Five Quick Tips to Assess Your Employment Risks

It can be daunting to keep up with the numerous employment laws. Often it is hard to know where to begin to assess risk. Here are five quick tips:

- **Check Your Leave of Absence Protocols**. How many supervisors are handling information from medical providers relating to health information? That number should be zero. This should go through HR or a single point person and supervisors should be on a need to know basis, such as knowing an employee's job limitations. Are you designating workers' compensation leaves of absence as FMLA leave when appropriate? Do you have a process in place to communicate with employees to confirm their return to work date before FMLA ends? Doing so will enable you to start the ADA interactive process if additional time is requested. Most critically, do you have appropriate documentation of what was discussed with the employee and what action was considered and taken? Paper is king.
- **Check your Accommodation Process.** Short of undue hardship, you have a duty to accommodate employees with disabilities and those with religious needs. Deciding what is and is not an appropriate accommodation is a separate analysis from an undue hardship analysis. Speaking with the employee is key. Many claims of discrimination arise from an employer cutting short the accommodation process because of a perception that the employee is not fulfilling his or her obligations. There are certainly cases where, despite your best efforts to provide accommodation, this cannot be done because of the employee's unwillingness to cooperate. And in that case, you may disengage from the process. However, an assessment of an employee's lack of cooperation will always include a critical assessment of the sequence of events that preceded the breakdown in the accommodation process. If your accommodation process is inflexible, punitive, or not carried out in good faith, a court might find that the employee's actions were reasonable and that it is you who has failed in your duty to accommodate. In addition, there is no doubt that you have to spend some effort to accommodate an employee's needs. Some degree of hardship is to be expected – hence the test is "*undue* hardship" rather than "mild hardship" or "reasonable hardship." You should only conclude that an accommodation request will amount to undue hardship after careful and careful consideration of all elements of the request, your ability to meet it, and consultation with legal counsel. Again, documentation is key.
- **How Are You Doing in Keeping Track of Hours Worked?** Florida is a hot bed of wage and hour litigation. Ensuring proper documentation of hours worked can go a long way toward defending many of these claims. Is record keeping electronic or manual? Are you using automatic meal break deductions? Do you have a policy addressing non-exempt employees working after scheduled hours in light of the prevalence of electronic devices and the ability to work remotely, including the checking of emails?
- **Review Your Termination Process.** It is crucial that documentation be reviewed. Look for consistency in performance reviews and reasons for termination. Reasons for termination should not shift and should be legitimate business reasons. Ensure that an effective investigation precedes every termination, including an opportunity for the employee to tell their side of the story. Be careful when speaking to terminated employees. It is not unusual for a terminated employee to record such conversations in an attempt to get you to make admissions for use in litigation. Remember that at-will employment is not a fail-safe and is not a defense to claims of discrimination, harassment, retaliation, interference with protected leave, whistleblowing activities, union activity, enforcing wage rights and so on. If the reason for termination is violation of workplace policies, do you have a signed employee handbook receipt? How many employees would be in a position to say that were unaware of certain policies, like your harassment policy? That number should be zero.
- **Is At-Will Employment Clearly Defined?** Do your offer letters contain a clear statement that employment is at-will? Does your employee handbook clearly make such a statement? What about employment contracts? When you issue written discipline, do you include a statement providing that nothing in that document changes the at-will nature of the employee's employment?

Bonus Tip: Review your written policy on the proper use of electronic communications. Many people communicate things in emails they may not have said face-to-face or in an office setting. Emails can often be misunderstood as well. Email and other electronic communication is discoverable in litigation and may come back to haunt you.

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TEN TIPS BENEFITS

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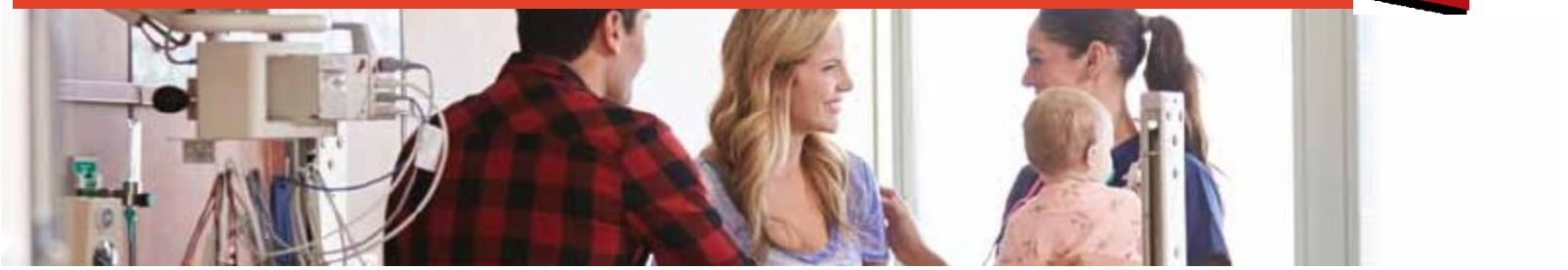

1. Assure health insurance policies provide coverage equally for all illnesses and disabilities without regard to sex, disabilities, health-status factor or pregnancy, and provide equal coverage for spouses and domestic partners.
2. Provide proper notices under ERSIA, CHIPRA, HIPAA and COBRA at the inception and termination of health plan coverage.
3. Payroll system reflects the annual Social Security (FICA) taxable wage and the addition of an additional employee-paid Medicare tax for employees earning more than $200,000.
4. Properly notify employees of changes in medical plan within 60 days before their effective date.
5. Be prepared to properly notify employees of material changes in your non-medical welfare plans within 210 days of the close of your benefit year.
6. Properly disclose to employees the changes in contribution limits for retirement plans each year.
7. Audit whether all wages are being captured and taxed properly for imputed income.
8. Include appropriate contract disclaimers for all employee benefits and policy communications.
9. Engage in a timely Actual Deferral Percentage and Actual Contribution Percentage discrimination testing on your 401(k) plan(s), if applicable, and cure any discrimination in favor of highly compensated employees by the IRS deadline to avoid the exercise tax.
10. Be prepared to meet the IRS deadline for distribution to employees of their excess deferrals and excess annual additions beyond the statutory maximum under your qualified retirement plan(s).

Our Practice Group

The Employee Benefits Practice helps employers comply with the many layers of statutory and regulatory requirements affecting employee benefits. Our employee benefits attorneys provide practical solutions to legal issues, communicating with clients in straightforward plain English. Our attorneys provide day-to-day advice on various employee benefits and executive compensation tax and legal issues.

We provide representation and assistance in several areas, including drafting and reviewing plan documents, preparing summary plan descriptions and other employee communications, mergers and acquisitions, Internal Revenue Service and Department of Labor audits; preparing or reviewing annual IRS Forms 5500 and other returns; providing advice regarding Employee Retirement Income Security Act (ERISA) fiduciary issues, prohibited transaction and other plan asset issues; Consolidated Omnibus Budget Reconciliation Act (COBRA) continuation coverage issues; compliance with the Health Insurance Portability and Accountability Act (HIPAA) privacy requirements; employment tax and income tax withholding issues; employee benefits and executive compensation litigation; and multiemployer plan withdrawal liability issues.

Our benefits attorneys also prepare 401(k) and other qualified and non-qualified retirement plans, assist in designing executive compensation arrangements in both the profit and not-for-profit sectors, and advise clients with respect to employee stock ownership plans (ESOPs), health and welfare benefit plans, wellness plans and cafeteria plans.

Visit www.fisherphillips.com for additional resource materials.

For additional information contact **Lorie Maring** at 404.240.4225 or lmaring@fisherphillips.com

Harassment and Discrimination Trends

On October 17, 2016, the EEOC issued its 2017 Strategic Enforcement Plan. The SEP outlines the areas in which the EEOC will focus and vigorously pursue over the next four years, which includes:

-the "**Gig Economy**," in which workers are more independent and temporary (like Uber, Lyft and similar companies). The EEOC will pursue claims more vigorously when the relationship is characterized by temporary workers, independent contractors, or those placed in employment by staffing agencies because such individuals may not receive equal pay or qualify for benefits.

-**Emerging Issues**, including "backlash discrimination" in which persons who are Muslim, Sikh, or of Middle Eastern, Arab, or South Asian descent are treated differently in hiring or workplace actions due to global events which has increased the likelihood of discrimination against them. In addition, the EEOC will continue to focus on other trends and emerging issues, such as expanding LGBT rights, and watching for qualification standards and inflexible leave policies that discriminate against disabled, pregnant employees, or leave policies that are inflexible regarding an employee's family obligations.

-**Eliminating Barriers for Recruiting and Hiring** by focusing on the impact of the use of computerized screening tools for hiring decisions, resulting in the screening out of older workers, minorities, and women. Similarly, it will scrutinize online application processes (which may be inaccessible to persons with disabilities), background checks that screen out blacks and minorities, and medical questionnaires that ask for improper information in the hiring process.

-**Equal Pay for Equal Work**, in which the EEOC will focus on pay differentials, especially between men, women, and minorities. This comes on the heels of the EEOC's changes to the EEO-1 form which will require reporting of wages among employees for the 2017 compensation year (reportable on March 31, 2018 and each March 31 thereafter). The new EEO-1 will require employers with 100 or more employees to report the number and types of employees in 12 different pay bands in each of the 10 job categories (executive, professional, etc.) with hours worked. The EEOC will analyze this data for pay differentials based on gender, race, and ethnicity and target those employers for enforcement action. If you have not analyzed your workforce to determine areas of concern, this may be the time to do so with your counsel to preserve the attorney-client privilege over such information.

-**Preserving Access to the Legal System**, in which the EEOC will continue to scrutinize any policies or procedures that preclude or discourage individuals from seeking the protections of the EEOC, which include mandatory arbitration provisions, confidentiality and non-disparagement provisions in severance or other agreements, and similar processes.

-**Preventing Systemic Harassment**, in which the EEOC will continue to look for ways to eliminate harassment in the workplace. The EEOC will be looking for allegations reflecting a pattern of harassment in the workplace, which could include repeat allegations about a particular manager or group, social media exchanges that the employer does not address properly, ageist comments relating to one's inability or unwillingness to become computer or tech saavy, or generational harassment characterized by comments by older workers regarding body piercings and tattoos.

Recommendations: Now is the time to shore up your defenses by working with counsel to evaluate your workforce for pay disparities, review your hiring processes and website accessibility, and to invest in harassment training for managers and employees.

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Best Practices For Hiring & Firing

The best way to handle a problem employee is to never hire him. With a well developed hiring practice, you can increase your chances of hiring only those quality employees who will benefit your company. In the often necessary event of having to part ways, it is important that your managers are utilizing best practices to ensure minimum liability.

- **What should your objectives be in hiring?**
  1. Screen out likely problem employees, and instead hire only the best possible candidates.
  2. Eliminate negligent hiring claims.
  3. Utilize non-discriminatory hiring practices.

- **Applications should be completed for every new hire – including rehires!**
  1. Make sure the application is completely filled out.
  2. Carefully review what is written.
  3. Don't make any notes on the application.

- **Red flags to look for on applications:**
  1. Declining pay.
  2. Gaps in employment.
  3. Suspicious reasons for leaving previous employers.
  4. "Forgetting" to answer certain questions.
  5. Failing to sign the application.

- **Make the interviews count!**
  1. Use the 80/20 rule – the person you are interviewing should be doing most of the talking!
  2. Ask open ended questions such as:
     - "What if" questions.
     - Tell me about your current supervisor?
     - What are some things you'd like to avoid in a new job?
     - Have you ever been fired or asked to resign from a job?
  3. Don't ask illegal questions!
     - Are you married? (marital status discrimination)
     - Where is your accent from? (national origin discrimination)
     - When did you graduate from high school? (age discrimination)
     - What church do you go to? (religious discrimination)
     - Do you have any physical problems? (disability discrimination)
  4. Observe the applicant's body language and facial expressions as they respond.
  5. Don't make notes on their applications, and always be mindful about what you are writing.
  6. Avoid statements that the applicant could misconstrue and try to use against you later:
     - after your probationary period you will become a permanent employee
     - no one ever gets fired here unless it is for a really good reason

- **Introductory Period**
  1. Uh oh – Did we make a mistake hiring this employee? Keep your eyes and ears open during an employee's first 90 days on the job. It is easier to explain why an employee is terminated early in his or her employment, there is less risk of legal action, and the employee (usually!) doesn't have a strong sense of entitlement.

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- **Termination for Poor Performance**
    1. Was the employee given fair warning of his/her shortcomings?
    2. Was warning documented?
    3. Was employee given sufficient time to improve?
    4. Have other employees had similar performance problems?
    5. Were they treated consistently?
    6. Does the employee know his job is at risk?
    7. Are there any "extenuating" circumstances that might explain the poor performance? (*i.e.,* how will this case look to a jury of the employee's peers?)

- **Termination for Rule Violation**
    1. Do we have all of the facts?
    2. Did we give the employee a chance to tell his side of the story?
    3. Do we have a written statement from the employee?
    4. Has someone personally interviewed all witnesses?
    5. Do we have written statements?
    6. Is the rule clear and sufficiently communicated?
    7. Does the employee admit violating the rule?
    8. Were there witnesses to the violation?
    9. Is discharge the appropriate penalty?
    10. How were previous violations of the rule treated?

- **Handling The Separation**
    1. Once you have determined that the employee should be separated, you need to ensure that the communication to the employee is handled appropriately.
    2. Have a witness lined up to assist in the process. Your witness should be prepared to listen closely and take good notes of all things said by you or the employee in the meeting.
    3. Prior to the meeting, put a few bullet points together of what you want to communicate to the employee regarding the reason for the separation.
    4. Listen to the employee's questions and concerns, but do not argue or debate the point.
    5. If the employee is being terminated immediately, be prepared to get all remaining property (or tell the employee what must be turned in and by when).
    6. Be prepared to discuss how you will respond to requests for references.
    7. Be prepared to answer the employee's question about pay for unused vacation (if any), sick time, health care continuation, and other similar issues.
    8. If the employee is being terminated immediately, be prepared to respond to the employee's question on unemployment eligibility.
    9. Do not discuss the reasons for the separation with other employees or third parties. Since each situation is unique, you need to determine the appropriate communication for each situation, recognizing that employment issues should remain confidential.

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TEN TIPS IMMIGRATION

1. Keep I-9 forms in a separate binder for current employees and another for terminated employees. Do not keep I-9 forms in employee personnel files.
2. Complete the I-9 form in a timely manner (or the required timeframe). The employee must complete Section 1 before starting work on the first day and employer must complete Section 2 and the Certification by the end of the third business day.
3. Ensure that you are using the correct version of the I-9 form.
4. When completing the I-9 form for a new hire, do not accept any document with an expiration date that has expired.
5. Do not re-verify U.S. passports or passport cards, Permanent Resident or Resident Alien Cards, or List B Identity documents.
6. Ensure that you re-verify expiring work authorization documents before they expire and do not allow an employee to continue to work after his or her work authorization document expires.
7. Conduct a self-audit of your I-9 forms to make sure they are correctly completed.
8. Do not engage in discrimination or document abuse when completing the I-9 form process.
9. If the document(s) presented by the employee is on the List of Acceptable Documents, reasonably appears to be genuine and relates to the person presenting it, you may accept that document to complete Section 2 of the I-9 form.
10. Know your rights! If ICE appears to review your I-9 forms and conduct an audit, insist on a written Notice of Inspection and your right to have three business days before you turn over your original I-9 forms.

Our Practice Group

For more than 25 years, Fisher & Phillips has advised employers in all areas of U.S. business immigration law. Our Global Immigration Practice Group is composed of experienced attorneys and paralegals dedicated to assisting companies and individuals with a wide spectrum of employment-related immigration issues.

We work with clients to:

- develop immigration strategies and policies
- obtain U.S. inbound employment authorization and permanent residence for foreign national employees
- provide guidance, training, and support in connection with immigration worksite compliance, including Form I-9 issues
- prepare for and respond to government audits
- assist employers with the transfer of U.S. workers to assignments abroad

To view our **Cross Border Employer Blog** visit: http://www.crossborderemployer.com/ and visit www.fisherphillips.com for additional resource materials. **For additional information contact** Jessica T. Cook at jcook@fisherphillips.com or 404.240.4151

Tips for Leaves and Accommodations

When will you grant a leave of absence?

- Twelve weeks during a rolling calendar year (can be used intermittently) if the Family Medical Leave Act applies
- As much time as may reasonably be needed pursuant to the Americans with Disabilities Act (but not **indefinite leave**)
- Workers compensation injury
- Pursuant to your own company policy (make sure you apply you policy consistently)

What is a Disability?

- A physical or mental **impairment** that **substantially limits** one or more **major life activities**
- A **record** of such an impairment
- **Being regarded** as having such an impairment

The Basic Rule

- You must **reasonably accommodate** a **disabled** employee or applicant unless doing so is an **undue hardship** or creates a ***direct threat*** to health or safety

What is a reasonable accommodation for an employee with a disability?

- Provide equal opportunity for individual to be considered for the job he or she **holds** or **desires**
- Enable employee to perform essential functions of job employee holds or desires
- Provide equal opportunity for individual to enjoy equivalent benefits and privileges
- Focus on the job restrictions, not on the diagnosis
- Not every diagnosis will impact an employee's ability to work
- If limitations on employee's ability to work are not clear, obtain medical certification
- Never assume that an employee's problems are the product of a mental condition
- Possible accommodations to consider: time off from work, working from home, job restructuring (but you never need to disregarding the **essential functions** of the job), equipment or furniture changes

What is the Interactive Process?

- A timely good-faith exchange of information between employer and a disabled employee or applicant to explore both the necessity for accommodation and the accommodation options
- Initiate the interactive process when the employee's disability is **known** or **apparent**. For example, when:
    - Employee requests an accommodation
    - Employee presents doctor's note with work restrictions
    - Employee exhausts FMLA leave
    - Employer otherwise becomes aware of need for accommodation through third party or observation

Requesting Medical information

- You absolutely can (and should!) request medical documentation and information
- You are entitled to know the nature and duration of restrictions, but you are not necessarily entitled to know diagnosis
- Be clear on what you are seeking so that employee and physician know the request is narrowly tailored to the restriction or concern at issue
- Be clear also on who receives the medical information. Preferably, this is one person in HR and not a supervisor

Religious Accommodations

- Employers must accommodate an employee's **sincerely held religious beliefs or practices** unless the accommodation would impose an **undue hardship**
- A religious practice may be sincerely held by an individual even if newly adopted, not consistently observed, or different from the commonly followed tenets of the individual's religion

Remember: This is a tough area of the law. Don't make assumptions and don't rush through decisions. As always, document everything!

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OSHA Developments: Try To Keep Up

- The Obama Administration believes employers under-report injuries and illnesses, discourage, employee reporting, and retaliate against employees who do report.

- Effective August 1, 2016, OSHA increased penalties:
  - OTS and Serious: $12,471 (max) per violation from $7,000
  - Failure to Abate: $12,471 (max) per day from $7,000 per day
  - Willful and Repeat: $124,709 (max) per violation from $70,000

- Focus on whistleblower complaints:
  - Updated Whistleblower Investigations Manual
  - Employees/former employees can file online
  - OSHA can issue penalties, recommend abatement (including reinstatement and back pay)

- New injury reporting obligations for employers:
  - Within 24 hours after in-patient hospitalization of one or more employees
  - Within 24 hours after employee amputation or loss of an eye
  - Within 8 hours after employee fatality (has not changed)

- Expanded employer responsibility:
  - Temporary employees
  - Joint employers
  - Multi-employer doctrine

- New injury and illness reporting requirements:
  - Inform employees of right to report work related injuries and illness free from retaliation
  - Procedures for reporting work-related injuries and illnesses must be "reasonable" and not discourage employees from reporting
  - Employer cannot retaliate against employees for reporting work-related injuries and illnesses
    - Potential impact on safety incentive programs
    - Potential impact on post-accident drug testing
  - By July 1, 2017 – Employers (not exempt) with 250 employees or more at an establishment must have filed OSHA 300A summaries
  - By July 1, 2018 – Employers (not exempt) with 250 employees or more at an establishment must have filed OSHA 300, 301 and 300A summaries
  - By July 1, 2017 – Employers with 20 to 249 employees in one of 67 specific industries must have filed OSHA 300A summaries

- Get ahead of the curve:
  - Audit Injury & Illness Records (for at least 5 years)
  - Train site personnel on proper recordkeeping
  - Properly correct logs and review related recordkeeping areas, such as accident/root cause analysis and safety programs
  - Develop measurements of safety & health programs that do not rely on injury and illness rates (leading indicators)
  - Revise safety incentive programs
  - Prepare for OSHA recordkeeping inspections

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FEDERAL CONTRACTOR AFFIRMATIVE ACTION COMPLIANCE

This document is intended to provide companies that provide supplies or services[1] for government contracts an overview of affirmative action compliance requirements. For more specific questions and analysis, please contact your labor and employment counsel.

The following compliance requirements apply to a federal contractor or subcontractor (including its subsidiaries or affiliates[2]) with 50 or more employees and government contracts or subcontracts of $50,000 or more, unless otherwise stated.[3] All requirements apply equally to any subcontractors whose work is necessary to the performance of the federal contract that generates the initial compliance requirements, except as otherwise noted.

Checklist for Determining Affirmative Action Obligations

Contractor:

Does the company, including its subsidiaries or affiliates, have a contract with the Federal Government? Yes ___ No ___

1. Is the amount of the contract $50,000 or more? Yes ___ No ___

   - ❖ If yes, affirmative action obligations under Executive Order 11246 and Section 503 of the Rehabilitation Act of 1973 (Section 503) apply.

2. Is the amount of the contract $150,000 or more? Yes ___ No ___

   - ❖ If yes, affirmative action obligations under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) also apply.

3. If there is no dollar value on the contract, are the purchases or sales of services or goods in a year expected to exceed $50,000/$150,000? Yes___ No___

   - ❖ If yes, then the affirmative action obligations under #1 and #2 apply.

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[1] Construction contractors' affirmative action plans (AAP) differ significantly from supply and service contractors' AAPs.

[2] The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has developed a 27-point questionnaire to determine whether companies are considered single or related entities for jurisdictional purposes. Centralized employment decisions are a key indicator of single employer status, although other factors are also considered.

[3] The basic compliance requirements related to the Vietnam Era Veterans' Readjustment Assistance Act arise when the contractor has a contract of $150,000, regardless of the number of employees, and affirmative action plans are required with a $150,000 contract and 50 employees. Other laws, including Executive Orders, apply where the contractor has a contract in the amount of $500,000 or $1 million. In addition, contractors with a contract of $5 million or more must establish a Business Code of Conduct policy and complaint reporting procedure, which typically includes a hotline reporting system. Further, some obligations attach to Federal Government contracts and subcontracts before the contract level reaches the $50,000 or $100,000 thresholds. For example, at $10,000, the Equal Opportunity clause must be incorporated, which now includes non-discrimination provisions for gender identity and sexual orientation.

Subcontractor:

1. Does the company have a contract to provide goods or services to a Federal Government contractor or subcontractor? Yes___ No___

2. Does the subcontract provide goods or services necessary to the performance of the ultimate federal contract? Yes___ No___

   - ❖ If yes, the company is a federal subcontractor.

3. Is the amount of the subcontract $50,000 or more? Yes ___ No ___

   - ❖ If yes, affirmative action obligations under Executive Order 11246 and Section 503 apply.

4. Is the amount of the subcontract $150,000 or more? Yes ___ No ___

   - ❖ If yes, affirmative action obligations under VEVRAA also apply.

Extent of Obligations

Federal contractors and subcontractors have virtually the same compliance requirements. The Company's obligations as a government contractor/subcontractor can be divided into six main areas: (1) preparation and annual updating of the affirmative action plans; (2) preparation of and submission of reports to the government; (3) recordkeeping and posting requirements; (4) compliance with a higher minimum wage and paid leave provisions; (5) participation in compliance audits; and (6) participation in complaint investigations.

1. *Preparing Annual Affirmative Action Plans (AAPs)*

The basic elements of an Executive Order 11246 AAP include:

a) Data collection and record keeping, including providing compliant voluntary self-identification forms to applicants and employees;

b) Taking an annual “snapshot” of the representation of minorities and females within each establishment’s workforce, by job group;

c) Conducting a job group analysis to identify and group jobs which are similar and will be used for statistical comparison (job groups are defined as groups of jobs with similar content, wage rates and opportunities);

d) Conducting a statistical availability/utilization analysis by job group to compare the representation of minorities and females with the internal and external availability and establishing placement goals where the categories are under-represented;

e) Preparing an applicant flow log (covering 12 months prior to the snapshot) that includes applicants' race and sex (Section 503 and VEVRAA AAPs also require a log that includes disability and protected veteran status);

f) Conducting statistical adverse impact analyses for personnel activity for hiring, promotions and terminations for the 12-month period prior to the snapshot. Statistically significant adverse impact may result in financial liability, including back pay and the requirement to engage in preferential hiring or promotion;

g) Conducting a compensation self-audit, recommended annually, by job group or job title, race and sex; and

h) Annually reviewing goal attainment. (Section 503 and VEVRAA AAPs require analysis of the applicable goals and benchmarks for individuals with a disability and protected veterans).

Additional obligations include supervisor training, internal dissemination of the AAPs, posting requirements and a mandatory equal opportunity contract clause for all subcontracts and purchase orders and other requirements.

2. *Reporting Obligations*

- EEO-1 Report - file annually (also required of non-federal contractors with 100 or more employees). The company must identify its status as a federal contractor on the form. Contractors with 100 or more employees must also complete the pay data and hours worked sections for the new EEO-1 Reports that will be due March 31, 2018 (replacing the September 30, 2017 reporting deadline).
- VETS-4212 Report - file annually (formerly called VETS-100 or VETS-100A report) identifying the number of protected veterans in its employment and the number of new hires that are protected veterans, if the contractor has a covered contract of $150,000 or more
- Labor Law Violations Reporting (Fair Pay and Safe Workplace Executive Order, applies to contracts/subcontracts of $500,000 or more) – contractors report every six months on SAM website all violations of federal laws and at least some state counterparts that occurred within the last three years. Contractors must ask their subcontractors if they have reported. Reportable laws include any administrative determination, arbitral award or decision, or civil judgment under:
    - National Labor Relations Act
    - Title VII of the Civil Rights Act
    - Fair Labor Standards Act
    - Occupational Safety and Health Act
    - Service Contract Act
    - Davis Bacon Act
    - Executive Order 11246
    - Section 503 of the Rehabilitation Act of 1973
    - Vietnam Era Veterans' Readjustment Assistance Act of 1974

- Family and Medical Leave Act
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Executive Order 13658 (Federal Minimum Wage)
- Migrant and Seasonal Agricultural Worker Protection Act
- Equivalent state laws

3. *Recordkeeping and Posting Requirements*

- Post all job openings (except highest-level jobs and those filled from within) with the local or state job services agency.
- Post Employees' Right to Organize poster required by Executive Order 13496 in all areas where other employee notices are displayed, including electronically.
- Post the "EEO Is the Law" poster that includes the federal contractor language.
- Post Federal Contract Minimum Wage poster, if applicable.
- Post a notice to all applicants and employees that the non-confidential portions of the AAPs for individuals with a disability and veterans are available for review upon request during normal business hours.
- Post a notice to all applicants and employees that the contractor will not discriminate against applicants or employees who disclose or discuss compensation information, using OFCCP's Pay Transparency language.
- Maintain all employment-related records for 3 years to comply with the veterans and disability regulatory retention requirements, including pre-offer, post-offer, and all employee voluntary self-identification survey information.

4. *Defending Compliance Audits*

Compliance audits require that the contractor submit to OFCCP its complete affirmative action plans for the particular establishment being audited for a desk audit, as well as additional information specified in a letter sent to the contractor 30 days in advance of the deadline. That desk audit may lead to an onsite review, including interviews of managers and employees, review of records, and frequently, identification of problem areas, both monetary and non-monetary. These onsite reviews normally take 3-5 days per establishment. When the OFCCP identifies potential affected class issues, there is a likelihood that there will be monetary liability either in the required hiring of a specified number of minorities or females, the increase in compensation of current minorities or females, or the promotion of minorities and/or females, all of which include a back pay component. OFCCP also enforces perceived disparities impacting whites or males. The duration of an audit may vary from a few weeks to several years.

5. *Contractor Wage and Paid Leave Requirements*

Most contracts and subcontracts subject to the Davis Bacon and Service Contract Acts and concessions contracts with the Federal Government impose minimum

wage and paid leave requirements for employees working on or in connection with the contracts. Currently the minimum wage is set at $10.15 per hour but it is indexed to inflation so it can change each January, and it is increasing to $10.20 effective January 2017. Employees working on or in connection with covered contracts must also earn 1 hour of leave for each 30 hours or covered work, up to a maximum of 56 hours per year. Current PTO policies may satisfy this requirement if the provisions for use and the accrual and carryover provisions are consistent with the regulations.

6. Complaint Investigations

Complaint investigations by the OFCCP are similar to investigations of discrimination charges by the EEOC with a significant difference. While the EEOC rarely undertakes an onsite investigation and typically makes decisions based upon initial submission of written materials, the OFCCP typically conducts an onsite investigation and interviews managers and employees as well as inspects records. It also usually requires additional documentation beyond what may be required by the EEOC. In addition, the government contract obligation creates additional protected categories, such as protected veterans, sexual orientation and gender identity.

Costs and Risks

1. Risks of Affected Class or Other Monetary Relief

Statistically significant adverse impact findings, generally defined by OFCCP as personnel actions (hiring, promotions or terminations) that result in two or more standard deviations and compensation differences that are not explained by justifiable factors, are treated similarly to class actions and may result in a Conciliation Agreement that includes back pay, interest, and benefits awards, as well as mandatory salary adjustments or requirements to create a preferential hiring list of the alleged victims. Contactors may also be debarred from participation in federal contracts and may risk having contract payments withheld, although those more extreme sanctions will not occur absent a hearing.

2. Discoverable in Litigation

The AAP provides a detailed and critical look at the organization, including significant employment data such as the adverse impact analyses referred to above. The AAP will likely be discoverable in litigation and may provide a source of unfavorable information to a plaintiff's lawyer. Underlying analysis, discussion and conclusions may also be discoverable, if the data is not protected by an attorney-client privilege.

3. Costs of Compliance

The cost of preparing and maintaining AAPs, both in terms of internal manpower and out of pocket costs, may be significant. Internal support for affirmative action compliance is often augmented by consultants or outside counsel. Defending an audit, even an audit that results in a positive outcome, is very expensive—in time and resources.

For assistance in working with the regulations, conducting a compensation self-audit, defending an OFCCP audit, or preparing affirmative action plans, contact your Fisher Phillips counsel or a member of the firm's Affirmative Action and Federal Contract Compliance Practice Group, including:

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The NLRB's Impact on Non-Union Workplaces

There is little doubt that the NLRB is making its impact felt – even with employers that may never see a union. By expanding its concept of "concerted protected activity," the Board has staked out new territory for investigating union and non-union entities alike. Remedies may extend beyond notice posting and global rescission of offending policies to include reinstatement of those employees who are discharged for violating them. Set forth below are just a few areas in which this agency can impact your business, along with some action items to help you steer clear of potential legal exposure.

- **Social Media Policies**. The NLRB will closely scrutinize policies purporting to broadly restrict employee rights to air their public grievances concerning wages and other working conditions.

- **Off-Duty Access Restrictions.** Policies that reserve in management the broad discretion to determine the circumstances in which employees may be disciplined for violating "no loitering" policies will likely be invalidated.

- **Class Action Waivers.** Despite multiple court decisions to the contrary, the agency continues to enforce its doctrine prohibiting binding arbitration with class action waiver as an encroachment on concerted protected activity.

- **Restricting Discussion of Internal Investigations.** The NLRB has issued a line of decisions invalidating policies imposing blanket restrictions on an employee's right to discuss the status of complaints under internal investigation.

- **Solicitation and Distribution Policies.** The agency is carefully scrutinizing rules banning solicitation for "commercial purposes," or otherwise extending beyond working areas and working time.

- **Electronic Communications.** Through recent decisions such Purple Communications, the NLRB is now invalidating electronic communications that purport to restrict use of such vehicles during non-working time.

- **At-Will Policy Statements.** Recent ALJ rulings suggest that the Board will now invalidate at-will statements that suggest that such status may not be modified by anyone under any circumstances.

- **Rules Requiring "Courteous" or "Respectful" Behavior.** Policies broadly requiring such conduct, or prohibiting "disparaging" or other conduct that "impedes harmonious relationships are generally deemed unlawful.

- **Outright Bans on Workplace Photography or Recording.** Through a pair of recent Board rulings, employers are generally precluded from imposing outright bans on such conduct except under extremely narrow circumstances.

- **Overly Broad Restrictions on Media Disclosures.** The NLRB has made clear that unless confined to situations in which the employees purports to address the media on the employer's behalf, such restrictions are overly broad.

- **Restrictions on Public Logo Displays**. Remarkably, the agency has gone so far as to suggest that an employer may not impose outright bans on displaying a company logo, absent compelling business reasons.

- **Overly Broad Confidentiality Rules.** Policies purporting to prohibit disclosure of employee salary information or related data pertaining to wages or benefits are increasingly being struck down as overly broad.

- **Mandatory Complaint Policies.** Similarly, policies compelling employees to direct their grievances through internal resolution mechanisms are also being invalidated under the concerted protected activity doctrine.

  When you get back to the office: If you have not reviewed your policies and procedures in recent months, now is the time to do so. Scrutinize them carefully for any language broadly restricting group discussion or action, mandating advance management approval, or otherwise broadly proscribing "unprofessional" or "inappropriate" conduct. Take steps to ensure that all general restrictions are accompanied by narrower terms defining the scope of improper misconduct. Avoid ambiguity in favor of specific examples wherever possible. Consider adding a proper disclaimer.

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FLSA "White Collar" Exemption Action Items

❑ **Action Item No. 1:** **Become familiar with the background.**

- These changes are over two years in the making. Speculation as to what might be done and when changes might occur began with President Obama's March 2014 charge signaling a likely curtailment of the federal Fair Labor Standards Act's Section 13(a)(1) "white collar" exemptions.

- Information regarding the nature and purpose of these exemptions might be helpful in communications. For example, while U.S. Labor Department statements and other commentary have often suggested otherwise, the salary test's proper role has never been to serve as a "minimum wage" for exempt employees or to provide a means to expand "overtime rights".

❑ **Action Item No. 2:** **Become familiar with the scope of the changes.**

- USDOL officially released the proposed changes in July 2015. We highlighted the essential aspects of the proposed changes and provided a detailed analysis of them in our extensive Comments.

- USDOL will officially publish the final regulations on May 23, 2016.

- The salary threshold for exempt status will increase to a rate of $913 per week, the new total-annual-compensation threshold for the "highly compensated" exemption will increase to $134,004, and both thresholds will be "updated" every three years, beginning on January 1, 2020.

- Employers will be able to satisfy up to 10% of the salary threshold from "nondiscretionary bonuses and incentive payments", *including* commissions, paid on a quarterly or more-frequent basis. This will not be permitted as to the salaries paid to highly-compensated employees.

- USDOL made no changes in the exemptions' duties-related tests.

❑ **Action Item No. 3:** **Understand the current status of the changes.**

- The revisions' effective date is currently December 1, 2016.

- We believe that efforts to block the changes are unlikely to succeed.

- It is still uncertain whether or for how long the effective date might be delayed due to steps in Congress or for other reasons, but in our view employers should not count on any postponement.

❑ **Action Item No. 4:** **Conduct a self-audit.**

- Time is of the essence. If you have not already begun to review your employees currently treated as exempt, you should *immediately* conduct a "triage" to identify those most likely to be affected by USDOL's changes.

- Think about what steps might be taken to increase the prospects that some or all of the components and results of the evaluation can be protected against disclosure to a future adversary, such as in the course of litigation. For example:

    - Who will direct and control the process, including the collection of information?

    - Who will participate in the assessment, and what will each participant's role be?

    - What will be communicated, and from whom and to whom will the communications flow?

    - What documents and other information will be generated or compiled, and when and in what form will this be done?

    - What can be done to bolster the prospects that the components and results of the evaluation can be protected against disclosure in litigation?

    - What steps will be taken to avoid undercutting any such protections later.

- The self-audit should at least include these steps:

    - Identify employees paid in whole or in part on a "salary basis" whose salaries annualize to less than *$47,476*. Management should consider whether it will increase these employees' salaries to the minimum amount or will instead forgo a "white collar" exemption for them.

    - Employers who prefer to take into account what threshold the first "update" could be might instead use the figure of *$52,000*, taking into account the White House's estimate that the January 1, 2020 update might be a figure annualizing to "more than $51,000."

    - Employers who prefer to categorize all incumbents in the same position in the same way (*i.e.*, to treat all of them as exempt or all of them as non-exempt) should identify positions having incumbents both above and below the "triage" cutoff and then decide whether to evaluate the exemption status of all the incumbents.

- Identify employees at higher compensation levels who are not paid on a "salary basis". Keep in mind that annualized compensation (including annualized salaries) *is not the test*.

- Possibly carving out from the review any employees (i) who are not subject to the salary-basis requirement (such as many lawyers, doctors, or teachers in educational establishments), or (ii) who meet the weekly or weekly-equivalent salary threshold despite the fact that their salaries *annualize* to less than the "triage" cutoff (such as part-time employees or full-time employees working less than a full year).

- Identifying employees whose total annual compensation (including salary) is less than $134,004. Employers who prefer to take into account what "highly compensated" threshold the first "update" could be might instead identify employees whose total annual compensation is somewhat higher.

- Once the higher-priority employees have been identified, management should evaluate their status based upon the duties-related portions of the exemption requirements before deciding what to do about their compensation. We have prepared worksheets to assist you in gathering information for your *initial* evaluations.

- Identify other employees whose exemption status might be questionable to determine whether to convert them to nonexempt status.

❑ **Action Item No. 5:** **Develop a preliminary plan that takes alternatives into account.**

- Increasing salaries might seem to be the quickest solution, but in some cases this might simply (1) be the first of a series of recurring increases caused by future "updates" that further raise the threshold; and/or (2) create potential problems of a different kind if an employee does not meet the duties-related requirements for an exemption.

- Determine what *other* FLSA exemptions might be available besides the "white collar" ones (such as the FLSA Section 7(i) exemption, for instance).

- Determine what alternative FLSA-compliant pay plans might serve management's goals if some employees are converted to nonexempt status, including considering what cost-control measures might also be available. Begin by reviewing our "Selected FLSA Pay Alternatives". Of course, not every approach that might seem to make logical sense will comply with the FLSA's requirements.

- Keep in mind that other jurisdictions might have different wage-hour laws; might not recognize some or any of the "white collar" exemptions; might recognize analogous exemptions only on more-restrictive terms; or might impose specific requirements, limitations, or prohibitions in connection with how to structure and administer a pay plan, and so on.

- Consider whether to make other compensation changes not relating to these exemptions.

- Design a plan for communicating the nature of and reasons for whatever changes will be made. A one-size-fits-all approach is not advisable. Instead, communications should be developed based upon factors that are specific to the employer involved, the changes to be made, and all the other circumstances surrounding what management has decided to do.

- Be mindful of how much time it might take to put management's plans in place. In addition to engaging in the appropriate workforce communications, restructuring pay plans, carrying-through on modified job duties, etc. could entail weeks or even months of work. Furthermore, some jurisdictions require a particular amount of advance notice to employees about modifications in their pay.
