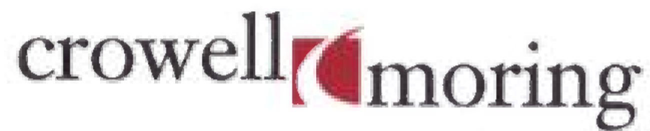

OOPS 2013

WEATHERING THE SEQUESTER: SELECTED EMPLOYMENT LAW ISSUES

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May 15, 2013

WEATHERING THE SEQUESTER: WARN ACT ISSUES

I. Summary of Relevant WARN Act Principles

The Worker Adjustment and Retraining Notification Act (WARN), enacted in 1988, obligates employers with 100 or more employees to give affected workers 60 days' notice before conducting either a plant closing or mass layoff. 29 U.S.C. § 2101 et seq. A plant closing is defined as a facility closure that results in an employment loss for 50 or more employees. A mass layoff is an employment loss for 500 employees, or 33% of the workforce, at a single site of employment.

The WARN Act and its implementing regulations promulgated by the Department of Labor define several terms that pose significant compliance issues in the wake of sequestration. They include: the determination of who is an affected employee (including the treatment of part-time employees); assessing the contours of a "single site" of employment; and what constitutes an "employment loss" for purposes of triggering WARN's obligations. WARN also contains detailed requirements regarding the content of the various notices required by the statute and the individuals and entities that are entitled to notice.

WARN provides that an employer that fails to give timely notice is liable to terminated employees for back pay and benefits for each "day of violation," *i.e.*, each day during which the employee had not received the required notice, to a maximum of 60 days. 29 U.S.C. § 2104(a)(1)(A) & (B). Back pay liability may be offset by any wages or benefits paid to employees during the period of violation, and by any "voluntary and unconditional payment" by the employer to the employee that is not required by any legal obligation. WARN provides for a $500 a day penalty to be paid to the local government where the employment loss occurred, in the event the employer fails to comply with the statute's notice requirements. The statute also provides for attorneys' fees to prevailing parties in litigation under a standard that would rarely give contractors an opportunity to recover their defense costs. The Supreme Court has yet to decide whether there is a right to a jury trial in a WARN case, and lower courts are split on the issue. *Compare Bentley v. Arlee Home Fashions, Inc.*, 861 F. Supp. 65 (E.D. Ark. 1994) *with Bledsoe v. Emery Worldwide Airlines, Inc.*, 635 F.3d 836 (6th Cir. 2011), *cert. denied* 132 S. Ct. 114 (2011).

There are several exceptions to the WARN notice requirements. The most important exception for these purposes is the provision that allows an employer to provide notice of less than 60 days in advance of a plant closing or mass layoff where the employment losses are caused by business circumstances that are not reasonably foreseeable. 29 U.S.C. § 2102(b)(2)(A). The reasonable foreseeability exception requires the employer to give notice as soon as practicable, along with a brief statement of the basis for reducing the notification period. 29 U.S.C. § 2102(b)(3).

WARN regulations define "reasonable foreseeability" as a situation where the employment loss is caused by "some sudden, dramatic, and unexpected action or condition outside the employer's control." 20 CFR § 639.9(b)(1). Examples of such circumstances include a client's sudden and unexpected termination of a contract, a strike at a major supplier, unanticipated and dramatic economic downturn, or a government-ordered closing of an employment site that occurs without prior notice. *Id.*

The employer has the burden of proof as to the "reasonable foreseeability" standard. Courts evaluate the employer's conduct under a totality of the circumstances test, inquiring whether the employer exercised prudent business judgment in assessing its business prospects. *See, e.g., Watson v. Michigan Industrial Holdings*, 311 F.3d 760 (6th Cir. 2002)(key customer's cessation of payments and cancellation of contract on short notice was sudden and unexpected; employer's late notice permissible under WARN).

Resolution of litigation on this issue often turns on a very close analysis of the specific business threats facing the employer during the period in which it is considering whether to issue WARN notices. *See, e.g., United Steel Workers of America Local 2660 v. U.S. Steel Corp.*, Civil No. 09-2223 (JRT/LIB), 2011 WL 3609490 (D. Minn. Aug. 16, 2011). The court there granted the employer's motion for summary judgment on the unforeseeable business circumstances defense, finding that the sudden economic downturn during the summer and autumn of 2008 was unforeseeable. In ruling for the employer, the court agreed with plaintiffs that the general economic downturn was well known 60 days prior to the date of the layoffs in that case. But the court concluded that the employer was not in a position to anticipate the dramatic decrease in demand from its automobile industry customers for steel that led to the layoffs, in part because of the uncertainties associated with the possibility of government intervention: "Given that [Defendant] was balancing the unprecedented high demand for steel and the possibility of the government bailout of the auto industry, the choice to delay plant closings [by idling blast furnaces] would not have raised the eyebrows of any prudent business person [i.e., the choice was commercially reasonable]."

The practical problems facing contractors in today's environment are illustrated by the WARN litigation filed in the wake of the Defense Department's 1991 decision to cancel the A-12 fighter bomber program on short notice. That litigation, summarized below, demonstrates the challenges contractors will face in defending how and when they exercised business judgment on this issue. *See, e.g., Loehrer v. McDonnell Douglas Corp.*, 93 F.3d 1056 (8th Cir. 1996).

II. Other Related Legal Obligations

Several states have enacted what are called sometimes referred to as "mini-WARN" statutes. Some of them impose requirements in addition to those required by WARN.[1]

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[1] For example, New York's statute requires 90 days advance notice in some circumstances. And California's statute requires advance notice of a mass layoff if it affects 50 employees at particular site, irrespective of the number of employees working at the facility. States with some version of mandatory advance notice or benefit continuation requirements include: California, Connecticut, Hawaii, Illinois, Kansas, Maine, Minnesota, Ohio, New Jersey, Pennsylvania Tennessee and Wisconsin.

Unionized employers may face additional notice obligations as a result of provisions in collective bargaining agreements that may require a specific level of advance notice to the union representing employees covered by the agreement. Unions often negotiate these provisions in labor contracts in order to provide them with sufficient time to bargain with the employer about the effects of the proposed job loss, as required by Section 8(a)(5) of the Labor Management Relations Act, 29 U.S.C. § 185(a)(5). Apart from contractual obligations, unionized employers normally have a statutory obligation to bargain about the effects of a decision to curtail operations.

III. Particular Uncertainties and Practical Problems

Contracting agencies continue to issue more specific information about the impact of sequestration. One of the challenges facing many contractors is that some of the plans announced to date fail to identify particular contracts, options, task orders, or other contract vehicles that will be affected. Many of the plans announced to date have exacerbated the anxiety level in many sectors of the contractor community by confirming the general sense that significant cuts are forthcoming. But, in general, absent more detail from the contracting agency, most contractors are not yet able to predict with any degree of certainty the specific impacts of sequestration on their business, including the specific questions of which contractor's contracts (and at which locations) are likely to be affected at a level that would trigger WARN notices. This situation leaves many companies in an uncertain position with respect to when and how they can best go about managing WARN compliance.

A. WARN Compliance Issues

The WARN Act presents several difficult issues for many federal contractors facing sequestration. Some of the more difficult of these issues are summarized below.

1. Aggregation of Multiple Employment Losses

WARN's notification provision is triggered if, within any 90-day period, there are "employment losses for 2 or more groups at a single site of employment, each of which is less than the [requisite] minimum number of employees . . . but which in the aggregate exceed that minimum number . . . ." 29 U.S.C. § 2102(d). This provision does not explicitly address whether one employment loss that is sufficient to trigger WARN's notification provision is aggregated with another employment loss that is insufficiently large to trigger the notification obligation.

Aggregation can often be a tricky problem for employers that have undergone a series of layoffs and other workforce restructuring events. DOL regulations require the employer to "look ahead and behind" 30 days and 90 days, respectively, to determine whether a series of workforce reductions both taken and planned will reach the minimum numbers for a WARN notice. *See* 20 C.F.R. § 639.5(a)(2). The practical challenges posed by trying to make an accurate count of the affected employees during the relevant time periods are made more complex by statutory prohibitions against taking steps to evade the statute. WARN provides that that it is the employer's burden to show that a series of smaller reductions (which would not be aggregated) are the result of separate and distinct causes and not an attempt to evade the notice requirements.

29 U.S.C. § 2102(d); 20 C.F.R. § 639.5(a). Sophisticated contractors are advised to examine the aggregation rules with extreme care.

2. Single Site of Employment

Whether employment losses occur at a "single site of employment" may determine whether a plant closing or layoff is subject to WARN. The analysis required in making this determination is often complex.

The term "single site of employment" is not statutorily defined. It can refer to either a single location or a group of contiguous locations. 20 CFR § 693.3(i)(1). Whether multiple locations constitute a "single site" under WARN is a totality of the circumstances analysis. *E.g., Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dept. Stores, Inc.,* 15 F. 3d. 1275, 1289 (5th Cir. 1994).

As a general rule, geographically related facilities are "single sites of employment," whereas geographically separate facilities are separate sites for purposes of WARN. *Rifkin v. McDonnell Douglas Corp.,* 78 F. 3d 1277, 1280 (8th Cir. 1996); *see also Frymire v. Ampex Corp.*, 61 F. 3d 757, 766 (10th Cir. 1995) ("proximity and contiguity are the most important criteria for making single site determinations"). Separate facilities located in different states hundreds of miles apart cannot be considered a "single site of employment" for WARN purposes. *Williams v. Phillips Petroleum Co.,* 23 F.3d 930, 934 (5th Cir. 1994). Similarly, branch offices of an employer in different locales in a single state are not a "single site" despite the main office's centralized control over their operations. *See Rifkin v. McDonnell Douglas Corp., supra,* 78 F. 3d at 1280. Likewise, noncontiguous sites in the same geographic area that do not share the same staff or operational purpose do not constitute a single site. 20 CFR § 639.3(i)(4). Even centralized payroll and certain other centralized managerial and personnel functions typically do not establish separate, noncontiguous locations as a "single site." *See International Union, United Mine Workers v. Jim Walter Resources, Inc.*, 6 F. 3d 722, 724-726 (11th Cir. 1993).

Groups of structures that form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment. 20 CFR § 639.3(i)(1). On the other hand, contiguous buildings owned by the same employer that have separate management, produce different products, and have separate workforces constitute separate employment sites. 20 CFR § 639.3(i)(5).

Case law holds that two facilities need not be contiguous to be a "single site" for WARN purposes. For noncontiguous sites to constitute a "single site," there must be some connection between the separate sites beyond that of common ownership. *Rifkin v. McDonnell Douglas Corp., supra,* 78 F. 3d at 1280. In such cases, to constitute a single employment site, the separate facilities must: (1) be in "reasonable geographic proximity;" (2) be "used for the same purpose;" and (3) "share the same staff and equipment."

As with most multi-factor tests, sequestration will force many federal contractors to struggle with the application of the single site rules.

3. Pay in lieu of Notice

For a variety of reasons, employers may choose to forego the 60 notice requirement of WARN in favor of a fairly rapid, if not immediate, layoff of affected employees. In such circumstances, where an employer pays the affected employees for the 60 day period, it can substantially reduce its potential exposure in litigation. This is because the statute provides that any amount of back pay owed to employees because of a failure to provide notice is offset by wage or salary payments made during that period.

Sophisticated contractors understand that this strategy is not without risk. Open questions remain as to how pay and benefits must be calculated in order to comply with this provision, and whether the pay must cover 60 calendar days or work days. *See, e.g., Gray v. Walt Disney Co.,* Civil No. CCB-10-3000, 2011 WL 2115659 (D. Md. May 27, 2011) (denying Defendants' motion to dismiss WARN Act complaint, reasoning that plaintiffs had made a plausible claim that the amount of money paid to them during 60 days of administrative leave was insufficient as not based on the "make-whole compensatory provisions of WARN, which requires the higher of a three-year average or the final regular rate. 29 U.S.C. § 2104(a)(1)(A); court ruled that discovery was necessary to determine whether the alleged reduction in pay, combined with the offset of severance, may have amounted to a constructive termination triggering the compensatory provisions of the Act).

4. Conditional Notice

The A-12 saga illustrates that the issue of whether to issue conditional notice may be the most challenging decision facing federal contractors in the coming months. DOL regulations provide some guidance as to the circumstances in which conditional notice of an upcoming employment loss may satisfy a company's WARN obligations. The applicable regulations state:

> Notice may be given conditional upon the occurrence or nonoccurrence of an event, such as the renewal of a major contract, only when the event is definite and the consequences of its occurrence or nonoccurrence will necessarily, in the normal course of business, lead to a covered plant closing or mass layoff less than 60 days after the event.

20 C.F.R. § 639.7(a)(3).

The Department of Labor issued advisory comments on the final rule implementing WARN. The commentary provides some additional guidance regarding conditional notice, including the following hypothetical involves a utility that operates a nuclear power plant that is the subject of some opposition:

> A referendum is scheduled to take place to decide whether the utility should continue to operate the plant. If the voters decide that the plant should be closed, the utility may have to begin terminating workers fairly quickly after the referendum occurs. In these circumstances, if a schedule of layoffs can be determined 60

> days in advance of the first layoff, conditional notice may be advisable.

Worker Adjustment and Retraining Notification, 54 FR 16042 (April 20, 1989).

The commentary further states that "conditional notice is permitted *only if there is a definite event*, like the renewal of a major contract, the consequences of the occurrence or non-occurrence of which will definitely lead to a covered plant closing or mass layoff less than 60 days after the event." *Id.* (emphasis added). Some of those who commented on the rule "raised concerns that a conditional notice requirement could lead to 'rolling' or overbroad notice and to liability for employers who fail to give conditional notice." *Id.*

Case law confirms that, in order to be effective, a conditional notice must describe a future definite event. *See, e.g., New England Health Care Employees Union v. Fall River Nursing Home, Inc.*, No. CV-96-12216-PBS, 1998 U.S. Dist. LEXIS 12817, at *20-21 (S.D. Mass., July 30, 1998) (the WARN "regulations permit conditional notice where the occurrence or non-occurrence of some future event, which is certain to transpire, will necessarily lead within sixty days to a plant closing or mass layoff").

The complexities associated with a conditional notice strategy are illustrated by *Poland v. CSC Applied Techs.*, No. 1:10-cv-326, 2010 WL 5401406 (S.D. Ohio, Dec. 23, 2010). The employer in *Poland* held a contract with the United States Postal Service ("USPS"), which was due to expire on June 30, 2009, to service mail transport equipment. *Id.* at *1. After the USPS informed the employer on April 17, 2009 that it had not yet decided whether to renew the contract, the employer, on April 30, issued a written notice to employees that their employment would terminate due to the anticipated plant closing. *Id.* at *2. The employer explained that this action was necessary "due to the fact that [the USPS] has not yet made a final decision on the possible renewal of the contract at this facility, which we must at this time conclude to mean the permanent end of the contract at this facility." *Id.*

Thereafter, the employer engaged in negotiations with the USPS about an extension of the contract, which necessitated the employer leasing new property to conduct its operations. *Id.* at *3. After agreeing to a contract extension with the USPS and securing a new facility, the employer, on June 8, issued a revised notice to employees explaining that it would begin permanent layoffs at its current location on June 15 in light of the winding down of operations at the current facility. *Id.* On June 18, the employer notified employees at its current location that they had the option to transfer to the new facility, and that those employees who chose not to transfer would be laid off on June 30. *Id.* at *4. On June 29, the employer notified all those employees who opted not to transfer to the new facility that their employment was terminated due to a layoff effective the next day, June 30. *Id.* at *5.

A group of laid off employees responded by filing a WARN Act complaint. The court granted summary judgment to the employer on plaintiffs' claims that it failed to provide proper notice under the WARN Act. The Court held that the employer's notice to employees, which "was conditional because USPS had not made a final decision as to whether to renew its contract," was "consistent with the WARN Act's authorization of conditional notices." *Id.* at *8 (citing 20. C.F.R. § 639.7(a)(3)). Rejecting plaintiffs' claim that the notice was deficient because it did not "clearly state that the facility would be closing or that layoffs were likely," the Court explained that the conditional notice was satisfactory because it apprised employees that the employer "would no longer be able to offer [them] continued employment with the Company because it anticipated the permanent end of the [USPS] contract at this facility." *Id.* at *8 (internal quotation omitted).

5. Other WARN Issues

WARN presents a variety of other scenarios that often make compliance particularly challenging. Additional issues that are likely to cause headaches after sequestration include:

a) Uncertainty as to the WARN Act implications of 'in-sourcing' decisions that may be made by contracting agencies. *See, e.g., Deveratuda v. Globe Aviation Security Servs.*, 454 F.3d 1043 (9th Cir. 2006)(no WARN violation on specific facts showing that workers were laid off due to federal government take-over).

b) Ambiguities in WARN's definition of a "plant closing" in situations where a few employees remain after production operations are concluded at a particular facility. 29 U.S.C. § 2101(2).

c) Similar ambiguities with respect to the significance of a distinct operation within a particular facility. *See, e.g., Pavao v. Brown & Sharpe Mfg. Co.*, 844 F.Supp. 890 (D.R.I. 1994)(shut down of specific parts of a manufacturing department found to be a plant closing for WARN purposes where the court found that the department had a distinctive product, operation and work function at a single site of employment); *Bagwell v. Peachtree Doors & Windows, Inc.*, 2:08-CV-191-RWS-SSC, 2011 WL 1497831 (N.D. Ga. Feb. 8 2011) (discussion of treatment of various operating units within a manufacturing facility).

d) Assessing a variety of issues necessary to make an accurate count of affected employees, including resolving questions of whether individuals hired as temporary or seasonal workers, certain part-time workers, or employees hired as temporary project workers, must be counted in determining whether a workforce reduction meets the WARN thresholds. *See, e.g.*, 29 U.S.C. § 2103(1); 20 C.F.R. § 639.5(c). *Marques v. Telles Ranch, Inc.*, 867 F.Supp. 1438 (N.D. Cal. 19094)(certain agricultural workers deemed permanent seasonal employees entitled to WARN notice).

e) Determining when a short-term layoff amounts to an "employment loss" that triggers WARN notification obligations, particularly in the (perhaps likely) event of a subsequent decision by a contracting agency to restore funding to a particular program or contract. WARN generally provides that notice is not required in a case of a layoff of less than six months, or a reduction of hours of less than 50% during a six month period. *See* 29 U.S.C. § 2101(a)(6). *See Bledsoe v. Emery Worldwide Airlines, Inc.*, 635 F.3d 836 (6th Cir. 2011), *cert denied,* 132 S. Ct. 114 (2011)(discussion of various communications issued by employer regarding the expected duration of a layoff caused by regulatory dispute with FAA).

f) Ambiguities about satisfying the employee transfer requirements of WARN. The statute provides that an employee does not experience an "employment loss" for purposes of triggering WARN obligations in certain situations in which transfer opportunities are offered to affected employees. *See, e.g., Martin v. AMR Serv., Corp.,* 877 F.Supp. 108 (E.D.N.Y. 1995) (employees terminated on June 4 and place in new position with acquiring company three days later did not suffer an "employment loss" for WARN purposes).

B. The A-12 Fighter Bomber Cancellation Litigation

The dilemma for many contractors facing sequestration is illustrated by the WARN litigation resulting from the 1991 decision of the Defense Department to cancel the A-12 fighter bomber procurement on extremely short notice. *See Loehrer v. McDonnell Douglas Corp.,* 98 F.3d 1056 (8th Cir. 1996). The facts of the dispute are worth retelling.

McDonnell Douglas, along with General Dynamics, entered into contracts with the U.S. Navy in 1988 to engineer and develop the A-12 fighter bomber. The contractors experienced difficulty in completing the project on time and within budget. As a result, relationships with the Navy deteriorated. In early December 1990, a government oversight board identified problems with the design of the A-12. McDonnell Douglas was notified on December 17, 1990 that its performance was "unsatisfactory" and that unless it met certain specified conditions by January 2, 1991, "the Government may terminate for default." In response, McDonnell Douglas, on December 20, issued "advisory memoranda" to employees "explaining that the A-12 program was in danger." On December 21, McDonnell Douglas notified approximately 2,500 employees that they would lose their jobs should the A-12 project be terminated.

On January 2, McDonnell Douglas submitted a written response to the Navy's December 17 default notice, arguing, *inter alia*, that many of the problems identified with the program had been corrected. That same day, McDonnell Douglas met with representatives of the Navy and offered a proposal for continuation of the project. After this meeting, the Navy gave McDonnell Douglas a Memorandum of Understanding ("MOU") setting forth the terms under which the Navy was willing to continue with the project, and informed the company that the Navy had "no intent to terminate." Despite these positive developments, the Navy terminated the contract five days later, on January 7, 1991. About a week thereafter, McDonnell Douglas issued formal notice to hundreds of affected employees that their employment would terminate at the end of the month.

Litigation naturally ensued. The case went all the way to a trial at which the company prevailed. Affirming the decision of the trial court, the Eighth Circuit held that the unforeseeable business circumstance exception to WARN's 60-day notice requirement excused McDonnell Douglas' failure to proffer a timely notice of the mass layoffs. *Id.* at 1061-62. The court explained that although McDonnell Douglas had notice of the precarious nature of the contract long before it was terminated, the Navy's cancellation "was not reasonably foreseeable." *Id.* at 1062. The court reasoned that due to the "unique, politically charged" field of defense contracting, and the fact that the government rarely cancels a contract for a program for which it has expressed a need, it was reasonable for McDonnell Douglas to delay issuing WARN notices until the contract was actually terminated on January 7. After summarizing the evidence, the court concluded that it had "little difficulty in concluding that the Government's January 7 announcement was sudden, dramatic and unexpected." *Id.*

The *Loehrer* court also rejected plaintiffs' additional argument that McDonnell Douglas should have issued an earlier, conditional notice. After observing that an employer "would in most situations be well-advised to undertake notification in order to fend off the prospect of liability," the court found no violation on this theory. The court explained that because the "decision whether to give conditional notice is committed to an employer's discretion," even it had been appropriate for McDonnell Douglas to issue such notice, failure to do so "cannot, in itself, justify the imposition of WARN liability." *Id.*[2]

General Dynamics took a different approach to the crisis. It issued a communication to its affected employees on December 20. This communication was specifically described as a conditional WARN notice. General Dynamics got sued anyway, in a WARN lawsuit brought by the labor union representing a substantial number of the individuals who were ultimately laid off. Like McDonnell Douglas, that company had to go all the way to trial before it ultimately prevailed, after the district court denied its motion for summary judgment on the issue of reasonable foreseeability. Following a bench trial, the district court in that case held for the contractor, holding that the December 20 communication constituted a valid "conditional notice" that complied with WARN. *International Ass'n of Machinists v. Gen'l Dynamics Corp.*, 821 F.Supp. 1306, 1310 (E.D. Mo. 1993).

C. The Furlough Option

Contractors may wish to consider a temporary furlough of certain employees, in part because that response may permit better alignment with staffing decisions made by certain government agencies. In general, a furlough does not constitute an "employment loss" that triggers WARN notice. And there are no general legal restrictions precluding an employer from reducing the work week for non-exempt employees. Companies considering this option, of course, should be mindful of any special legal obligations in this regard that may be imposed by collective bargaining agreements or state and local law. Companies should also review relevant

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[2] While the issuance of conditional notice is discretionary, "WARN generally encourages giving notice when a plant closing is anticipated, even if the notice is not strictly required. Both WARN and its implementing regulations state that an employer who is not required to comply with WARN's notice requirement 'should, to the extent possible, provide notice to employees about a proposal to close a plant or permanently reduce its workforce.'" *Local 179 of the Int'l Bhd. of Teamsters v. TSC Enters., Inc.*, No. 94 C 3356, 1995 U.S. Dist. LEXIS 3945, at *26-27 (N.D. Ill., Mar. 29, 1995) (quoting 29 U.S.C. §2106; 20 C.F.R. § 639.1(c)).

employment contracts and employee policy manuals to insure they do not impose any specific restrictions.

The use of the furlough device raises different issues for employees who are treated as exempt from the requirements of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* One of the FLSA's principal requirements for exempt treatment is that the employer must provide compensation to exempt employees on a fixed salary that exceeds the statutory minimum. This obligation, known as the "salary basis test," generally prohibits "docking" salaried employees for most types of absences.

Most courts have held that an employer does not violate the "salary basis test" by implementing a proportional reduction in salary along with the announcement of a new, reduced workweek for affected salary employees. See *Archuleta v. Wal-Mart Stores, Inc.* (10th Cir. 2008) 543 F.3d 1226). *But see Dingwall v. Friedman Fisher Associates, P.C.*, 3 F.Supp.2d 215 (N.D. NY 1998).

The biggest FLSA problem applicable to non-exempt employees in this scenario is that work schedule revisions on short notice can be argued as depriving employees of overtime pay in particular situations.

D. Employee Retention and Other Morale Issues

Contractors are particularly concerned about how the current uncertainty will affect their valued employees. Employee retention is a critical goal for most employers. In some industry sectors, federal contractors are worried about a "brain drain" scenario, in which significant numbers of mission-critical employees, *e.g.*, engineers, computer professionals, will decide to change employers rather than face the prospect of possible layoff.

The impact of sequestration poses a different (but no less serious) set of employee morale issues for individuals who may not be able to find another job as quickly as a highly-trained software design engineer. Productivity and morale suffer when employees are concerned about job security. These concerns will be exacerbated by the likely scenario of temporary furloughs and recalls, subject to the vagaries of the procurement process in the coming months.

IV. The Government's Position on Allowable Costs

Whether a Federal contractor's costs are deemed "allowable," and thus may be paid by the Government, is a highly fact-specific inquiry that involves numerous objective (*e.g.*, the specific costs in question, the timing of the costs, etc.) and subjective assessments (*i.e.*, were the costs reasonable). For this reason, there is no definitive, "one-size-fits-all" answer to the question of whether, in the wake of sequestration, a contractor's costs of complying with the WARN Act, or of defending against alleged violations of the WARN Act, would be deemed allowable by the contracting agency. That said, a contractor's costs of complying with the WARN Act, or of successfully defending its compliance with the WARN Act, would *generally* be deemed an allowable cost for which the contractor may seek compensation from its

contracting agency.[3] For purposes of this analysis, there is no meaningful distinction between such costs incurred as a result of sequestration-induced contract action (*e.g.*, termination for convenience, failure to exercise an option, etc.) and costs incurred as a result of a similar contract action occurring in the ordinary course of government operations.

The questions of whether a particular contractor's costs will be deemed "allowable" in the wake of sequestration is thus likely to hinge on the contractor's compliance with the WARN Act, rather than on a unique application of the cost principles. We can anticipate that the central question in litigation will be an assessment of when the contractor knew, with sufficient specificity, that sequestration-induced cuts will result in adverse contract action(s) which, in turn, will produce the type of layoffs as to trigger WARN Act notification obligations.

In July 2012, the Department of Labor ("DOL") issued guidance opining that sequestration-induced "contract terminations or cutbacks are speculative and unforeseeable," and that issuance of WARN Act notifications prior to the effective date of the sequester "would be inappropriate."[4] While this DOL guidance is not binding upon federal courts, which have sole responsibility for determining whether a contractor's conduct is compliant with the WARN Act, the Office of Management and Budget ("OMB") issued subsequent guidance stating that a contractor's "consisten[cy] with [the] DOL guidance" will be used by contracting agencies as a yardstick for determining allowable WARN Act costs.[5] Specifically, the OMB guidance provides:

> If (1) sequestration occurs and an agency terminates or modifies a contract that necessitates that the contractor order a plant closing or mass layoff of a type subject to WARN Act requirements, and (2) that contractor has followed a course of action consistent with DOL guidance, then any resulting employee compensation costs for WARN Act liability as determined by a court, as well as attorneys' fees and other litigation costs (irrespective of litigation outcome) would qualify as allowable costs and be covered by the contracting agency, if otherwise reasonable and allocable.

This guidance, of course, does not resolve the question of what a contractor should do now. As discussed above, any number of circumstances, some of which are unknowable at present, could combine to present a plausible argument by plaintiffs' lawyers or a labor union that a contractor violated WARN by not issuing notices to affected employees.

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[3] In a typical scenario, a contractor would likely request this compensation from the Government by submitting a claim or as part of its termination settlement proposal.

[4] *See* Dep't of Labor Training & Employment Guidance Letter No. 3-12 (July 30, 2012).

[5] *See* Memorandum, Office of Management & Budget, Subject: Guidance on Allowable Contracting Costs Associated with the Worker Adjustment and Retraining Notification (WARN) Act (Sep. 28, 2012).

WEATHERING THE SEQUESTER: CONSIDERATIONS IN PLANNING AND IMPLEMENTING A REDUCTION IN FORCE

Advance planning is the key to an effective reduction-in-force (RIF). Contractors should begin with the end in mind. Determine what the ultimate goal is – whether that be to reduce X headcount, or reduce X dollars or eliminate particular programs – and establish a selection process to meet this goal. Understanding the ultimate goal will help a contractor determine the appropriate population of its workforce to consider for termination. Companies should take appropriate steps to insure that the population under consideration is no broader than necessary to limit possible liability.

For contractors that wish to provide terminating employees a separation package in exchange for a waiver of claims, including age-related claims, the question of who is in the "decisional unit" – e.g. the group of employees from which the employer chose the employees to be terminated – is particularly important. Pursuant to the Older Workers Benefit Protection Act (OWBPA), in order to obtain a valid waiver of age-related claims under the Age Discrimination in Employment Act (ADEA) in the context of a RIF, an employer must provide each terminating employee who is forty years or older a chart that outlines the job titles and ages of all individuals in the decisional unit, and identify who was and was not selected. A waiver of claims is not valid unless the chart provided to the employee includes the appropriate decisional unit.

The other OWBPA requirements that all contractors should adhere to include:

- The waiver must be written in a manner that is easily understood – don't use a lot of "legalese."
- The waiver must specifically note that the employee is waiving all claims under the ADEA.
- The waiver must advise the employee to consult with an attorney prior to signing the agreement
- If more than one person is being laid off (as is the case with most RIFs), the employee must be given forty-five (45) days to consider the waiver before signing.
- The employee must be given seven days to revoke his signature after signing. As such, an employer should ensure that any payments to be made pursuant to the waiver are not due to be paid until the revocation period has passed.
- The waiver must be supported by consideration in addition to that which the employee is already entitled. If the employer has a severance policy that provides for a particular payment upon termination regardless of whether the employee signs a waiver, then the employer must provide additional compensation to obtain a valid waiver. A best practice is to ensure the policy makes any such severance amount contingent upon signing a waiver.

Regardless of whether an employer intends to provide a separation package and obtain a waiver of claims, performing an adverse impact analysis is a key component of any well-conducted RIF. Before the RIF list is finalized, the employer should conduct adverse impact analyses of all selection decisions to determine whether the decision-making will have an adverse impact on women, minorities, each of the racial subgroups and/or individuals who are 40 years old or older. These analyses should be conducted at the direction of counsel, for the purpose of providing legal advice, so that the analyses can be protected under the attorney-client privilege. Drafts prepared throughout the process should be identified as such and, at the conclusion of the decision-making process, only the final justification for the selection decisions should be maintained (consistent with company policy/practice).

WEATHERING THE SEQUESTER: NEW NDAA WHISTLEBLOWER PROTECTIONS ADD TO THE PANOPLY OF WHISTLEBLOWER LAWS

There has been a substantial increase in the number of whistleblower retaliation claims filed in recent years. As more employees lose their jobs due to sequestration, we expect these to continue to rise. All contractors should be aware of the panoply of both federal and state laws that protect whistleblowers from retaliation – there are whistleblower retaliation provisions in the False Claims Act, Sarbanes-Oxley, Dodd-Frank, American Recovery and Reinvestment Act and Patient Protection and Affordable Care Act, as well as over twenty other whistleblower laws enforced by the Occupational Safety and Health Administration (OSHA), and numerous comparable state statutes.

Most recently, the revisions to the National Defense Authorization Act, effective July 2, 2013, significantly expanded the previous whistleblower retaliation provisions contained in the NDAA. The most important changes include:

- The revisions expand whistleblower protections to civilian contractors and to subcontractors – previously, the protections only applied to employees of prime contractors doing business with the Department of Defense or NASA.

- The revisions also extend protection to employees who make a disclosure of wrongdoing internally to "a management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct" – previously, protection was available only to a contractor employee who disclosed to a member of Congress, an inspector general, a DoD/NASA oversight official, law enforcement, a court or a grand jury.

- The revisions further expand the definition of protected disclosures to include a disclosure regarding an "abuse of authority" in connection with the performance or award of a contract – previously, protection was limited to disclosures of gross mismanagement or waste, violation of a law, rule or regulation, and substantial and specific danger to public health or safety. "Abuse of authority" is defined broadly as "an arbitration and capricious exercise of authority that is inconsistent with the successful performance of a contract or grant or the mission of the awarding agency."

Employees must be informed of their rights and protections under the NDAA in writing in "the predominant native language of the workforce."

WEATHERING THE SEQUESTER: EMERGING FEDERAL GOVERNMENT REGULATORY AND ENFORCEMENT INITIATIVES

I. The U.S. Department of Labor

A. New Leadership

President Obama has nominated Thomas Perez to replace Hilda Solis as Secretary of Labor. The Perez nomination has been viewed as controversial in some quarters, and the Senate has not yet scheduled a vote on the nomination.

Deputy Secretary Seth Harris is serving as Acting Secretary during the interregnum. Mr. Harris has established himself as an ambitious, active administrator. He has made many public statements indicating his intention to continue to press for enactment of the Administration's agenda. Among other things, he has initiated a blog, called "Work in Progress," that addresses a variety of enforcement and compliance matters. *See* http://social.dol.gov/blog. The blog may be worth a quick read for contractors interested in getting additional insight into some of the specific priorities of the Department's plans, a full discussion of which is beyond the scope of this paper.

B. New Initiatives - DOL Wage & Hour Division

1. Investigations/Audits

Public reports confirm that DOL has recently completed an extensive program of hiring and training more than 350 additional investigators for the Wage & Hour Division. This is part of a coordinated effort by DOL to take a more aggressive approach to audits and other types of compliance investigations.

DOL's efforts have been particularly visible in certain industries and geographic areas. We have seen a significant increase in the number of "spot audits," in which an investigator shows up at a worksite with no advance notice, normally armed with a lengthy list of information requests. This effort was initiated by former DOL Secretary Solis, who famously claimed, soon after her confirmation, that there was "new sheriff in town."

2. Independent Contractor/Employee Misclassification

One of DOL's most aggressive regulatory efforts is its Misclassification Initiative, launched in September 2011 by former DOL Secretary Solis under the auspices of Vice President Biden's Middle Class Task Force. A key feature of the Initiative was the execution of a Memorandum of Understanding (MOU) between DOL and the Internal Revenue Service (IRS). Under this agreement, the agencies committed to work together and share information to reduce the incidence of misclassification of employees, to help reduce the tax gap, and to improve compliance with federal labor laws.

Since its launch, DOL has entered into memorandums of understanding with 14 states to coordinate efforts to identify and prosecute various types of misclassification arrangements. DOL claims that the Wage Hour Division has collected $9.5 million in back wages for more than 11,400 workers where the primary reason for minimum wage or overtime violations under the Fair Labor Standards Act was that workers were not treated or classified as employees DOL asserts that these figures represent an 80 percent increase in back wages and a 50 percent increase in the number of workers receiving back wages following the implementation of these agreements.

C. New Initiatives - OFCCP

Most contractors have some familiarity with the Office of Federal Contract Compliance Programs (OFCCP), the DOL agency responsible for enforcing, *inter alia,* various statutes and Executive Orders that require covered contractors to maintain affirmative action plans. As described below, OFCCP has particularly ambitious plans for the forthcoming years.

In March of this year, OFCCP rescinded two enforcement guidance documents on pay discrimination originally issued in 2006 – the only previously existing guidance regarding the Agency's approach to compensation discrimination. OFCCP asserted that the decision was "intended to protect workers and strengthen OFCCP's ability to identify and remedy different forms of pay discrimination. It will enable OFCCP to conduct investigations of contractor pay practices consistent with Title VII of the Civil Rights Act of 1964." Concurrent with the rescission, OFCCP issued Directive 307 – Procedures for Reviewing Contractor Compensation Systems and Practices. The Directive adopts a "case-by-case" approach to compensation analysis that, unfortunately, gives contractors little guidance and affords OFCCP maximum flexibility to simply do as it sees fit when analyzing compensation data.

The Agency's Rescission Notice and Directive 307 indicate that OFCCP will apply the following five broad guidelines when reviewing contractors' pay practices:

- Determine the most appropriate and effective approach from a range of investigative and analytical tools;
- Consider all employment practices that may lead to compensation discrimination
- Develop appropriate pay analysis groups;
- Investigate large systemic, small unit and individual discrimination; and
- Review and test factors before including them in analysis

The OFCCP will continue to use multiple regression analysis, but asserted that "its application has limitations" so it would utilize other statistical techniques as well.

1. Subcontractor Definition

In *UPMC Braddock v. Harris*, No. 09-1210 (D.C. D.C. Mar. 30, 2013), Judge Friedman of the U.S. District Court here in Washington affirmed a decision reached by DOL's Administrative Review Board (ARB) which, in turn, upheld an administrative law judge's finding that three hospitals in the University of Pittsburgh Medical Center family were federal

subcontractors required to comply with OFCCP regulations. The court agreed with DOL that OFCCP has jurisdiction over the hospitals by virtue of their receipt of payments from a health maintenance organization whose members included U.S. government employees. Judge Friedman's decision confirmed the order requiring the hospitals to comply with the affirmative action obligations enforced by OFCCP. In reaching this conclusion, the court rejected various arguments made by the hospitals, most of which hinged on the fact that none of them were parties to traditional government contracts. DOL found it sufficient that a government contract existed with the health plan with which the hospitals had contracts.

The *UMPC* decision represents a significant expansion of the traditional definition of subcontractors covered by OFCCP's regulations. The decision has significant implications for many categories of participants in the health care industry, particularly in light of the upcoming implementation of the Affordable Care Act.

2. Veterans Preferences and Disability Regulations

In 2011, the OFCCP issued Notices of Proposed Rulemaking regarding the regulations implementing Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act. These proposed changes, which the OFCCP has targeted to publish as Final Rules in mid-2013, will significantly change the recordkeeping and reporting obligations with respect to veterans and individuals with disabilities. Of particular note in the proposed regulations are the following requirements:

- A nationwide, across-the-board seven percent "utilization goal" for individuals with disabilities, similar to the goals that Contractors are currently required to set for women and minorities.
- A requirement that contractors invite ***all applicants*** to self-identify their veteran and disability status, and that contractors conduct adverse impact analyses regarding veterans and individuals with disabilities similar to the adverse impact analyses currently required for women and minorities.
- A substantial increase in the required outreach efforts to veterans and individuals with disabilities that includes an obligation to conduct an annual evaluation of recruitment efforts and, if they have not been reasonably successful, to implement of at least one more of OFCCP's prescribed outreach efforts.
- A requirement to develop written procedures for processing requests for reasonable accommodations and inform all employees and applicants of these procedures. The proposed rule would require that, if a Contractor denies an accommodation request, the Contractor will provide a written basis for the denial and inform the requester that he or she has the right to file a complaint with the OFCCP.
- A mandate that Contractors conduct *annual* training of all supervisors and managers on a variety of issues including affirmative action compliance and its reasonable accommodation procedures.
- A *five-year* recordkeeping requirement for information relating to a Contractor's affirmative action program and its outreach efforts.

II. The Equal Employment Opportunity Commission (EEOC)

A. The Systemic Discrimination Initiative

1. Background

This initiative was first announced in 2006. The agency formally approved its 6 year strategic enforcement plan (SEP) in December of last year. Perhaps the most important feature of the SEP is the agency's decision to make national priorities of certain types of systemic investigations and cases to be pursued by the Commission. EEOC is now explicit in stating its position that meritorious systemic charges and cases that raise SEP or district priority issues should be given precedence over individual priority matters and over all non-priority matters, whether individual or systemic.

2. Key Provisions of the SEP

The SEP (available at this link: http://www.eeoc.gov/eeoc/plan/sep.cfm)makes for very interesting reading. Among its most important features is the listing of the following six systemic priorities for the agency:

1) **Eliminating Barriers in Recruitment and Hiring**. The EEOC believes that older workers, women, people with disabilities, and individuals in certain racial, ethnic, and religious groups continue to confront discriminatory policies at the recruitment and hiring stages. In particular, the EEOC intends to address exclusionary policies and practices, the channeling of individuals into specific jobs, restrictive application processes, and the use of screening tools such as pre-employment tests, background checks, and date-of-birth inquiries.

2) **Protecting Immigrant, Migrant and Other Vulnerable Workers**. Noting that immigrant, migrant, and other vulnerable workers are often unaware of or are unable to exercise their rights under the equal employment laws, the SEP states that the EEOC will target discriminatory practices and policies affecting these workers. Specifically, the EEOC will focus on disparate pay, job segregation, harassment, and trafficking.

3) **Addressing Emerging and Developing Issues**. The EEOC intends to prevent the spread of emerging discriminatory practices by promoting greater awareness and facilitating early, voluntary compliance with the law. The SEP identifies the following as emerging issues:

   - ADA coverage, reasonable accommodation, qualification standards, undue hardship, and direct threats;

   - accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act and the Pregnancy Discrimination Act; and

- coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply.

4) **Enforcing Equal Pay Laws.** The EEOC will use directed investigations, among other strategies, to target compensation systems and practices that discriminate on the basis of gender.

5) **Preserving Access to the Legal System.** The EEOC will also combat practices that it perceives as preventing individuals from exercising their rights under employment discrimination statutes or impeding the EEOC's investigative or enforcement efforts. Such practices include: retaliatory actions, failure to retain records required by EEOC regulations, overly broad waivers, and settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of discrimination claims.

6) **Preventing Harassment Through Systemic Enforcement and Targeted** Outreach. With respect to unlawful harassment, the EEOC will emphasize the use of systemic enforcement. The SEP observes that harassment claims based on race, ethnicity, religion, age, and disability combined significantly outnumber sexual harassment claims.

3. Some Observations

A careful review of the SEP should convince most readers that the agency has embarked on an extremely aggressive agenda. In addition to announcing its intention to "move the law" to address some of the novel issues summarized above, EEOC is now firmly on record in favor of pursuing what might be called a "more bang for the buck" enforcement approach. The agency has brought several important class cases in recent months, including wide-ranging complaints against UPS and Cintas. The agency's description of its litigation objectives in these cases can be found here: http://www.eeoc.gov/eeoc/newsroom/release/1-17-13.cfm.

EEOC recently announced a significant settlement with Verizon in which the company entered into a consent decree following a broad-ranging complaint alleging that various practices violated the Americans With Disabilities Act.

Among the many challenges facing employers is the prospect that a "one-off" complaint filed with EEOC by a lower-level employee might turn into something much more significant. If a particular claim attracts the attention of EEOC investigators, perhaps because it raises issues under one of the six priorities summarized above, may well lead to a more comprehensive investigation by EEOC. Companies are right to be concerned that such charges may result in something resembling a "discrimination audit," in which the EEOC undertakes to conduct a broad investigation into the employer's overall hiring and employment practices, rather than simply resolving an individual incident. As the SEP highlights, certain policies that may give rise to a suspected systemic violation include background checks, automatic termination dates for persons out of work because of a disability, and pre-employment tests. While it is impossible to predict whether an employer will be targeted by the EEOC, employers should review their EEO-1 reports for discrepancies that might be red flags and should assess whether charges

brought by individual employees suggest that there is a larger pattern, such as multiple age discrimination claims relating to hiring or promotion.

The SEP confirms predictions made by Crowell & Moring about likely trends in employment litigation. A copy of our report is available on our website at http://www.crowell.com/files/Employment-Litigation-Forecast-Greater-Challenges-Ahead.pdf

B. Enforcement Actions -- Illustrative Examples

The agency's press releases further illuminate demonstrate its priorities. Examples of EEOC's description of recently filed lawsuits includes a particular emphasis on cases involving retaliation, harassment, and disability rights.

- EEOC v. Cal-Main Food (Texas) EEOC claims the employer violated Title VII by subjecting a black employee to a pattern of racial and sexual harassment and then firing him because he reported the harassment to company officials and then filed a charge with the EEOC. The EEOC asserts that the employee was subjected to racial harassment including, among other things, a pattern of extremely crude racial jokes and slurs. The complaint alleges that management and supervisory personnel knew of the discriminatory conduct but failed to take measures to prevent and correct the harassment.

- EEOC v. Olympia Construction (Alabama) EEOC alleges that the employer violated Title VII when its project superintendent and a supervisor racially harassed three African-American employees at a construction site. According to the EEOC's lawsuit, in 2011, the project superintendent and a supervisor routinely addressed and referred to its three black employees in racially derogatory language. After the employees complained to company owners and officials about the harassment, and informed them that they had contacted the EEOC, the company terminated their employment.

- EEOC v. Toys "R" Us (Maryland) EEOC claims that the company violated the ADA when it first refused to provide an interpreter for a deaf applicant and then failed to hire her. The woman communicates by using American Sign Language, reading lips and through written word. When the company contacted the applicant to attend a group interview, his mother advised the company that her daughter was deaf and requested the company to provide an interpreter for the interview. The retailer refused and said that if the applicant wished to attend a group interview in November 2011, then she would have to provide her own interpreter, the EEOC alleges. The applicant's mother interpreted for her during a group interview, but the company refused to hire her, despite her qualifications for and ability to perform the team member position, with or without a reasonable accommodation, the EEOC said in its lawsuit.

- EEOC v. Florida Commercial Security Services (Florida) EEOC claims that an asset protection security firm violated federal law by firing an employee because of his disability, a missing arm, and then punishing him for complaining about the discrimination. The EEOC had charged that Florida Commercial Security Services, Corp., doing business as Florida Construction Security Services (FCSS), terminated a guard for failing to wear his prosthetic arm, even though it was unnecessary, and then refused to assign him to another position because he filed a discrimination charge with the EEOC. According to the EEOC's suit, the guard applied for a position as a security officer with FCSS in July 2010. FCSS hired the individual for a driving post, and he was responsible for driving around a community association in a security vehicle. Following his first day of work, however, the president of the community association called FCSS and complained that FCSS "was a joke for sending them a one-arm security officer." Although the guard does not need his prosthetic arm to perform his job, and although FCSS never instructed him to wear it, FCSS removed him from the position immediately. Further, once the guard filed his discrimination charge, FCSS refused to assign him to another position, the EEOC said.

- EEOC v. Prestige Transportation Service, LLC (Florida). EEOC claims that a Miami-based transportation company violated federal law by subjecting African-Americans to race discrimination and retaliation. According to the EEOC's suit, the company refused to hire black applicants for employment, discriminated against a black employee, and retaliated against three employees for opposing race discrimination and/or filing a discrimination charge with the EEOC. Prestige primarily transports crew members of airlines between airports and their hotels. The EEOC said Prestige's management regularly told its human resources manager that it would be a "waste of paper" to give black persons employment applications, advised her not to give applications to African-Americans, and stated that "black people were trouble and would sue the company." In addition, Prestige singled out its one, non-Hispanic black employee by forcing her to leave early on a regular basis, while allowing Hispanic employees to work their full shifts. The lawsuit also claims that Prestige unlawfully destroyed or failed to keep records and documents related to employment applications, personnel records, and documents regarding rates of pay and other terms of compensation. Further, Prestige punished employees who opposed the company's unlawful practices, and fired three employees in retaliation for voicing their objections.

- EEOC v. Fidelity Engineering (Maryland) EEOC claim that a mechanical contractor violated the ADA when it fired a sheet metal mechanic because of his disability. Further, the company later unlawfully refused to rehire him because of his disability and in retaliation for filing a charge of discrimination, the agency

said. The employee worked for six years as a sheet metal mechanic when he developed endocarditis, an infection of the inner lining of the heart. He had valve replacement surgery in September 2010 and was medically released to return to work in January 2011. Despite his record of good job performance, the company refused to allow him to return to work because of his disability, the EEOC said. Instead, the employer fired him, stating in the termination letter, "[g]iven the nature of [his] job as a Sheet Metal Mechanic, it is too risky to allow [him] to return to [his] previous line of work." Fidelity Engineering also violated federal law when it failed to transfer Arteaga to a vacant position as a reasonable accommodation for his disability and instead terminated him, the EEOC said in its lawsuit.

- EEOC v. Camden Place Health & Rehab, LLC (North Carolina) EEOC alleges that the employer unlawfully refused to accommodate a disabled employee and subsequently discharged her because of her disability in a dispute over the consequences of exposure to second-hand smoke. According to the lawsuit, the company discriminated against a nursing employee with asthma. The complaint alleges that the employer began requiring all of its CNAs to supervise residents during scheduled smoking breaks. The employee found that the secondhand cigarette smoke that she inhaled while supervising these breaks aggravated her asthma. The complaint alleges that she complained repeatedly to her supervisors that the cigarette smoke was aggravating her asthma and that in July 2010, after a particularly severe asthma attack, she brought a note from her doctor to Camden Place and asked to be excused from supervising the smoking breaks. The complaint further alleges that Camden Place denied her request and that she was subsequently terminated for refusing to supervise the smoking breaks.

- EEOC v. Baptist Health South Florida (Florida) EEOC alleges that the hospital system violated the ADA when it refused a reasonable scheduling request from a newly hired physician with epilepsy. According to the EEOC's suit, the newly hired physician notified the hospital of her condition during an initial interview, advising hospital management that her condition required that she not exceed an eight-hour work day. Hospital management initially agreed to the scheduling request and, after she interviewed with other members of the Doctor's Hospital staff, the physician was ultimately hired. However, as soon as she began working, her pre-determined schedule was altered and management demanded that she work additional hours, which caused her health to rapidly deteriorate. The doctor consulted with hospital management and renewed her request for a reasonable accommodation in the form of a modified work schedule, but the request was denied. Within a few days, she was terminated.

- EEOC v. Presbyterian Healthcare Associates, Corp. (North Carolina). EEOC's lawsuit claims that employer violated the ADA by refusing to hire an applicant for a phlebotomist position because of an impairment to his left knee. According to the EEOC's complaint, the adversely affected employee received medical clearance, following surgery for a knee condition, to participate in a phlebotomist training program at a community college in Charlotte. As part of the program, the employee completed a seven-week phlebotomist internship with Presbyterian Healthcare. On completion of the program, he applied for and was offered a permanent position as a phlebotomist, pending a health screening exam. He disclosed the knee impairment during the health screening and provided Presbyterian Healthcare with his related medical records, and then the company rescinded its job offer. According to the EEOC, the employee was fully qualified for the position and could perform its duties, but was denied hire simply because Presbyterian Healthcare perceived him to be disabled as a result of his knee injury.

III. The National Labor Relations Board (NLRB)

A. Introduction - Not Your Father's NLRB

Many sophisticated companies, particularly in the technology industry and other "white collar" business sectors, tend to think of traditional labor as a historical artifact. You may work in a large company with a totally non-union work force, and may assume that labor unions are a "so 1980s problem" and that the NLRB is not a significant concern for sophisticated companies with top-level HR and legal talent. You might be wrong.

The NLRB has initiated a series of aggressive attempts to change certain aspects of traditional labor law that affect non-union employers. In some precincts, this has been an "under the radar" initiative, particularly for companies that routinely do not face traditional union organizing campaigns. Organized labor is supporting these initiatives, in part because of the failure to persuade Congress to pass the "card check" legislation introduced several years ago. *See* http://www.crowell.com/documents/Card-Check-Changing-the-Rules-for-Collective-Bargaining.pdf for a summary of that legislation. The next section summarizes some of these initiatives.

B. Employer Confidentiality Policies

Some readers might be surprised to learn that some of your company's more sophisticated practices, implemented to comply with other legal obligations, are now subject to attack for violating the Labor Management Relations Act (LMRA). An example is a company policy requesting employees not to discuss internal investigations undertaken by the company, where confidentiality is requested for legitimate reasons, including employee privacy concerns and other legal obligations.

One of the most controversial of the NLRB's recent decision is its July 30, 2012 decision in *Banner Health System,* 358 N.L.R.B. No. 93 (2012). Crowell & Moring's client alert on the decision can be found here: http://www.crowell.com/NewsEvents/AlertsNewsletters/all/NLRB-Rules-Against-Routine-Requests-for-Confidentiality-in-Ongoing-Employer-Investigations. In brief, the NLRB concluded in that case that the employer violated the LMRA by asking an employee who was the subject of an internal investigation to refrain from discussing the matter while the employer conducted the investigation. The 2-1 decision concluded that the employer had not demonstrated that confidentiality was actually necessary to further a legitimate business interest.

C. Social Media Policies

The NLRB has been particularly active in investigating social media policies adopted by employers. In its first published decision on the issue, the NLRB held, in *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012), that the retailer's social media policy violated the LMRA. The policy, like many such policies promulgated by employers in recent years, prohibited social media postings that damage the reputation of Costco or any person. The NLRB majority held that this prohibition was overly broad and had a reasonable tendency to inhibit employee activity that is protected under Section 7 of the LMRA. The LMRA broadly prohibits employer practices that "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," namely, to engage in concerted activities, including the right to make statements critical of an employer's treatment of its employees.

The disputed language concerning social media, set forth in Costco's "Electronic Communications and Technology Policy," prohibited employees from posting statements "electronically (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation," and warned that employees who violate the policy "may be subject to discipline, up to and including termination of employment."

Holding that "employees would reasonably construe this rule as one that prohibits Section 7 activity," the NLRB reasoned that the broad prohibitions set forth in Costco's policy "clearly encompass concerted communications protesting [Costco's] treatment of its employees," which are otherwise specifically protected under the NLRA. The NLRB further explained that there was no language in Costco's policy that provided an exception for protected communications, such as making critical comments about Costco or its managers. Under these circumstances, the Board held, "employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications." In invalidating Costco's social media policy, the Board referred to other workplace rules limiting employee communications that have been deemed unlawful, including a rule prohibiting "derogatory attacks" on an employer and its agents, and a rule prohibiting "negative conversations about associates and/or managers."

The Board's decision in *Costco* still leaves many unanswered questions about how broadly employers may limit employees' speech on social media without infringing on their Section 7 rights. This confusion has been exacerbated by a series of "Advice Memoranda" issued by NLRB Acting General Counsel Lafe Solomon. A link to a recent article by Chris

Calsyn of Crowell & Moring, entitled "Do's and Don'ts for Employer Social Media Policies," which provides a summary of this guidance can be found here: http://lexisnexis.com/in-house-advisory/fullArticle.aspx?Bid=62744.

The practical takeaway from these developments is that the NLRB has undertaken an extraordinary effort to parse and criticize provisions in employee handbooks and policy manuals that have been adopted by sophisticated employers in part to comply with other legal obligations. decisions in this area. As with the last generation of litigation over the permissible wording of employer no-solicitation and distribution rules (a battle that continues to rage in some industries), the NLRB's decisions are both extremely difficult to reconcile and a surprise to many of our clients.

D. Other Examples

The NLRB has been active in many areas other than attacks on policy manuals and confidentiality rules. Other examples include new rules on the following:

- micro-bargaining units;
- more people eligible to vote in NLRB elections;
- tougher rules generally on election campaigns; and
- some "game changing" decisions affecting leverage in collective bargaining.

A detailed discussion of these developments is beyond the scope of this paper. The preceding summary is intended to remind our readers, even those working in non-union environments, that it is still important to pay attention to developments in traditional labor law.

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