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Workplace Policy Institute: Regulatory Agenda Update

by Ilyse Schuman and Michael Lotito

On December 21, 2012, federal agencies released their long-awaited unified agendas and regulatory plans for 2012. Under the Regulatory Flexibility Act, federal agencies are required to publish semi-annual lists of economically significant regulations under development, with the first publication in April and the second in October. Agencies must also disclose a unified agenda of regulations under development or review to the Office of Management and Budget, which then publishes a complete list of the regulations. However, administrative agencies failed to publish a spring agenda and delayed the newly released Fall 2012 agenda until well past the October deadline, likely holding off on the publications in order to avoid stirring up political controversy during the election cycle.

Although many of the target dates for rulemaking identified in the delayed release are now out of reach, the agencies' release nonetheless provides a valuable roadmap for the likely regulatory agenda for 2013. As Littler's Workplace Policy Institute predicted in its post-election ASAP¹ on the impact of the 2012 presidential election on labor, employment, and benefits policy, the newly released agenda includes items from the U.S Department of Labor (DOL), National Labor Relations Board (NLRB), and Equal Employment Opportunity Commission (EEOC) and shows a strong focus on enforcement from each of these agencies. This regulatory activity has taken on particular importance in light of the likelihood that legislative gridlock will continue to prevent significant workplace legislation from being enacted before the mid-term elections.

Below is a summary of the highlights of the agencies' unified agendas and regulatory plans for 2012. In addition to the regulatory items included in this agenda, agencies are widely expected to issue additional regulations under the Patient Protection and Affordable Care Act. This long-awaited guidance will be critical for employers as they undertake intensive efforts to comply with the new law's requirements and as they evaluate their options with regard to the provision of health insurance for employees.

1 See Ilyse Schuman and Michael Lotito, [How Will the 2012 Election Results Impact Labor, Employment and Benefits Policy?](#), Littler ASAP (Nov. 7, 2012).

The Federal Regulatory Agenda for 2012

Department of Labor (DOL)

According to the DOL's Fall 2012 [statement of regulatory priorities](#), the agency will continue, pursuant to its "[Plan/Prevent/Protect](#)"² regulatory and enforcement strategy, to pass regulations requiring businesses to establish and enforce plans for identifying and remedying labor law violations. According to "Plan/Prevent/Protect," employers failing to take these steps "to comprehensively address the risks, hazards, and inequities in their workplaces will be considered out of compliance with the law and, may be subject to remedial action." The DOL's agenda includes both a [list of rules to be considered in the coming months](#) and a [list of more long-term regulatory items](#).

Within the DOL, the Occupational Safety and Health Administration (OSHA), Mine Safety and Health Administration (MSHA), Office of Federal Contract Compliance Programs (OFCCP), Employee Benefits Security Administration (EBSA), Office of Labor-Management Standards (OLMS), and Wage and Hour Division (WHD) all proposed specific regulatory actions furthering the DOL's implementation of its Plan/Prevent/Protect strategy.

Occupational Safety and Health Administration (OSHA)

The majority of items on the DOL's agency rule list address worker safety and health. OSHA's regulatory list includes 10 regulations at the final rule stage, 10 at the proposed rule stage, five items at the pre-rule stage, and an additional two rulemaking items identified as longer-term priorities. Among the highlights of the anticipated OSHA regulatory items are:

- **Infectious Diseases.** OSHA is in the [process of determining whether additional regulations are needed](#) to address worker exposure to infectious diseases in healthcare and other related high-risk environments. According to the agency's statement of priorities, "OSHA is interested in all routes of infectious disease transmission in healthcare settings not already covered by its bloodborne pathogens standard (e.g. contact, droplet, and airborne)." In particular, OSHA expresses its concern that incomplete adherence to voluntary infection control measures is resulting in the transmission of infectious diseases to both patients and healthcare workers.
- **Injury and Illness Prevention Program (I2P2).** OSHA is [developing a rule](#) requiring employers to implement an Injury and Illness Prevention Program. A proposed rule on this program, which is scheduled to be issued by the end of 2013, "will explore requiring employers to provide their employees with opportunities to participate in the development and implementation of an injury and illness prevention program, including a systematic process to proactively and continuously address workplace safety and health hazards." The proposed I2P2 includes ergonomics among the hazards to be identified and mitigated by the newly required safety and health program.
- **Recordkeeping Requirements.** OSHA will consider requiring employers to submit data required under OSHA's injury and illness reporting requirements electronically. However, the [proposed rule](#) only impacts transmission of the required data, not the recording criteria.
- **Whistleblower Protection.** OSHA proposes issuing procedural rules (available [here](#), [here](#), [here](#), and [here](#)) for the filing of whistleblower complaints under eight of the statutes with whistleblower protections that are enforced by the agency. The procedural rules are intended to provide specific timeframes and guidelines regarding the filing of complaints with OSHA, issuance of an agency finding, appeals, and remedies.
- **Risk Reduction.** The agency is in the early stages of drafting rules (available [here](#) and [here](#)) related to combustible dust hazards, crystalline silica, and beryllium.
- **Long-Term Rulemaking.** The agency has [relegated the development of standards](#) addressing occupational exposure to food flavorings containing diacetyl and diacetyl substitutes to a longer-term priority. The [controversial plan to add a musculoskeletal disorder \(MSD\) column](#) to OSHA's recordkeeping and reporting Form 300 Log is also now considered a longer-term regulatory proposal.

2 See Jay Sumner, Van Goodwin, Mary Sharp, and Antonio Robinson, "[Plan/Prevent/Protect](#)": *The DOL's Program to Transform Employment Law Compliance for Business*, Littler ASAP (May 5, 2010).

Office of Federal Contract Compliance Programs (OFCCP)

- **Affirmative Action Requirements.** The OFCCP intends to issue a host of proposed and final rules amending current affirmative action requirements for various employers. In mid-late 2013, the OFCCP is scheduled to issue proposed rules that would [increase construction contractor affirmative action requirements](#), and regulations 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.”
- **Affirmative Action and Nondiscrimination Obligations Regarding Protected Veterans and Protected Individuals with Disabilities.** By April 2013, the OFCCP also [plans to issue final rules](#) that would amend regulations regarding a contractor’s and subcontractor’s affirmative action 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. With regard to veterans, the new rule would amend the regulations to require that federal contractors and subcontractors conduct more substantive analyses of recruitment and placement efforts, including the use of benchmarks to measure the effectiveness of affirmative action efforts. With regard to individuals with disabilities, the rule would similarly require more substantive analysis of recruitment and placement efforts and efforts to better measure the effectiveness of affirmative action efforts. Both rules would also introduce new recordkeeping requirements.
- **Compensation Data Collection Tool.** By June 2013, the OFCCP [intends 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.

Employee Benefits Security Administration (EBSA)

Several proposals on the EBSA agenda are intended to “expand disclosure requirements, substantially enhancing the availability of information to employee benefit plan participants and beneficiaries and employers, and strengthening the retirement security of America’s workers.” The EBSA, in conjunction with other federal agencies, also intends to continue issuing guidance implementing the health reform provisions of the Affordable Care Act.

- **Definition of “Fiduciary.”** The EBSA [plans to re-propose a rule](#) by July 2013 that would clarify who is a “fiduciary” under the Employee Retirement Income Security Act (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.³
- **Pension Plan Disclosures.** The agency [intends to issue a final rule](#) addressing the requirement that administrators of defined benefit pension plans annually disclose the funding status of their plan to the plan’s participants and beneficiaries. The EBSA also [intends to amend disclosure requirements](#) applicable to plan investment options, including Qualified Default Investment Alternatives, “to better ensure that participants understand the operations and risks associated with investments in target date funds.”
- **Lifetime Income Option.** As discussed in the statement of priorities, the EBSA is in the early stages of [developing a proposed rule](#) under ERISA section 105 “relating to the presentation of a participant’s accrued benefits; i.e., the participant’s account balance, as a lifetime income stream of payments, in addition to presenting the benefits as an account balance.”
- **Healthcare.** Among other rules, the agency [plans to develop regulations](#) relating to contraceptive coverage under the new health care reform law for group health plans and health insurance issuers. While the regulatory agenda sets December 2012 as the target release date, the agency has publicly estimated that this rule will be released in early 2013.

Office of Labor-Management Standards (OLMS)

- **Persuader Agreements - Employer and Labor Relations Consultant Reporting Under the LMRDA.** By April 2013, the OLMS [intends to issue a controversial final rule](#) that would broaden the scope of reportable activities by substantially narrowing the “advice exemption” to the reporting obligations contained in Section 203(c) of the Labor Management Reporting and Disclosure Act (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.

³ See Ilyse Schuman, [EBSA to Re-Issue Proposed Rule Re-Defining “Fiduciary” Under ERISA](#), Littler’s Washington D.C. Employment Law Update (Sept. 19, 2011).

Wage and Hour Division (WHD)

- **FLSA Exemption for Domestic Service (Companionship).** By April 2013, the WHD [intends to issue a final rule](#) applying 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 2011.⁴
- **“Right to Know” Under the FLSA.** This [rule would amend the recordkeeping regulations](#) under the FLSA by requiring that employers disclose workers’ status (e.g., independent contractor or employee) and, for employees, to disclose the manner in which compensation is calculated. The rule would also “clarify that the mandatory manual preparation of ‘homeworker’ handbooks applies only to employers of employees performing homework in the restricted industries.” The agency’s plans for a “Right to Know” rulemaking seems to be put on hold indefinitely, as it continues to be listed on the WHD’s long-term agenda with no target date.

Equal Employment Opportunity Commission (EEOC)

The EEOC does not have any major regulatory items lined up for consideration. The agency still [intends to issue a proposed rule](#) that would update its race and ethnicity data collection method to conform with current reporting instructions for the EEO-1 Report, making employee self-identification the preferred method for collecting race and ethnic data on employees. It also plans to develop a proposed rule revising procedures for complaints or charges under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973.

A complete list of its rulemaking items can be found [here](#).

National Labor Relations Board (NLRB)

The agenda makes no mention of the NLRB’s controversial notice posting regulation,⁵ which is currently being challenged in court. The agenda does, however, include the NLRB’s so-called “ambush election” rule as a “long term action” with no definite date for finalization. The election rule, which initially took effect on April 30, 2012, is also currently subject to legal challenge and has been temporarily suspended pending the outcome of that litigation.⁶

What This Means for Employers

As the 113th Congress begins, the legislative logjam that characterized the 112th Congress is likely to continue with respect to labor and employment law. Accordingly, the administration will turn to the agencies to advance its workplace agenda. President Obama’s second term in office could hold even more dramatic changes for employers than his first term. The recently released regulatory agenda is evidence of the scope and ambition of these efforts. The regulatory agenda for 2013 suggests that employers should begin now to prepare for significant changes in workplace reporting, monitoring, and other compliance obligations.

[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 motito@littler.com.

4 See Ilyse Schuman, DOL Proposes to Extend Minimum Wage, Overtime Requirements to In-Home Care Workers, Littler’s Washington D.C. Employment Law Update (Dec. 15, 2012).

5 See Gavin Appleby and Tracy Stott Pyles, [NLRB Issues Final Rule Requiring Employers to Post a Notice Informing Employees of Their Rights Under the NLRA](#), Littler ASAP (Aug. 30, 2011). See also Stefan Marculewicz and Gavin Appleby, [Federal Court Partially Invalidates NLRB Notice Post Rule, Rejects First Judicial Attempt to Contest Board Recess Appointments](#), Littler ASAP (Mar. 5, 2012).

6 See Tom Dowd, [Pick Up the Pace: New NLRB Regulations Force Employers to Respond More Quickly to Election Petitions](#), Littler ASAP (May 1, 2012). See also Stefan Marculewicz, [NLRB Suspends Implementation of New Representation Election Rule](#), Littler’s Labor Relations Counsel (May 15, 2012).