Fourth of July holiday. She returned to work in September 2007. In January 2008, she again notified her employer that she would need to take medical leave. Two days later, her employment was terminated based on her failure to follow three equipment-related procedures.

At trial, the plaintiff presented evidence that other employees had committed similar infractions and were not disciplined. The jury found for the plaintiff on her FMLA retaliation claim, believing that her employment was terminated because she took FMLA leave, which termination was motivated by the bad faith investigation of the plaintiff’s supervisor.

On appeal, the Court applied the cat’s paw theory of liability to the decision to terminate the plaintiff’s employment, including any liquidated damages. The court upheld the district court’s decision to award liquidated damages, noting “we impute [the supervisor’s] bad faith to [the employer] for purposes of liability, [and] we see no reason to decline to impute her bad faith to [the employer] for purposes of awarding liquidated damages.”

**3. Holliday v. Commonwealth Brands, Inc., 2012 WL 3176316 (5th Cir. Aug. 3, 2012)**

In *Holliday*, the Fifth Circuit held that the plaintiff had not made the proper showing to invoke the “cat’s paw” theory, as the plaintiff had not offered any evidence that his manager had “influence or leverage” over the individuals who made the decision to terminate his employment. The court noted that the record contained evidence of an independent investigation into complaints about the plaintiff’s performance and that the plaintiff was only terminated after his performance did not improve.

**IV. FOCUS ON HEALTH CARE REFORM – WHAT MUST EMPLOYERS DO NOW -- AND LATER?**

**A. Background**

On June 28, 2012, the U.S. Supreme Court ruled that the parts of the Patient Protection and Affordable Care Act that affect employers are constitutional. As a result, employers must start implementing the changes wrought by the Act. Even if there is a change of administration resulting from the November, 2012 election, it is unlikely that the entire Act will be repealed. Below is a summary of the major provisions that will require action on the part of employers. (NOTE: Health plans in existence on March 23, 2010 may be "grandfathered" and thus be exempt from some of the law's provisions. If a grandfathered plan significantly reduces benefits or increases out-of-pocket spending above what it was when the new law was enacted, the plan

will lose its "grandfather" status. Application of the provisions to grandfathered plans is also noted below.)

## **B. What Must Employers Do Now?**

Medical Loss Ratio Rebates. Under the law, insurance companies may only spend 80 percent (for individual and small businesses) or 85 percent (for large businesses) on health care costs and no more than 20 percent and 15 percent, respectively, on administrative costs. If administrative costs exceed that amount, the insurance company generally will have to refund the excess to policy holders. Effective August 1, 2012 employers must have procedures in place to handle any rebates received from the insurer, which should start arriving in late July. In general, if the employer paid the entire cost of the insurance coverage, the employer may retain distributions. If premiums are paid with employer and employee contributions, rebates generally need to be apportioned. The employer should look to the actual insurance policy, other related materials and communications with participants to determine if there is guidance on how to allocate the rebates. Employers generally have the flexibility to not distribute rebates to participants, but instead apply the amounts received against future contributions or toward benefit enhancements. For example, as a default rule, if the cost of distributing payments to former participants approximates the amount of the rebates, the employer may allocate the proceeds to current participants based upon a fair and objective method of allocation. *Thus, plan sponsors should review their plan documents and plan communications to participants to ensure preparedness, e.g., possibly amending the document to address how the rebate should be allocated.* Failure to properly allocate rebates could subject employers to a claim for breach of fiduciary duty. *This applies to grandfathered plans.*

Summary of Benefits and Coverage. For enrollment beginning 9/23/12 and beyond, both self-insured and insured plans must provide a summary of benefits coverage to participants and beneficiaries (in addition to a summary plan description) at enrollment, renewal and on request. The SBC is a description of the Plan provisions which are subject to government requirements. The SBC may be provided electronically or as an internet posting as long as paper copies are available on request, and it may only be posted on the internet if the individual is notified on paper. *This applies to grandfathered plans.*

Material Modifications to the Summary of Benefits and Coverage. If there is a material modification to any of the terms of coverage that would affect the content of an SBC (other than at renewal or reissuance), the plan or issuer must provide notice of the modification at least 60 days before the effective date of the modification.

Comparative Clinical Effectiveness Research Fees. These are fees imposed for plan/policy years ending on or after October 1, 2012 and before October 1, 2019. For self-insured health plans, the fees must be paid by the plan sponsor; for insured health plans, the fees must be paid by the insurance company. Reported on IRS Form 720, the initial fee will cover plans with years ending between October 1, 2012 and September 30, 2013 and will be \$1 per covered beneficiary. The fee will increase to \$2 thereafter. *This applies to grandfathered plans.*

Flexible Spending Account Limit. Cafeteria plans must be amended to provide that employees may elect no more than \$2,500 (adjusted for inflation) in salary reduction

contributions to a health FSA for plan years beginning in 2013 and beyond. *This applies to grandfathered plans.*

FICA Tax. Systems must be modified to provide for an increase in the Hospital Insurance portion of FICA by 0.9 percent for employees with wages in excess of \$200,000 (\$250,000 for a joint return). This increase will be on the employee's portion of the Medicare premium only.

W-2 Reporting. The 2012 Form W-2 must include the cost of employer-sponsored health insurance coverage but only for those for whom the employer is otherwise required to issue a Form W-2. In 2012, the reporting requirement only applies to employers filing 250 or more W-2s; starting in 2014, W-2 reporting is required for all employers. The reporting requirement does not apply to Health Savings Accounts, Health Flexible Spending Accounts, Health Reimbursement Arrangements, or Archer Medical Savings Accounts. *This applies to grandfathered plans.*

### **C. What Must Employers Do In 2013?**

Notice of Exchanges. A notice must be provided to employees by March 1, 2013 (once guidance is issued) of the existence of state exchanges and options and implications of obtaining health care through an exchange. *This applies to grandfathered plans.*

Elimination of the tax deduction for employer-provided retiree prescription drug coverage, effective January 1, 2013. Under Medicare Part D, retirees may enroll in prescription drug coverage. To encourage employers to continue to provide prescription drug coverage to their retirees after the enactment of Medicare Part D, Congress provided a subsidy, equal to 28 percent of the employer's allowable retiree drug costs. Prior to the ACA, these subsidies were not included in taxable income, and the employer's deduction for health care expenses was not offset by the value of any subsidy received. In effect, the subsidy was tax-free. The ACA requires employers to subtract the amount of any Medicare Part D subsidy received from the amount of health care expenses that may be deducted, thus eliminating the tax-free nature of the subsidy.

### **D. What Should Employers Start To Plan for 2014 (Subject to the Issuance of Guidance)?**

Pay or Play. Employers with 50 or more full-time (30+ hours/week) employees must provide health insurance that meets affordability and value requirements or pay a penalty of the lesser of \$2,000 per employee (less 30 employees) or \$3,000 per exchange-certified employee. Employers can start to do a cost/benefit analysis of their current plan and possible alternative, but no meaningful decisions can be made until guidance is issued. Furthermore, employers may want to analyze their work force and consider whether or not establishing categories of employees at less than full-time to avoid medical coverage may result in an ERISA or tax code violation or other types of illegal discrimination, albeit inadvertent.

Automatic enrollment (with the opportunity to opt out) for employers with more than 200 full-time employees. *Applies to grandfathered plans.*

Notices required as to whether the health coverage offered qualifies as minimum essential coverage.

New nondiscrimination rules for fully-insured group health plans. These were to be effective January 1, 2011 and have been delayed. Potentially discriminatory insured health plans are those that benefit only highly paid executives. One key area of concern is retiree medical coverage for highly compensated retirees. These rules, when effective, could have a significant impact on executive employment and severance agreements in that they would effectively prohibit providing richer medical benefits for executives and their families or providing post-termination medical insurance only for executives and their families. Plan sponsors are subject to an excise tax of \$100 per day per individual discriminated against in an insured plan.

#### **E. What About After 2014?**

Cadillac Tax. Beginning in 2018, employers will have to pay a 40 percent excise tax on the cost of coverage exceeding \$27,500 for a family or \$10,200 for an individual in high deductible (self-funded) health plans.

#### **F. Other Things to Note Effective in 2014**

Reward for wellness programs. Increased from 20 percent to 30 percent of the cost of coverage. Health plans may provide a premium reduction for participation in wellness programs that require individuals to satisfy a standard related to a health factor in order to obtain the reward ("health-contingent wellness programs"). Such wellness programs include, for example, those that require an individual to obtain or maintain a certain health outcome in order to obtain a reward (such as being a non-smoker, attaining certain results on biometric screenings, or exercising a certain amount).

Individual mandate. In general, an individual who does not maintain health insurance must pay an additional amount to the IRS when he pays his taxes. The penalty is the greater of a flat dollar amount (\$95 for 2014, \$325 for 2015 and \$695 in 2016 – capped at 300 percent of the flat dollar amount) or a percentage of taxable income (1 percent in 2014, 2 percent in 2015 and 2.5 percent thereafter).

Annual dollar limits on essential health benefits prohibited. (Note that lifetime limits have already been eliminated and annual limits, beginning with plan years on or after September 23, 2010, are gradually being eliminated.) The elimination of limits on coverage will result in an increased cost to employers. *This applies to grandfathered plans.*

Cost-sharing (deductibles and co-payments) limits cannot exceed limits in effect for high-deductible health plans (HDHPs). (For example, in 2012, this amount would be \$6,050 for self-only coverage and \$12,100 for family coverage. These amounts will be adjusted in 2014.)

Pre-existing condition exclusions prohibited. *This applies to grandfathered group health plans.*

Waiting periods for coverage over 90 days prohibited. *This applies to grandfathered plans.*

## **G. Conclusion**

Employers should have begun addressing the items requiring action in 2012, and should look for additional guidance from the federal government to flesh out additional details for succeeding years.

## **V. SELECTED AGENCY REGULATORY DEVELOPMENTS: TITLE VII, FMLA & ADEA**

### **A. Recent EEOC Guidance on Use of Criminal Background Checks**

#### **1. Background**

On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) issued “Enforcement Guidance” on the use of arrests and convictions in hiring/retention decisions. The document is formally known as the “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.”

The Guidance focuses on race and national origin discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”). The EEOC takes the position that African-Americans and Hispanics are arrested and convicted in disproportionate numbers. The Guidance provides “best practices” on how to use criminal background checks without violating Title VII.

The Guidance is not the product of formal rule-making (such as regulations enacted by the EEOC); rather, it is a policy statement by the EEOC, and as such, is only entitled to deference to the extent the policy statement is reasonable (“Skidmore” deference). As a practical matter, however, employers should be aware that the policy statements set forth in the Guidance are the culmination of long-held EEOC policy and philosophy, and the EEOC has already shown a propensity to try to enforce the Guidance.

#### **2. Analysis**

Under Title VII, there are two theories of discrimination: (1) disparate treatment; and (2) disparate impact. Under disparate treatment, an employer is liable when a practice or policy is applied differently to individuals due to race or national origin. Under disparate impact, an employer is liable if (1) a neutral policy or practice has the effect of disproportionately screening out individuals due to race or national origin; and (2) the employer fails to demonstrate that the policy or practice is “job-related and consistent with business necessity.”

In determining whether a conviction is “job-related and consistent with business necessity,” employers should consider the following factors: (1) nature of conviction; (2) nature of job; and (3) whether the nature of conviction would adversely affect performance of the job. The focus is on the conduct underlying the conviction, not the title of the criminal offense. Thus, an employer’s use of criminal convictions must be narrowly tailored; the employer cannot reject an application based purely upon the title of the criminal offense. The EEOC takes the position

that once informed of the offense, the employer is under a duty to investigate the conduct that led to the criminal offense, and then determine whether such conduct would adversely affect performance of the job.

According to the EEOC, if an employer screens out a candidate due to a criminal conviction, the employer has the burden of demonstrating that an “individualized assessment” was conducted. The EEOC has developed a three-pronged framework for evaluating decisions at the hiring stage: (1) the employer gives notice to the candidate that he/she has been screened out due to a criminal conviction; (2) the employer provides the candidate with an opportunity to explain and present information to prove why he/she should not be excluded from the position; and (3) the employer considers the explanation and information presented by the candidate. The employer should consider such factors as: (1) circumstances surrounding the offense; (2) number of offenses committed; (3) age of the individual at the time of conviction; (4) evidence that individual performed the same type of work for the same or another employer; (5) length and consistency of employment history before and after offense; (6) rehabilitation efforts; and (7) employment or character references.

Beyond criminal convictions, the EEOC warns that employers should be cautious of using arrests in employment decisions. According to the Guidance, employers may not consider the fact that a candidate/employee was arrested. Employers can, however, consider the conduct underlying the arrest. This raises several difficult questions, which are discussed below.

### **3. Impact**

Based upon the recent EEOC Guidance, it is now more difficult for employers to rely upon criminal history in employment decisions. Employers must be particularly concerned with potential race or national origin discrimination claims based upon a disparate impact theory. This theory is particularly troublesome for employers because—as its title suggests—it does not involve “direct discrimination.”

Consistent with the EEOC Guidance, employers should only consider criminal convictions that are “job-related and consistent with business necessity.” To determine whether a criminal conviction may be properly considered, employers should develop screening procedures that allow the employer to consider: (1) the nature of the crime; (2) the time elapsed since the criminal conviction; and (3) the nature of the job.

The EEOC Guidance will also lengthen the process of rejecting an application or terminating an employee. Under the EEOC Guidance, if an employer relies upon a criminal conviction in denying an application, the employer must provide the candidate with an opportunity to explain and present information to prove why he/she should not be excluded from the position. This burden-shifting framework, as suggested by the EEOC, will delay hiring/firing decisions significantly.

Employers should also be cautious of using arrests in employment decisions. According to the Guidance, employers may not consider the fact that a person was arrested. Employers can, however, consider the conduct underlying the arrest. This imposes several burdens on the

employer, including the fact that the employer will now have to investigate the conduct underlying the arrest. In many cases, this will be very difficult (documents related to arrest could be missing or difficult to obtain, criminal record expunged or sealed, inaccurate records). Equally troubling, the employee could dispute the allegations related to the arrest. An arrest, after all, is nothing more than probable cause to believe that an individual has committed a criminal offense. Unlike an indictment, an arrest is not even a formal charge of wrongdoing.

Finally, employers will face several concerns with following the EEOC Guidance in its entirety. Many employers have adopted policies in which they do not hire applicants with felony convictions (regardless of the conduct underlying the felony conviction). Employers who hire an individual with a criminal background, risk that the person will commit a future criminal offense. If an employer is not permitted to use a felony criminal conviction in denying an application (assuming that the use of the felony conviction was not “job-related” and subject to an “individualized assessment”), and the individual injures other employees or engage in other criminal behaviors related to the job, that individual will subject the employer to negligent hiring actions (a state law claim). Because the potential fall-out from a negligent hiring action could be just as significant as any Title VII claim, employers should carefully consider and understand all potential liabilities related to hiring decisions.

## **B. FMLA Regulations: 2012 Updates Address 2009 Amendments**

On February 15, 2012, the U.S. Department of Labor Wage and Hour Division published proposed regulations intended to implement two sets of statutory amendments to the Family and Medical Leave Act of 1993 (29 U.S.C. §2601, *et seq.*). The Notice of Proposed Rulemaking (NPRM), at 77 Fed. Reg. 8,960-9,020 (Feb. 15, 2012), addressed amendments made in October, 2009 through the National Defense Authorization Act for Fiscal Year 2010, and amendments made in December, 2009 through the Airline Flight Crew Technical Correction Act. Although the public comment period was set to expire April 16, 2012, it was extended through April 30, 2012 to enable receipt of as many comments as possible. No further action has been taken to finalize the proposed regulations, however employers should be aware of their content since it is not likely that there will be many changes when the Final Rule is published.

### **1. Background**

When it was enacted in 1993, the FMLA entitled eligible employees of covered employers to up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons, including the birth and care of an employee’s newborn child, placement with the employee of a child for adoption or foster care, care for an employee’s immediate family member with a serious health condition, or attending to the employee’s own serious health condition. Final regulations implementing the FMLA went into effect in April, 1995. They underwent no substantive changes for almost 14 years, until January 16, 2009 when revisions encompassing the 2008 amendments, several U.S. Supreme Court and lower court rulings and various interpretive changes, went into effect. Although the 2009 version of the regulations will be relatively short-lived in comparison with the 1995 version, the 2009 amendments to the FMLA both expanded and revised a number of the items introduced by the

2008 amendments, and the revisions are necessary for resolution of a number of differences between the 2008 and 2009 amendments.

The January, 2008 amendments, through the National Defense Authorization Act for Fiscal Year 2008, introduced the concepts of “military caregiver leave” and “qualifying exigency leave,” increasing the number of weeks of job-protected leave to 26 weeks in a 12 month period to care for a injured servicemembers and expanding FMLA coverage to employees whose spouse, child or parent was called up for duty in the National Guard or Reserves to enable them to deal with matters related to the call-up of their family member.

The October and December, 2009 amendments expanded eligibility for both military caregiver leave and qualifying exigency leave, expanded various definitions, enhanced the amount of time off available under the qualifying exigency leave provisions, and provided special eligibility rules for airline flight crews. The NPRM covers these matters and also attempts to clarify the way employers must compute increments of FMLA leave time.

## **2. Military Caregiver Leave**

Under the 2008 amendments, “military caregiver leave” (“MCL”) entitled eligible employees who were the spouse, child, parent or next of kin of a covered servicemember with a serious injury or illness to up to 26 weeks of leave during a single 12-month period to care for the servicemember. A “covered servicemember” included current members of the Armed Forces, including the National Guard and Reserves, who were undergoing medical treatment, recuperation, or therapy, were otherwise in outpatient status, or were otherwise on the temporary disability retired list, for a serious injury or illness. Retired military were not included in the definition. A “serious injury or illness” was defined as one that was incurred by a servicemember in the line of duty on active duty that rendered the servicemember medically unfit to perform the duties of the member’s office, grade, rank, or rating.

The 2009 amendments expand the MCL concepts, making it available not only to employees caring for family members who are current servicemembers, but also to employees who are caring for recent veterans, i.e., veterans discharged within the previous five years who have a serious injury or illness incurred in the line of duty. The definition of “serious injury or illness” has been expanded to include conditions that existed prior to military service but were aggravated in the line of duty, and it now applies not only to current servicemembers but also to veterans. In addition, “serious injury or illness” for veterans includes conditions that occurred while the veteran served and continued after the veteran’s discharge, physical or mental conditions for which the veteran received a VA service-related disability rating of 50% or higher, or any injury or illness of similar severity that substantially impairs the veteran’s ability to secure or follow a substantially gainful occupation by reason of a service-connected disability, or would do so absent treatment. This includes conditions that do not arise until after the veteran has left military service. The DOL is in the process of proposing several alternatives to enable veterans to meet the “serious injury or illness” requirement so as to facilitate coverage for caregivers; thus, while most of the October 2009 amendments are already in effect, this provision will not take effect until the DOL issues a final rule.

### **3. Qualifying Exigency Leave**

For the purposes of “qualifying exigency leave” (QEL), the 2008 amendments defined a “qualifying exigency” to include the need for leave to: (a) address issues arising from a covered military member’s short notice deployment (i.e., deployment on seven or fewer days of notice) for a period of seven days from the date of notification; (b) attend certain military events and related activities that are related to the active duty or call to active duty status or to attend family support or assistance programs and informational briefings; (c) arrange for childcare and related activities, such as arranging alternative childcare, providing childcare on an urgent, immediate need basis (but not routine, regular or everyday basis), enrolling in or transferring a child to a new school or day care facility; (d) make or update financial and legal arrangements; (e) attend certain counseling sessions; (f) take up to five days of leave to spend time with a covered military member on short-term temporary, rest and recuperation leave during deployment; (g) attend post-deployment activities, including reintegration briefings, ceremonies or programs for a period of up to 90 days following termination of active duty status or to address issues arising from the death of a covered military member; and (h) any other event the employer and employee agree is a qualifying exigency.

The 2009 amendments expand the concept of QEL to include family members of the Regular Armed Forces. The 2008 amendments had limited QEL to employees with family in the National Guard or Reserves. Now, eligible employees with a family member in the Regular Armed Forces may take leave to deal with exigencies related to their family member’s deployment to a foreign country. Eligible employees with family members in all sectors of the military may take QEL for the qualifying exigencies defined in the 2008 revisions. The family member must be on “covered active duty or call to active duty status,” which is defined for Regular Armed Forces members as including deployment to a foreign country, and for National Guard or Reserves members as including deployment to a foreign country under a Federal call or order to active duty. In addition, the DOL is proposing to expand available leave time from five to 15 days for qualifying family members of service members who are on leave for rest and recuperation.

### **4. Airline Flight Crews**

The Airline Flight Crew Technical Corrections Act amends the FMLA to establish a special hours of service eligibility requirement for the airline industry due to the manner in which scheduling and hours worked attribution occurs in the airline industry. In essence, an airline flight crew employee will meet the FMLA hours of service eligibility requirement if s/he has worked or been paid for not less than 60% of the applicable total monthly guarantee and has worked or been paid for not less than 504 hours during the previous 12 months, not including personal commuting time, time spent on vacation, medical or sick leave. The DOL is also proposing calculation provisions specific to flight crew leave availability and usage, again due to the manner in which scheduling in the airline industry occurs. Beyond the special eligibility and calculation rules, airline flight crew employees will remain subject to all other FMLA eligibility

requirements, and non-flight crew airline employees will remain subject to the typical FMLA eligibility requirements (i.e., 1250 hours during prior 12 months).

## **5. Time Increments**

Although not provided for in the amendments to the FMLA, the DOL is also seeking to revise the ability of employers to use different time increments when accounting for FMLA leave, depending on the circumstances. Citing confusion and inconsistency in the application of a 2009 regulation permitting employers to use different time increments, the DOL is proposing to eliminate flexibility and require calculation of FMLA leave usage based on the smallest leave increment available in an employer's timekeeping system.

## **6. Reinstatement Requirement**

Similarly, the DOL seeks to clarify a 2009 revision to the FMLA's reinstatement requirements, which permits employers to delay reinstatement to employment if it is "physically impossible" to return the employee to employment mid-shift. The DOL takes the position that employers are confusing "physical impossibility" with inconvenience, resulting in delay of reinstatement and attribution to the employee of more leave time used than would otherwise have been necessary.

## **7. Model Forms**

Finally, the DOL seeks to remove the model forms and notices currently included at the Appendices to the regulations. This will enable the DOL to make revisions to the forms as needed. The DOL intends to revise the forms to update them in accordance with recent changes in the law (not limited to changes to the FMLA), as well as to revise the model poster, and make all forms and posters available on the DOL website.

### **C. EEOC Final Rule on ADEA Reasonable Factors Other Than Age Defense to Claims of Disparate Impact Discrimination**

On March 30, 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued a Final Rule intended to clarify the "reasonable factors other than age" (RFOA) defense to claims of disparate impact discrimination under the Age Discrimination in Employment Act (ADEA). The Final Rule amends the ADEA regulations effective April 30, 2012. Employers need to understand application of the RFOA defense and how to establish it before implementing employment actions that may have a disparate impact on older workers.

#### **1. Background: Defenses Under the ADEA**

The ADEA, which prohibits discrimination on the basis of age against individuals 40 and over, provides for multiple statutory defenses to allegations of age discrimination, including, but not limited to, the "bona fide" defenses (i.e., "bona fide occupational qualification" (BFOQ), "bona fide employee benefit plan," "bona fide seniority system") and the "non-age" defenses (i.e., "reasonable factors other than age" (RFOA) and "good cause"). The "bona fide" defenses

are typically used when defending claims of disparate treatment, that is, claims that an employer discriminated against one or more individuals on the basis of their protected class, in this case, age. When using these defenses, the employer may agree that age was a factor in the decision, but that the decision was lawful under the circumstances.

The RFOA and “good cause” defenses are typically used when an employer denies that age was a factor in the challenged conduct. In essence, the employer defends the challenged conduct by demonstrating that the differentiation was based on reasonable factors other than age or that it otherwise had good cause for its actions.

The “business necessity” defense is another defense typically used by employers defending discrimination cases. Here, the employer argues that the decision in question was “job related and consistent with business necessity.” The plaintiff may counter by demonstrating that an alternative practice exists that would have had a less discriminatory impact, but although the employer was aware of the practice, it refused to adopt the practice. The employer may counter these allegations by raising cost, feasibility and multiple other factors.

Employers who raise the RFOA defense with respect to claims for disparate impact age discrimination may not also use the “business necessity” defense. The EEOC’s Final Rule discusses this differentiation and clarifies how employers may apply the RFOA defense pursuant to two U.S. Supreme Court decisions on disparate impact.

## **2. Disparate Impact and the ADEA**

In 2005, the U.S. Supreme Court decided Smith v. Jackson, confirming that claims for disparate impact discrimination were allowed under the ADEA and endorsing use of the RFOA defense. The Court followed up in 2008 with its decision in Meacham v. Knolls Atomic Power Lab., confirming use of the RFOA defense and its status as an affirmative defense under the ADEA, and, contrary to the EEOC’s position, holding that the Title VII “business necessity” defense has “no place in ADEA disparate impact cases.”

While disavowing the EEOC’s position on applicability of the “business necessity” test, these holdings confirmed the EEOC’s position that the ADEA prohibits both disparate *treatment* discrimination (intentional discrimination on the basis of age) and disparate *impact* discrimination (employer’s application of facially neutral practice or policy has a greater negative impact on older individuals). The ADEA itself acknowledges that otherwise prohibited actions may not be unlawful when the employer engages in “differentiation” based on “reasonable factors other than age,” thus the RFOA defense focuses on whether the practice in question was both reasonable and based on factors other than age, rather than whether the employer should have sought to achieve its goals in a different manner.

## **3. The Final Rule**

The EEOC’s Final Rule sets forth amendments to the ADEA regulations, specifically 29 C.F.R. §1625.7 entitled, “*Differentiations based on reasonable factors other than age.*” According to the EEOC, “To establish the RFOA defense, an employer must show that the

employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.” In addition, the revised regulation includes the following concepts:

- clear statement that if age is used as a limiting factor, the RFOA defense is not available to employers
- creation of a presumption that an employment practice that adversely affects individuals within the protected age group is discriminatory unless justified by a reasonable factor other than age
- requirement that the individual challenging a practice specifically identify the practice causing the disparities
- assignment of the RFOA burdens of production and persuasion (evidentiary burdens) to employers
- confirmation that the RFOA defense is not available with respect to claims of disparate *treatment*
- inclusion of examples of the EEOC’s interpretation of a “reasonable factor other than age”
- confirmation that the RFOA defense is a fact-specific, multi-pronged determination
- continued acknowledgement that a differentiation based on the average cost of employing older workers as a group is unlawful except as to *bona fide* employee benefit plans which qualify for the ADEA exception to prohibited practices.

While these revisions to the regulations more accurately reflect the Supreme Court’s guidance than prior versions issued by the EEOC, they do not resolve several issues that have been gaining currency in the Federal courts. One of these issues is whether there are two classes of employees, including one class of employees under 40 and a second class consisting of either (1) employees 40 and over or (2) employees 40 and over within multi-year incremental ranges (e.g., 60-65, 55-60, etc.). This may be one of the next battles to reach the Supreme Court.

#### **4. Impact**

The RFOA defense sets a slightly lower bar for employers to step over than the “business necessity” defense. This is because the RFOA defense inquires whether the employer’s actions were “reasonable,” rather than whether the employer could or should have achieved its goals in a different manner so as to further minimize the resulting disparate impact on a protected class.

Similar to the way employers have established the affirmative defense set forth by the Supreme Court in the Faragher and Ellerth sexual harassment cases, employers may put specific steps and methods in place to ensure that they can establish the RFOA affirmative defenses. These include adapting the “considerations” enumerated by the EEOC at revised section 1625.7(e)(2), including:

- defining the business purpose for specific employment actions and considering the best way to achieve them

- defining and applying factors related to achieving the business purpose in a fair and accurate manner
- providing guidance and training to managers who will apply the factors so as to avoid discrimination
- limiting the ability of managers to engage in subjective assessments, especially where the relevant factors are subject to age-based stereotypes
- assessing adverse impact on older workers
- attempting to minimize the degree of harm to protected age workers, including the extent of the harm and the number of individuals adversely affected;
- taking available steps to prevent more serious harm, balanced against the burden of undertaking such steps.

In the Final Rule, the EEOC was careful to note that while such “considerations” are relevant to determining whether a practice is based on a reasonable factor other than age, no specific consideration or combination of considerations must be present to establish the defense; likewise, the presence of any of these considerations does not automatically establish the defense.

With disparate impact age discrimination claims on the rise, employers should consider how to establish the RFOA affirmative defense prior to taking employment actions that may adversely affect protected classes of workers. A strong framework for doing so includes strategic human resources planning, identifying legitimate business purposes, identifying reasonable ways to achieve those purposes, training managers, assessing anticipated outcomes, implementing consistent, relevant processes, and ensuring consistent documentation.

## **VI. CASES TO WATCH IN THE U.S. SUPREME COURT’S 2012-2013 TERM.**

As of the date this article went to print, the few employment-related cases that the Supreme Court has on its docket for the 2012-2013 Term may result in serious consequences for employers. So far, the slate of cases include three cases from the Third Circuit:

- *U.S. Airways, Inc. v. McCutchen*, 663 F.3d 671 (3<sup>rd</sup> Cir. 2011) (whether a court may override specific plan language relevant to subrogation and other reimbursement requirements based on “fairness” consideration as to plan participants)
- *Genesis Health Care Corp. v. Symczyk*, 656 F.3d 189 (3<sup>rd</sup> Cir. 2011) (whether offer of full relief to single name class action representative renders collective action moot)
- *Comcast Corp. v. Behrend*, 655 F.3d 182 (3<sup>rd</sup> Cir. 2011) (whether a class action may be certified under Rule 23 without evidence that the case is capable of resolution through the award of damages on a class-wide basis)
- *Vance v. Ball State University*, 646 F.3d 461 (7<sup>th</sup> Cir. 2011) (determination regarding who qualifies as a supervisor subjecting employers to vicarious liability for discrimination)

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