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Complying with Employment Regulations

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Understanding Key New Employment Regulations

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Introduction

In the last couple of years, new regulations affecting employment and labor law have proliferated, leaving employers struggling to keep up. This chapter is a summary and explanation of the major new regulations enacted or proposed since 2010.

The Dodd-Frank Wall Street Reform and Consumer Protection Act

On May 25, 2011, the Securities and Exchange Commission (SEC) released its rules implementing the bounty provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act enacted in July 2010.[1] The act specifically targets the financial services industry and makes wide-sweeping changes to the financial service industry's regulatory structure, but its bounty provision is one of the more controversial sections, representing a significant enhancement of the enforcement powers of the SEC.

Dodd-Frank's bounty provisions differ from most anti-retaliation laws in that they provide employees with a significant monetary incentive to report perceived misconduct. Like the federal False Claims Act,[2] and unlike Section 806 of the Sarbanes-Oxley Act, Dodd-Frank offers the possibility of substantial financial awards to employees who disclose corporate fraud to the government. Under Dodd-Frank, whistleblowers who provide information that leads to a successful SEC enforcement may receive 10 to 30 percent of the monetary sanctions over $1 million.[3]

Importantly, the rules do not require an employee to report the suspected fraud internally before contacting the SEC. This rule is disappointing to employers that have developed extensive compliance mechanisms to effectively conduct investigations and quickly address employee concerns regarding fraudulent behavior in response to increased requirements under Sarbanes-Oxley and other regulations.

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C.A. §§ 5301-5641 (West 2012).
[2] *See* 31 U.S.C.A. § 3729 (West 2012).
[3] 15 U.S.C. § 78u-6 (2010).

In an effort to address employers' concerns expressed during the notice and comment period, the SEC responded that it would take internal reporting into consideration in determining the size of whistleblower awards. Additionally, the SEC created a rule that provides that a whistleblower will be credited with all information the company provides to the SEC where the whistleblower first reports original information through a company's internal compliance channels, and the company then reports the information to the SEC.[4] The rules thus provide whistleblowers with incentives to use an employer's internal compliance program, but do not require them to do so.

Dodd-Frank prohibits retaliation, and whistleblowers need not actually be eligible for bounties to invoke the anti-retaliation provisions. The final rules, in contrast to the proposed rules, require a whistleblower to have a reasonable belief that the information he or she discloses relates to a possible securities law violation that has occurred, is ongoing, or is about to occur.

Additionally, the rules exempt certain employees from eligibility for an award, including attorneys, auditors, and internal compliance officers. However, these exemptions contain exceptions, which could nevertheless open employers up to reports of violations by their trusted advisors. An attorney, for example, may recover an award if the attorney-client privilege has been waived, or if disclosure is permissible under applicable state laws or ethics rules. Auditors and internal compliance officers, in turn, may qualify as whistleblowers if, among other things, they have a "reasonable basis to believe" that disclosure would prevent the employer from engaging in activity "likely to cause substantial injury to the financial interest or property of the [company] or investors."[5] These exceptions leave broad room for interpretation, and employers cannot be blamed for wondering if they all but eliminate protection against reporting by confidential advisors.

Concerns for Employers

Indeed, the new rules have the potential to significantly affect all employment relationships in the financial services industry. For example,

[4] 17 C.F.R. § 240.21F-4(b), (c) (2011).
[5] 17 C.F.R. § 240.21F-4(b)(4)(v).

Dodd-Frank's monetary incentives encourage employees to bypass internal compliance procedures. Additionally, the rules permit employees to submit complaints to the SEC anonymously, but require those who do to obtain counsel. This rule may make it more difficult for employers to address genuine performance problems for those whistleblowing employees who retain counsel. Also, because the SEC will reward "ongoing" cooperation with the commission, the new rules provide incentives for employees to act as agents for the SEC and enlist similar cooperation from fellow employees. Thus, employers' traditional expectations for employee behavior may be challenged by the framework established by the Dodd-Frank rules.

Dodd-Frank's bounty provisions may also be used by unscrupulous attorneys representing employees, who hope to earn a large fee by encouraging employees in the financial services industry to report information to the SEC in the hopes of receiving a percentage of the monetary amount awarded by the SEC. Because the employee is protected from retaliation by the employer, the employee's attorney may also use the threat of a report to the SEC as leverage when negotiating directly with the employer regarding severance or an alleged whistleblower violation. This may lead to a lot of information being reported to the SEC that is untrue and additional legal expense for employers that must then defend an SEC investigation.

The new Dodd-Frank rules provide a challenging regulatory landscape for the financial services industry, but employers are still rewarded for taking steps to cultivate a culture of compliance and prevention of violations before whistleblowing occurs with fewer incidents of reporting and better overall compliance. Employers should take preventive measures to promote internal compliance, including distributing their ethics and compliance policies and providing easily accessible avenues of communication for employees to report potential violations internally. Employers should further identify ways to encourage employees to make use of internal compliance procedures. Companies should consider establishing several methods of anonymous reporting, such as an anonymous e-mail address, an internal website, a toll-free telephone number, and even an ombudsman. Finally, employers should review their internal compliance systems, looking for ways to make investigations more efficient without compromising the quality of the investigation.

Preventive Measures

Human resources departments can also help promote internal compliance procedures and reduce the risk of whistleblower complaints. Specifically, human resources professionals can help prevent personality conflicts and other workplace disputes from becoming whistleblower activity. The human resources department can also be proactive in this area by exercising care when making hiring decisions, requiring background checks and references for employees in key positions. The whistleblower who has acted out of animus toward his or her supervisor often has a history of similar conduct or even a criminal record that would be detected by a careful pre-hire screening procedure. Finally, even after whistleblowing occurs, the human resources department can help the employer properly handle the complaint and not retaliate against the reporting employee. In those situations where discipline against a whistleblower is warranted, the human resources department should be careful to document its investigation thoroughly, support an adverse employment action with a detailed record, and make decisions in consultation with the company's attorneys. Coordinating the legal, human resources, and compliance personnel in an effort to respond quickly and effectively to compliance concerns will be a crucial focus for employers following the adoption of the new Dodd-Frank rules.

The Genetic Information Non-Discrimination Act

The Genetic Information Non-Discrimination Act (GINA) became law on May 21, 2008.[6] Title I of GINA addresses the use of genetic information in health insurance. Title II, which took effect November 21, 2009, prohibits the use of genetic information in employment, restricts employers from requesting, requiring, or purchasing genetic information, and strictly limits the disclosure of genetic information. All employers with more than fifteen employees must comply with GINA and the new regulations enacted by the US Equal Employment Opportunity Commission that clarify workplace compliance with the act.[7]

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[6] *See* 42 U.S.C. § 2000Ff-200Ff-11 (West 2012).

[7] The regulations are on the EEOC's website at www.eeoc.gov/laws/types/ genetic.cfm and in the Code of Federal Regulations. 29 C.F.R. §§1635.1-1635.12 (2011). The EEOC has also issued guidance on GINA, which can be found at www.eeoc.gov/laws/regulations.

The key to understanding the impact of GINA is acknowledging the broad definition of "genetic information" it provides. The act includes within the definition information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (i.e., family medical history). Genetic information, as defined by GINA, also includes an individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual. Also included in the definition is the genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

The inclusion of family medical history in GINA widens the reach of the act to include information that is easily obtainable, and employers screening job applicants should be careful not to ask questions that might be considered inquiries into family medical history. A job applicant's indication that there is a family history of a certain disease would make an employer susceptible to later claims of discrimination against that job applicant due to the genetic information disclosed. Employers also risk violating GINA, and other laws, by performing Internet and social media searches of job candidates. Searches of popular social media sites such as Facebook or LinkedIn may uncover genetic information and other information regarding a candidate's protected status, which an employer is often better off not knowing.

If employers do use social media to screen applicants, consistency is the key to managing the risk of refusal-to-hire suits. Employers become vulnerable if they are selective in picking which applicants to screen online, or if they evaluate the information found on certain applicants differently from that found on other applicants. When employers are made aware of an applicant's protected or personal information, they must be able to show that it did not influence their decision. To achieve this end, employers should have a non-decision-maker undertake social media or Internet background checks. While reviewing the content, only job-related criteria should be considered and communicated to decision-makers. Information that discloses or might reveal genetic information should be screened from

decision-makers. Careful documentation of the process is also important. Hiring managers should maintain records of the social networking tools used, their findings, and explanations of why an applicant was or was not considered or chosen for a particular job.

New Risks for Employers

Aside from the GINA-related risks involved in job applicant screening, the new risks for an employer during employment are numerous. For example, under GINA, an employer may not ask for a family medical history as part of a medical examination of a job applicant or employee. While the Americans with Disabilities Act permits an employer to conduct medical examinations after making a job offer or during employment, the examination may not include the collection of a family medical history. An employer must tell its healthcare providers not to collect genetic information as part of an employment-related medical exam, and, if it finds out that family medical histories are being collected, the employer must take measures within its control (including not using the services of that healthcare provider) to prevent this from happening in the future.

Similarly, employers commonly make requests for medical information when asking an employee to provide a medical certification for Family and Medical Leave Act leave or as part of the Americans with Disabilities Act interactive process. The regulations specify that employers must tell employees (using specific language) to not disclose protected genetic information when the employer requests medical information.[8] Not surprisingly, the regulations also require employers to maintain any genetic information obtained in a separate confidential medical file. Genetic information may be kept in the same file as other medical information.

GINA also forbids discrimination based on genetic information when it comes to all aspects of employment, including hiring, firing, pay, job

[8] The specific safe harbor language that should be included with any request for medical information to employees or their medical providers, provided at 29 C.F.R. §1635.8(b)(1)(i)(B) (2011), is as follows: "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information."

assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. Under GINA, it is also illegal to harass a person because of his or her genetic information. Harassment can include, for example, making offensive or derogatory remarks about an applicant's or employee's genetic information, or about the genetic information of a relative of the applicant or employee. Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, it does prohibit harassment that is so severe or pervasive that it creates a hostile or offensive work environment or when it results in an adverse employment decision.

Acquiring genetic information is generally prohibited by GINA, but the act does provide for six narrow exceptions to this prohibition:

1. Inadvertent acquisitions of genetic information do not violate GINA, such as in situations where a manager or supervisor overhears someone talking about a family member's illness, or when a supervisor receives genetic information in response to a question about an employee's general well-being.
2. Genetic information (such as family medical history) may be obtained as part of health or genetic services, including wellness programs, offered by the employer on a voluntary basis, if certain specific requirements are met.
3. Family medical history may be acquired as part of the certification process for Family and Medical Leave Act leave (or leave under similar state or local laws or pursuant to an employer policy), where an employee is asking for leave to care for a family member with a serious health condition.
4. Genetic information may be acquired through commercially and publicly available documents like newspapers, as long as the employer is not searching those sources with the intent of finding genetic information or accessing sources from which they are likely to acquire genetic information (such as websites and online discussion groups that focus on issues such as genetic testing of individuals and genetic discrimination).
5. Genetic information may be acquired through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace where the monitoring is required by law or, under carefully defined conditions, where the program is voluntary.

6. Acquisition of genetic information of employees by employers who engage in DNA testing for law enforcement purposes as a forensic lab or for purposes of human remains identification is permitted, but the genetic information may only be used for analysis of DNA markers for quality control to detect sample contamination.

Compliance and Defensive Measures

To ensure compliance with GINA, employers would be well advised to revise their equal employment opportunity statement to include a prohibition on discrimination based on genetic information, as well as ensure that their application forms or other employee information forms clearly express that they do not seek family medical history information. Finally, employers should ensure their communications to employees when requesting medical information include the Equal Employment Opportunity Commission rules' approved safe harbor language.

The NLRB's Union Election Rule

While implementation of the National Labor Relations Board's (NLRB) new notice posting requirement has been repeatedly pushed back, including most recently on April 17, 2012, the NLRB's final rule implementing significant changes to longstanding representation election procedures took effect on April 30, 2012. Only two weeks later, the U.S. District Court for the District of Columbia invalidated the rule because only two members of the NLRB participated in the final vote on the rule changes. On May 14, 2012, the D.C. court invalidated the rule because of the lack of participation by a full quorum; significantly, the court opined that "nothing appears to prevent a properly constituted quorum of the Board from voting to adopt the rule if it has the desire to do so." While representation elections are currently run under the old rules, the NLRB could well reinstitute the proposed new rules with a proper quorum in place, thus it is worth understanding the possible impact.

The new election rules were dubbed by critics as the "quickie" or "ambush" election rules, because they expedite the union election process. While the final proposed rule was less restrictive than the rule that was initially proposed, which included a provision requiring employers to provide union organizers with a list of employees' e-mail

addresses and phone numbers, it contained several substantial changes to the current representative election process.

Probably the most significant change proposed by the new rules is the limiting of pre-election regional hearings to issues relevant to the question of whether an election should be conducted, and allowing the hearing officer to exclude evidence regarding voter eligibility and other matters. The way things currently work is that when a representation petition is filed, the NLRB regional director schedules a hearing, normally seven days after the petition has been filed. This hearing is generally used to determine whether the proposed unit is appropriate, including determining whether certain employees should be included in the unit, and to establish the time, place, and procedures for the elections. Under the proposed new rule, this hearing would be limited to a determination of whether a question of representation exists.

Disputes concerning whether particular individuals or job categories should be included in or excluded from the unit would therefore be excluded from the pre-election hearing. However, the importance of making these determinations before the election should not be underestimated. For example, if individuals ultimately determined to be supervisors are actively involved in the employer's campaign, an election victory for an employer may be overturned because of such involvement if it is later determined that the supervisors should have been included in the new unit, and such activities may be the basis of unfair labor practice charges. Under the proposed new rule, the resolution of such issues would be postponed to post-election proceedings, which in some circumstances may be after a new unit is certified. Another consequence of postponing the determination of the appropriate bargaining unit is the increased likelihood that bargaining units that are small, easy to organize, and may even include supervisors will be certified.

Cautions for Employers

The ramifications of the proposed new election procedures to employers facing a union-organizing campaign should not be underestimated. Limiting pre-election regional hearings to issues relevant to the question of whether an election should be conducted only would seriously restrict the options

available to employers for opposing a union election petition. As it works now, employers that receive petitions for proposed units determine whether the unit proposed is appropriate, whether the unit should include more or fewer employees, and whether the proposed unit includes employees who should be excluded, such as supervisors.

All of the options available for arguing how the unit should be constituted are used as part of the employer's strategy to oppose the petition and then hopefully win the organizing campaign. If the proposed rule were adopted, all of these options would be taken away from the employer and all of these issues would be presented to the NLRB in a post-election petition. This would result in some employers that have legitimate objections to issues, such as whether the unit should include supervisors, having to litigate these issues after the union has won the organizing campaign. In these situations, the deck would be stacked against employers with legitimate objections.

Another significant change in election procedures that the proposed new rule would bring about is to allow hearing officers to decide whether and when to accept post-hearing briefs. Under the proposed rule, post-hearing briefs could only be filed upon special permission of the hearing officer, within the time set by the hearing officer, and addressing only the subjects permitted by the hearing officer. This change would have the effect of possibly precluding the submission of post-hearing briefs, which under current rules are allowed as a matter of right. Employers would then be limited to briefs or arguments submitted at the hearing, which significantly affects an employer's ability to respond to evidence presented at the hearing. With the proposed changes to the pre-election regional hearing rules and the limitations put on pre-election hearings, it will be more important than ever for employers to place the board on notice of any objections to the proposed unit prior to the election in order to preserve a post-election review. Such issues as whether supervisors should be included in the unit, whether the unit should include one or more facilities, and whether the proposed unit includes professional employees and non-professional employees should be raised with the regional director in writing prior to the election date. In addition, at the election, the ballots of any voters that should arguably be excluded from the unit should be challenged, since these votes may be determinative of the outcome of the election.

The possibility of post-election challenges may also result in the union stipulating to a consent election in which certain employees are excluded from the proposed unit. The regional director and the union will always push for a consent election whenever possible. The employer can use this as leverage to exclude members of the proposed unit, such as supervisors or professionals. The union will often be willing to agree to exclude voters with questionable eligibility in exchange for a consent agreement for an election covering the rest of the proposed unit.

Eliminated Elements

The proposed new election rule also eliminates a party's right to file with the NLRB a pre-election request to review a regional director's decision and direction of election, deferring all such requests until after the election. This proposed change has two related effects. First, under the current rules, a party who is unhappy with a pre-election decision by the NLRB regional director is required to file an appeal to the NLRB to preserve the issue. The NLRB has discretion over whether to accept the appeal. This review right would be eliminated under the new rule. The second related effect is that all pre-election disputes would be decided only after the election is held, and such disputes would be combined with any issues that arise during the post-hearing/pre-election period or at the election itself. The possibility of invalidating an already-conducted election would bring with it significant ramifications for both employees and employers who have invested in the election and its outcome.

Possibly the most significant change wrought by the proposed new rule is the elimination of language in the NLRB's statement of procedure recommending that a regional director should not schedule balloting within twenty-five days of directing an election. Eliminating the twenty-five-day waiting period would allow for more immediate scheduling of representation elections, and the regional director would have practically unfettered discretion to do so.

Two scheduling and timing rules would remain unaltered by the proposed new rule, however. First, employers would still be required to post a notice of the election at the worksite at least three working days prior to the election. Second, employers would still be provided a list of the eligible

employees' names and addresses to the union within seven working days after the direction of the election. Under the proposed new rule, these would appear to be the only limitations on scheduling the election imposed on the regional director.

These potential changes to the NLRB's election procedures appear to be an effort by the board to bring representation petitions to election much more quickly than in the past. The explanation of the possible election process changes on the NLRB's website indicates that the board's focus is to reduce unnecessary litigation, particularly where the issues in dispute might concern only a small number of employees, and might, in the past, have been litigated at great length and expense to the parties.

The board's goal is to conduct elections in less time and to allow employees to exercise their rights under the National Labor Relations Act as quickly as possible. For employers, however, the potential impact cannot be overstated. Employers have a right to have supervisors excluded from bargaining units and to make sure bargaining units are organized properly to include only employees with a common community of interests. The proposed new election procedures steamroll over the employer's rights. It will be interesting to see whether these new rules, if ever implemented, will make it easier for unions to successfully organize employees or result in an increase in organizing activity.

The Department of Labor's Proposed Persuader Activity Rule

The Department of Labor has issued its own contribution to the ever-widening labor-management contest by proposing a rule change that commentators feel is designed to strengthen union organizing efforts. The proposed rule seeks to revise the interpretation of "advice" as it pertains to the employer and labor relations consultant persuader reporting requirements of Section 203 of the Labor-Management Reporting and Disclosure Act.[9] The new interpretations will impose new obligations on employers, labor relations consultants, and law firms to file disclosure reports when they are retained to "persuade" employees about whether to accept unionization.

[9] 29 U.S.C.A. § 433 (West 2012).

Under the proposed rule, an agreement with a consultant would be reportable in any case where the consultant engages in persuader activities that go beyond the plain meaning of "advice."[10] Reportable persuader activities would include those in which a consultant engages in any actions, conduct, or communications on behalf of an employer that would directly or indirectly persuade workers concerning their rights to organize and bargain collectively, regardless of whether the consultant has direct contact with workers. An agreement also would be reportable in any case in which a consultant engages in specific persuader actions, conduct, or communications regardless of whether advice is given, such as when a consultant plans or orchestrates a campaign or program to avoid or counter a union organizing or collective bargaining effort.

Because employers often turn to labor lawyers or other outside consultants for advice or guidance with regard to union-organizing activities, the new Department of Labor rule is potentially quite burdensome for employers and their consultants. Reports will be required for activities that have heretofore been not reportable, including proposing or drafting employer policies with an objective of remaining union-free, coaching or counseling supervisors about how to deal with employees in a union campaign setting, or providing informational materials to employers for consideration and distribution to employees concerning issues pertaining to union representation. Potentially, even seminars aimed at educating employers about how to remain union-free could trigger the duty to report under the new regulations.

Conclusion

The new employment and labor regulations bring with them significant changes to the regulatory landscape. While some, like GINA, appear only to append a new category to existing statutes and regulations, others, like the NLRB election rule, completely upend existing procedures and regulations. In the case of all of these regulations, employers are well served to consider the ramifications at every level of their compliance systems, and to train their employees in the new world of regulation compliance.

[10] The proposed rule applies to regulations at 29 C.F.R. §§ 405, 406 (2012).

Key Takeaways

- Take a proactive stance with preventive measures aimed at promoting internal compliance. This includes ensuring that the company's ethics and compliance policies are thoroughly distributed to all employees and management, and the lines of communication are open to everyone, making it easy and safe to report potential violations. Identify and create ways for employees to implement internal compliance procedures, and encourage their use. Also protect anonymity from several angles, including e-mail, an internal website, and a toll-free telephone number.
- Involve human resources in promoting internal compliance by reducing workplace conflicts and possible retaliatory actions by employees and employers. Human resources must be cautious when making hiring decisions: require background checks and references for key positions. Look for a history of negative conduct in applicants that could turn into whistleblower activity and/or false accusations by disgruntled employees.
- Human resources must establish procedures for disciplinary actions, especially when dealing with a whistleblower, to ensure all actions are warranted and cannot be labeled as retaliatory. Thoroughly document all investigations, create detailed records of adverse employment actions, and consult the company's attorneys in making decisions.
- Carefully prepare the screening process for job applicants so no questions are asked that could be mistakenly considered inquiries into family medical history. Prevent, whenever possible, the chance of learning details that could lead to claims of discrimination against job applicants.
- Establish guidelines for conducting searches of social media sites to handle any genetic or family medical history information uncovered unintentionally, which the employer does not need to know, and which may be prohibited by GINA. Make sure of consistency in screening practices and how applicant information is evaluated. Document all steps and decisions to prove that protected or personal information did not influence decisions. This includes separating the background checks and ensuring they are not

conducted by decision-makers. Take care that only job-related criteria is considered and communicated to decision-makers.

- Tell the company's health care providers not to collect genetic information in employment-related medical exams. If the information is collected despite orders, establish procedures to prevent this from happening again, including terminating the healthcare provider's services.

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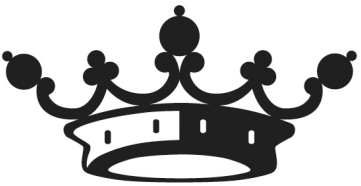

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