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Agencies Release Spring 2013 Regulatory Agendas; Final Persuader Rule Expected in November

by Ilyse Schuman and Michael Lotito

Federal agencies have released their spring 2013 regulatory agendas outlining the rules they will likely propose or issue in final form during the next six-month period. While agencies often stray from their stated goals and deadlines, the agendas provide a glimpse of the issues and topic areas agencies such as the Department of Labor (DOL), Equal Employment Opportunity Commission (EEOC), and Department of Health and Human Services (HHS) consider priorities. The latest agenda reveals that the Obama administration plans to further its aggressive rulemaking plans over the coming months and that employers should prepare for significant developments ahead. Among the items listed for final regulatory action is the proposal by the DOL to dramatically change the “advice” exemption to persuader reporting requirements under the Labor-Management Reporting and Disclosure Act (LMRDA). Highlights from the agendas are as follows:

Department of Labor

There are 68 items on the DOL’s spring 2013 regulatory agenda.¹ Of these items, the DOL plans to issue 31 final rules and 26 proposed rules in the coming months. The remaining entries in the DOL’s agenda are at the pre-rule stage. Details about some of these regulatory items are outlined below.

Office of Labor-Management Standards (OLMS)

- **Persuader Agreements.** By November 2013, the OLMS intends to issue its controversial final rule—Employer and Labor Relations Consultant Reporting under the LMRDA—that would broaden the scope of reportable activities by substantially narrowing its interpretation of the “advice exemption” in Section 203(c) of the LMRDA. This final rule would greatly expand the types of employer activity and legal advice in conjunction with a union organizing campaign that would trigger the LMRDA reporting requirement. If finalized, the rule could have a drastic impact on the confidential nature of the attorney/client relationship.

¹ A complete list of the DOL’s spring 2013 agenda can be found [here](#).

- **Consultant Reporting.** By June 2014, the agency plans to issue a proposed rule governing persuader agreement consultant Form LM-21: Receipts and Disbursements Report. Section 203(b) of the LMRDA requires this form. The proposal would mandate that the forms be filed electronically.

Wage and Hour Division (WHD)

- **Companionship Exemption.** According to the agenda, the WHD plans to issue a final rule this month that would apply the Fair Labor Standards Act (FLSA) to domestic service workers. A proposed rule extending FLSA overtime and minimum wage requirements to domestic caregivers was issued in December 2011.
- **Right to Know.** The agency's plan for a "Right to Know" rulemaking continues to be listed on the WHD's long-term agenda with no target date. However, the agency recently solicited comments on a proposed worker misclassification survey that could be used to promulgate the rule. This rule is expected to update the recordkeeping regulations under the FLSA "in order to enhance the transparency and disclosure to workers of their status as the employer's employee or some other status, such as an independent contractor, and, if an employee, how their pay is computed" and to "clarify that the mandatory manual preparation of 'homeworker' handbooks applies only to employers of employees performing homework in the restricted industries."

Occupational Safety and Health Administration (OSHA)

Health and safety-related rules once again dominate the DOL's regulatory agenda. OSHA alone intends to issue nine final and nine proposed rules in the next six months. The remaining eight items on OSHA's agenda are at the pre-rule stage of development. These items include the following:

- **Whistleblower Rules.** By the end of this year, the agency plans to issue rules for handling whistleblower complaints under section 806 of the Corporate and Criminal Fraud Accountability Act of 2002. By April 2014, OSHA intends to issue its final whistleblower rules under the Consumer Financial Protection Act; the Seaman's Protection Act; the Affordable Care Act; and the FDA Food Safety Modernization Act.
- **Final Safety Rules.** By the end of this year, OSHA plans to issue final rules governing: confined spaces in construction; electric power transmission and distribution; electrical protective equipment, and walking working surfaces and personal fall protection systems (slips, trips, and fall prevention).
- **Injury and Illness Prevention Program (I2P2).** OSHA plans to issue a proposed rule on the I2P2 by January 2014. The agency describes the I2P2 as the prototype for its Plan/Prevent/Protect strategy. A proposed rule on this program will require employer "planning, implementing, evaluating, and improving processes and activities that protect employee safety and health." Although details of the proposed rule are unknown at this time, the sweeping proposal could dramatically alter employers' health and safety obligations and their own programs already in place to enhance workplace safety.
- **Proposed Rules.** This month OSHA plans to issue a proposed rule governing occupational exposure to crystalline silica. A similar rule for occupational exposure to beryllium is planned for an October 2013 release.
- **Long-Term Actions.** OSHA's plans to issue a rule developing standards for occupational exposure to food flavorings containing diacetyl and diacetyl substitutes, as well as its controversial plan to add a musculoskeletal disorder (MSD) column to OSHA's recordkeeping and reporting Form 300 Log, once again appear to be placed on the regulatory back-burner. Both items are listed on OSHA's long-term agenda with no set release date.²

Office of Federal Contract Compliance Programs (OFCCP)

The OFCCP plans to finalize proposals that would impose sweeping and costly new obligations on the government contractor community.

- **Affirmative Action.** The OFCCP intends to issue several proposed and final rules amending current affirmative action requirements for various employers. This month, the OFCCP plans to issue final rules regarding a contractor's and subcontractor's affirmative action

² The DOL's long-term agenda items can be found [here](#).

and nondiscrimination obligations towards protected veterans under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) and revise the nondiscrimination and affirmative action requirements for federal contractors and subcontractors regarding individuals with disabilities. The final change to the regulations with respect affirmative action for individuals with disabilities, if similar to the proposed rule, would impose significant and costly burdens on government contractors, including establishing a 7% utilization goal for the employment of individuals with disabilities. By October of this year, the OFCCP plans to issue a proposed rule that would update a construction contractor's affirmative action requirements.

- **Compensation Data Tool.** By the end of this month, the OFCCP is also slated to issue a proposed rule that would create a compensation data collection tool "to identify contractors likely to violate" sex- and race-based compensation discrimination laws and "could play a key role in OFCCP's establishment-specific, contractor-wide, and industry-wide analyses." It remains to be seen whether the OFCCP adheres to this target date.
- **Sex Discrimination Guidelines.** By November 2013, the agency is scheduled to issue proposed rules that would revise sex discrimination guidelines for federal contractors and subcontractors. According to the agency, because current sex discrimination guidelines have not been updated in more than 30 years, they warrant a "regulatory lookback."

Employee Benefits Security Administration (EBSA)

- **Healthcare.** This month, the EBSA plans to issue a final rule governing coverage of preventive services under the ACA for group health plans and health insurance issuers. By the end of 2013, the EBSA, in conjunction with other federal agencies, intends to issue a final rule on the 90-day waiting period limitation and technical amendments to certain health coverage requirements under the ACA.
- **Mental Health.** By October, the EBSA plans to issue some regulatory guidance on the Mental Health Parity and Addiction Equity Act.
- **Pension Plan Disclosures.** By October 2013, the agency intends to issue a final rule governing pension plan annual funding notices, and by November a rule addressing target date disclosures.
- **Fiduciary.** The EBSA once again intends to issue a proposed rule to amend the regulatory definition of the term "fiduciary" under ERISA when providing investment advice to retirement plans and other employee benefit plans. After withdrawing the initial proposal, the EBSA in September 2011 announced that it had decided to re-propose this rule.

Equal Employment Opportunity Commission (EEOC)³

- **Disability.** By March 2014, the EEOC plans to issue proposed rules that would revise procedures for filing complaints or charges of employment discrimination based on disability subject to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. As discussed in the agenda, the EEOC "has a joint regulation with the Department of Justice (DOJ) to explain how Federal agencies that provide financial assistance should process disability-based employment discrimination complaints/charges against entities subject to both title I of the Americans with Disabilities Act, as amended (ADA) (prohibiting disability-based employment discrimination by employers with 15 or more employees), and section 504 of the Rehabilitation Act (Section 504) (prohibiting disability-based discrimination in programs or activities receiving Federal financial assistance). This proposed rule would amend this joint regulation to revise the definitions of certain terms and clarify the procedures for referring these complaints/charges between agencies with responsibility for enforcing title I of the ADA and section 504." Similarly, the EEOC plans to issue proposed rules that would revise the procedures for handling complaints/charges of employment discrimination based on disability filed against employers holding government contracts or subcontracts, as well as complaints filed against recipients of federal financial assistance.

Health and Human Services (HHS)⁴

- **Healthcare.** The HHS, in conjunction with the EBSA and the IRS, plans to issue a number of rules related to the Affordable Care Act. Some of these final and proposed rules are discussed elsewhere in this article. In addition, by the end of 2013, the HHS plans to issue

³ The EEOC's spring 2013 regulatory list can be found [here](#).

⁴ A complete list of items on the HHS's regulatory agenda can be found [here](#).

a proposed rule that would implement prohibitions against discrimination on the basis of race, color, national origin, sex, age, and disability, as provided in section 1557 of the Affordable Care Act.

- **Mental Health Privacy.** By October of 2013, the HHS is scheduled to issue a rule finalizing an interim final rule that implements the Mental Health Parity and Addiction Equity Act of 2008. “This rule requires parity between mental health or substance use disorder benefits and medical/surgical benefits with respect to financial requirements and treatment limitations under group health plans and health insurance coverage offered in connection with a group health plan.”

Internal Revenue Service (IRS)⁵

- **Final ACA Rules.** By December 2013, the IRS plans to issue a final rule governing the shared responsibility “pay-or-play” employer provisions under the Affordable Care Act. By September of this year, the IRS intends to issue a final rule on the shared responsibility payment for failing to provide minimal essential health coverage under the ACA. The Obama administration recently announced that it would delay by one year the implementation of the pay-or-play health insurance mandate.
- **Proposed ACA Rules.** By the end of 2013, the IRS plans to issue proposed regulations requiring health insurance issuers, self-insured employers, and governmental agencies to report minimum essential coverage provided to individuals. By December 2013, the IRS also plans to issue its proposed rule under section 6056 of the Internal Revenue Code, as enacted by the ACA, requiring covered large employers to file certain information with the IRS on coverage under an eligible employer-sponsored health plan and furnish the information to individuals. Also by the end of the year, the IRS intends to issue proposed regulations that “provide guidance under sections 4375 to 4377 of the Internal Revenue Code, as added by section 6301 of the Patient Protection and Affordable Care Act, on fees imposed on health insurance and self-insured health plans.”

National Labor Relations Board (NLRB)

While the validity of the composition of the Board is under question and awaiting Supreme Court resolution, the NLRB announced that it continues to consider additional broad changes to union election rules. The NLRB agenda lists the so-called “ambush election” rule as a “long term action” with no definite date for finalization. The final election rule, which initially took effect on April 30, 2012, was ruled invalid by the U.S. District Court of the District of Columbia. The Board, which has appealed the ruling, states that it is “continuing to deliberate” on the rest of the proposed amendments.

What This Means for Employers

The most recent regulatory agenda holds no real surprises. Rather, it is confirmation that the Obama administration is intent on pursuing rulemaking to achieve its ambitious workplace policy agenda. With the congressional logjam on controversial legislative changes to labor and employment law likely to continue for the remainder of the 113th Congress, the focus of attention will be on the agencies. Employers should not lose sight of the fact that significant new obligations could come from the regulators if not Congress. This latest insight into upcoming rulemaking activity indicates that employers’ understanding of and preparation for these developments is more important than ever.

[Ilyse Schuman](#), a Shareholder in the Washington, D.C. office, and [Michael Lotito](#), a Shareholder in the San Francisco office, are Co-Chairs of Littler Mendelson’s Workplace Policy Institute (WPI). WPI is devoted to developing and influencing workplace legislative and regulatory developments at the federal and state levels. WPI provides the employer community with advocacy services, including litigation support. In addition, WPI closely monitors important labor, employment, and benefits policy initiatives and provides clients, trade associations, and policymakers with timely and thoughtful analysis of the practical implications of such proposals. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Ms. Schuman at ischuman@littler.com, or Mr. Lotito at milotito@littler.com.

5 A complete list items on the IRS’s agenda can be found [here](#).