2010 CAPLAW National Training Conference

Cutting Edge Issues in Employment Law

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Agenda

- Genetic Information Nondiscrimination Act
- ADA Amendments Act
- Family and Medical Leave Act Amendments
- Lilly Ledbetter Fair Pay Act
- New Federal Contractor Requirements: Notice to Employees of Their Rights under Federal Labor Law
- Other Hot Topics: Health Care Reform

Understanding GINA

What is GINA?

- Genetic Information Nondiscrimination Act of 2008 (GINA)
- New federal law
  - Prohibits discrimination in employment (and health coverage) based on genetic information of individuals and their family members
  - Restricts acquisition and limits disclosure of such genetic information
- The employment provisions (Title II) became effective November 21, 2009

Understanding GINA

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Does Title II of GINA apply to you?

- Private and state and local government employers with 15 or more employees
- Employment agencies
- Labor unions
- Joint labor-management training programs
- Congress and federal executive branch agencies

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Understanding GINA

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How is "genetic information" defined?

Genetic information (GI) is information about:

- an individual's genetic tests
- the genetic tests of family members
- the manifestation of a disease or disorder in an individual's family members
  - Alzheimers disease, breast or ovarian cancer, heart disease, diabetes, sickle cell anemia, etc.
- Inclusion in genetic services or research (including genetic testing, counseling, education)

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GI does not include information about:

- the sex or age of an individual or family member;
- an individual's *current* disease or disorder; or
- tests for alcohol or drug use

(though other laws may restrict acquisition and/or use of information concerning all of the above)

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GINA prohibits discrimination by employers

- Using GI to make decisions related to any terms, conditions, or privileges of employment
  - Hiring, firing, pay, layoffs, promotions, transfers, job assignments, etc.
  - No exceptions – even for legitimate business reasons

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GINA prohibits acquisition of GI

- Intentionally requesting, acquiring, or purchasing GI

Exceptions: (1) inadvertent acquisition or (2) acquisition to comply with the FMLA or ADA

GINA limits disclosure of GI

- Generally prohibited

Exception: with employee authorization, or by court order, or to comply with leave laws

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GINA requires confidentiality

- Following the same rules for GI as medical information generally
- Keeping GI in confidential medical files
  - Separate from personnel files
  - Properly secured
- Not disclosing GI about applicants and employees

Exception: Employers not liable for disclosing GI already publicly available

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GINA prohibits harassment

- Making offensive remarks about the GI of an applicant, employee, or family member

GINA prohibits retaliation

- Taking an adverse employment action against an employee who:
  - files a charge
  - cooperates or participates in an investigation or proceeding
  - opposes or complains about unlawful practices concerning GI

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GINA in Action

- Alleged violations are filed with the EEOC (and state agencies in many states) before an individual can pursue a claim in federal court
- On April 27, 2010, Pamela Fink of Connecticut filed the first publicly known complaint under GINA with the EEOC and the Connecticut Commission on Human Rights.
- Fink alleges that her employer, Mxenergy, demoted and then terminated her employment after learning that she carries a gene implicated in breast cancer.

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Understanding GINA

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Remedies available to those aggrieved

- Reinstatement, hiring, and promotion
- Back pay and front pay
- Compensatory and punitive damages
- Attorneys' fees and costs

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GINA's "Five to Survive"

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Five steps to comply with GINA

1. Post EEOC's revised "Equal Employment Opportunity is the Law" poster
   www.dol.gov/ofccp/regs/compliance/posters/pdf/eeopost.pdf
2. Protect GI
   - Review current employee files for GI
   - Place in a confidential medical file, separate from personnel file
3. Review and revise employment applications and other related forms that ask for GI.

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GINA's "Five to Survive"

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4. Review employment policies and practices.
   - Equal Employment Opportunity policy
   - Non-discrimination and harassment policies
   - Fitness-for-duty exams
5. Provide training to all employees about GINA's prohibitions, record-keeping requirements and any changes to agency policies and practices.
   - Esp. supervisory, management HR staff, and recruiters
   - Strategies to limit risk of employee "self-disclosure"
   - Strategies to address inadvertent disclosures of GI

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Interpreting the ADAAA

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What is the ADA? (A Refresher)

- Americans with Disabilities Act of 1990 (ADA)
  - prohibits discrimination against individuals with disabilities
  - requires reasonable accommodation of disabilities (unless undue hardship exists)
- Definition of "Disability"
  - an impairment that substantially limits one or more major life activities,
  - a record of such impairment, or
  - being "regarded as" having such an impairment

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Interpreting the ADAAA

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- Remember, state laws can (and often do) provide *additional* protections, and where there is a conflict, the more protective statute will apply
- The employment provisions (Title I) apply to:
  - Private and state and local government employers with 15 or more employees
  - Employment agencies
  - Labor unions
  - Joint labor-management training programs
  - Congress and federal executive branch agencies

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Interpreting the ADAAA

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What is the ADAAA? (A Refresher)

- The ADA Amendments Act of 2008 (ADAAA) introduced changes to the ADA to broaden the interpretation of the definition of "disability"
- The changes make it easier for an individual to claim that he or she has a disability
- The ADAAA became effective on January 1, 2009

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Interpreting the ADAAA

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How does the ADAAA redefine disability?

1. Expands definition of "substantially limits"
2. Establishes specific, yet not exhaustive, list of major life activities, including major bodily functions
3. Establishes that episodic conditions and conditions in remission may be disabilities
4. Provides that an individual may be "regarded as" having an impairment even if the impairment is *not* perceived to limit a major life activity

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Interpreting the ADAA

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How does the ADAAA redefine disability?

5. Prohibits consideration of most "mitigating measures"
   - Medication, low-vision devices, prosthetic limbs, hearing aids, cochlear implants, mobility devices, oxygen therapy
     - Exception: ordinary eyeglasses or contact lenses
6. No reverse discrimination claims

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Interpreting the ADAAA

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ADA in Action – Prospective Relief

ADAAA Might Apply if Prospective Relief is Requested

- In Kirk v. Nat'l Bd. of Medical Examiners (2009), the Board denied student's request for extra time to take exam based on pre-ADAAA definition of disability.
- Sixth Circuit ruled that, because the case involves prospective relief and was pending when the ADAA became effective, the ADAA applies.
- Rather than seeking damages for past discrimination, the student seeks accommodation on a future test

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Interpreting the ADAAA

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ADA in Action – "regarded as"

Actions motivated by *bona fide* worker safety concerns not prohibited under the ADAAA

- **In Wurzel v. Whirlpool Corp. (2010), district court denied discrimination claim.**
- **Employer did not regard sporadic angina as substantially limiting major life activity of working.**
- **No pretext in employer's safety concerns about employee driving tow motor.**

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Interpreting the ADAAA

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ADA in Action – "Extensive Analysis?"

Question of whether an individual's impairment is a disability "should not demand extensive analysis" (that is, relatively easy test to pass)

- **Horgan v. Simmons (2010)**
  - **HIV substantially limits the function of the immune system (a "major bodily function" under the ADAAA)**
- **Menchaca v. Maricopa Community College Dist. (2010)**
  - **Mental impairment from traumatic brain injury and PTSD could be a disability**

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Interpreting the ADAAA

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ADA in Action – Inflexible Leave Policies

Inflexible medical leave policies may violate ADA

- On August 27, 2009, the EEOC filed a class action against United Parcel Service (case pending).
- UPS employee took maximum company-permitted 12-month leave because of her multiple sclerosis
- When employee returned, she experienced new symptoms and requested additional leave; UPS fired her, without even considering granting her new leave or a new position because of the company rule

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ADAAA's "Five to Survive"

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Five steps you should take to minimize liability under the ADAAA

1. Review current policies to determine if changes need to be made in light of expanded definition of "disability" and recent cases
   - When uncertain, assume the impairment qualifies
   - Eliminate automatic termination or "cut-off" policies
2. Establish written procedures and protocols to follow when you receive reasonable accommodation requests

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ADAAA's "Five to Survive"

Five steps you should take to minimize liability under the amended ADA

3. Create an interactive process checklist and compliance packet to document handling of reasonable accommodation requests
4. Ensure that job descriptions are accurate and current to bolster your "not qualified" defense
5. Train managers to understand the ADAA and your procedures to handle accommodation requests

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FMLA Amendments

- Family and Medical Leave Act (a refresher)
  - 12 weeks of leave in a 12 month period for employees who have worked for the employer for a total of at least 12 months and at least 1,250 hours within the preceding 12 months, on account of the employee's own, or a family member's, serious health condition, for the birth or care of a newborn child, or for placement of a child through adoption or foster care
  - Applies to employees who work at a site where, within 75 miles, the employer employs at least 50 employees

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FMLA Amendments

- What is new?
  - New regulations, issued by the US Department of Labor, effective January 16, 2009
  - FMLA Amendments via the National Defense Authorization Act for Fiscal Year 2010
- Why the amendments?
  - 2008 – Responding to (*not* attempting to overturn) a series of Supreme Court decisions invalidating earlier regulations, and new statutes providing military family leave
  - 2010 – Expanding the military leave provisions added to the FMLA in 2008

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FMLA Amendments

Military Caregiver Leave

- Family members or next of kin of "covered service members" are eligible for 26 workweeks of leave in a single 12 month period to care for a covered service member with serious illness or injury incurred in line of active duty in the regular armed forces or reserves
  - "Covered service members" now include certain veterans
    - who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness
    - and who were members of Armed Forces in preceding 5 yrs
  - "Serious injury or illness" now expanded
    - aggravation of existing injuries or illnesses rendering unfit

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FMLA Amendments

- Military Caregiver Leave, continued
  - One time only (not recurring year after year)
  - The 26 workweeks of leave swallows up the 12 weeks of other FMLA leave
  - May use accrued paid time off if that would be permitted under standard leave policies
  - Caregiver must give 30 days' notice if need for leave is foreseeable
  - Leave may be intermittent
  - Certification may be required, but no second or third opinions

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FMLA Amendments

Qualifying Exigency Leave

- For family members on or called to "covered active duty":
  - (1) individuals in a regular component of the Armed Forces who are deployed to a foreign country, or
  - (2) members of the reserve who are called up to active duty in a foreign country in connection with a contingency operation
- To deal with exigencies arising when individuals are on active duty or have been called up to active duty:
  - Childcare and school activities (urgent, rather than routine)
  - Short notice deployment (for seven days from notice)
  - Military events
  - Financial and legal arrangements
  - Counseling
  - Rest and recuperation, and other Post-deployment activities
  - Other activities agreed to between employer and employee

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FMLA Amendments

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Qualifying Exigency Leave (continued)

- May be taken intermittently
- Employee may use paid leave if allowed under employer's leave policies generally
- Employer may request copy of military orders and documentation of the specific need for the employee's absence
- 12 weeks of leave, but included within the normal FMLA allotment of 12 weeks

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FMLA Amendments

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Late Designation of FMLA Leave

- Former regulations required an employer to designate leave as FMLA leave within two business days, and provided that an employer that failed to do so could not designate leave retroactively
- New regulations extend employer's designation period to five business days, and preclude retroactive designation only where the employee would be unfairly prejudiced (but you still need to designate on time)

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FMLA Amendments

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Intermittent Leave – Getting Better

- Employees who take leave to attend medical treatment must make a "reasonable effort" (and not merely "attempt") to schedule leave so as not to unduly disrupt the employee's operations

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FMLA Amendments

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Light Duty – Doesn't Count

- At least two courts had held that an employee on leave who returns to light duty is still counting down the FMLA leave entitlement
- The final regulations reject this view. Time spent on light duty does not count, and the employee's right to return to work is held in abeyance during the light duty period

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FMLA Amendments

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Waiver of FMLA Rights – Feel Free

- The new regulations reject the view of one federal appeals court that FMLA rights could only be waived if approved by the US DOL or a federal court
- Under the regulations, backward-looking waivers of FMLA rights are enforceable
- *Prospective* waivers, however, are *not*

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FMLA Amendments

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- New Forms - *Use Them* (or some reasonable modification of them)
  - Available at http://www.dol.gov/whd/fmla/index.htm
- Post the New Poster
  - Available at http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf
- Keep your FMLA Policies up to Date

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Understanding the Ledbetter Act

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Who is Lilly Ledbetter?

- Lilly Ledbetter is a former employee of Alabama's Goodyear Tire & Rubber Company.
- After she retired in 1998, Ledbetter filed a sex discrimination claim against Goodyear under Title VII of the Civil Rights Act of 1964.
- In her complaint, Ledbetter alleged that her performance was rated less favorably than her male counterparts for performing similar work, and she was therefore paid less.

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Understanding the Ledbetter Act

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Ledbetter v. Goodyear Tire & Rubber Co.

- On May 28, 2007, the Supreme Court ruled that Ledbetter's claim was not timely.
- Title VII requires that a claim must be filed within 180 days of the unlawful employment action (or within 300 days, if cross-filed at a state agency in a dual-filing state).
- In Ledbetter's case, the Court stated that the unlawful employment action occurred when the decision was made to pay her less.

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Understanding the Ledbetter Act

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What is the Ledbetter Act?

- The Lilly Ledbetter Fair Pay Act of 2009 reversed the Supreme Court's decision in *Ledbetter v. Goodyear*.
- The Act clarifies that an unlawful employment action occurs with each discriminatory paycheck.
- The filing deadline for wage discrimination claims now resets every time a new paycheck is issued.

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Understanding the Ledbetter Act

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When does the claim clock start ticking?

- When a discriminatory compensation decision or "other practice" is adopted
- When an individual becomes subject to the decision or other practice
- When an individual is affected by application of the decision or other practice, including each time there is a discriminatory payment

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Understanding the Ledbetter Act

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- **Which discrimination statutes are amended by the Act?**
  - Title VII
  - ADA and Rehabilitation Act
  - ADEA

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Understanding the Ledbetter Act

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What is an "other practice"?

***Schuler v. PricewaterhouseCoopers* (2010):**

D.C. Circuit Court of Appeals ruled that a discriminatory denial of a promotion is not an "other practice" that resets the claim clock every time the aggrieved employee receives a paycheck.

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Understanding the Ledbetter Act

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Who can bring a claim under the Act?

- Any individual who becomes subject to the discriminatory decision or practice
- Note: Language of the Act is not limited to employees only, suggesting that family members (like the spouse of a deceased worker) can bring claims

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Understanding the Ledbetter Act

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When does the Act apply?

- The Ledbetter Act was signed into law on January 29, 2009, but applies retroactively to actions pending on or after May 28, 2007
- *AT&T Corp. v. Hulteen* (2009): Supreme Court ruled that Act does not apply to decisions that were lawful when they were made and only later became unlawfully discriminatory

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Ledbetter Act's "Five to Survive"

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Five steps you should take to minimize liability under the Ledbetter Act

1. Audit current pay documentation practices to determine whether you have sufficient documentation to support any challenged compensation decisions.
2. Develop and document specific criteria for compensation decisions to ensure consistency and uniformity in these decisions.

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Ledbetter Act's "Five to Survive"

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Five steps you should take to minimize liability under the Ledbetter Act

3. Review compensation decisions to avoid giving managers sole discretion.
   - Starting pay, promotional pay, merit pay
4. Consider revising document retention practices to retain compensation decision documentation for longer periods of time.
5. Train managers to understand the Act and its ramifications.

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New Federal Contractor Requirements

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- Overview
  - Include required language in all government contracts (unless an exception applies)
  - Post notices informing employees of their rights under the National Labor Relations Act (NLRA)
- Effective Date
  - June 21, 2010
- Law and Regulation
  - Executive Order 13496 and 29 C.F.R. 471

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New Federal Contractor Requirements Cont'd

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- Applies to "government contracts" with federal contractors and subcontractors
  - Contracts, subcontracts, and purchase orders
- Exceptions
  - Collective bargaining agreements
  - Government contracts below the "simplified acquisition threshold" (currently $100,000)
  - Government subcontracts of $10,000 or less
  - Government contracts "prior to" June 21, 2010
  - Government contracts abroad

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New Federal Contractor Requirements Cont'd

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- Language in Government Contracts, covered subcontracts and purchase orders
  - Must require contractor or covered subcontractor to post notices of employee rights under NLRA
  - Suggested language is provided in Appendix to Regulations
  - Language does not need to be quoted verbatim
  - Contract may simply cite the Appendix to the Regulations:
    - "29 C.F.R. Part 471, Appendix A to Subpart A"

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New Federal Contractor Requirements Cont'd

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- Posting Requirements:
  - Poster outlining employee rights under the NLRA, including (among others):
    - Right to organize
    - Right to join a labor union
    - Right to bargain collectively
    - Right to refrain from these activities

A copy of the poster can be downloaded at: http://www.dol.gov/olms/regs/compliance/EO13496.htm

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New Federal Contractor Requirements Cont'd

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- Posting Requirements, Cont'd
  - Physical posters
  - Electronic notices
  - Foreign language posters
- Process for Ensuring compliance
  - OFCCP compliance evaluation
  - Employee complaint

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New Federal Contractor Requirements Cont'd

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- Potential Sanctions
  - Debarment
    - Absolute or conditioned on compliance
  - Publication of names of contractors declared ineligible for future contracts
- What to do to ensure compliance?
  - Include prescribed language in new government contracts, and covered subcontracts and POs
  - Post the employee notice
  - Be prepared for questions

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Other "Hot Topics": Health Care Reform

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- **What?**
  - Creates an individual mandate; most individuals will be required to have health insurance or pay a penalty
  - Does not create an employer mandate; some employers may have no additional costs or obligations imposed by legislation
  - Does not require employers to change or modify current coverage
- **When?**
  - The timeline is complicated and in some cases uncertain—surprises are possible as additional guidance is released and it is uncertain when such guidance will be effective
  - Employers need accurate timeline information to develop implementation and compliance plans
- **Costs**
  - Employers need to be able to assess the impact of health care reform on their bottom line
  - Implementation and compliance costs may be considerable
- **Pitfalls**
  - Health care reform legislation is complex and in many respects the full scope of new rules is unclear—traps for the unwary abound
- **Opportunities**
  - Savvy employers can grab low-hanging fruit while avoiding pitfalls
  - A superior implementation and compliance plan will be a significant competitive advantage—employers caught unprepared will face major distractions and costs
  - Employers can enhance relationships with employees by providing accurate, timely information about health care reform

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Health Care Reform: Union Issues

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- Many employers are negotiating to reduce health insurance costs
- Be careful not to be *too* successful (premiums < 60%?)
- Don't pay too much in negotiations, or fight too hard, for changes you may regret later
- Note: no apparent exclusion for public employers

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Health Care Reform: Union Issues

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- Be careful not to lock in current plans for the life of long-term contracts ("employees shall continue to participate in the Company's Blue Cross/Blue Shield Master Health Plus Plan"), if you may need to change them ("employees shall be eligible to participate in such plans as are in effect from time to time for employees of the organization generally")

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Health Care Reform: Employment Agreements

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- Be careful not to promise current benefits for life of long-term contracts, if you may need to change them ("The executive shall be eligible to participate in such plans as are in effect from time to time for employees of the organization generally")
- Beware of offering more favorable terms to higher paid employees in insured plans

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Health Care Reform: Nursing Mothers

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- In effect *now* (most likely). Requires:
  - *reasonable break time to express breast milk for nursing child for 1 year after child's birth each time such employee has need to express the milk*
  - *place, other than bathroom, shielded from view and free from intrusion, for doing so*
- Not required to compensate for break
- < 50 employees, not required if "undue hardship"

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Health Care Reform: Nursing Mothers

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- Open questions:
  - Applies only to non-exempt employees?
  - How long is a “reasonable break time”?
  - How many “places” must be available?
  - How close must the “places” be to each employee?
- Awaiting DOL Guidance
- More protective state laws prevail (24 states and DC have their own laws)

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Any Questions?

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