Before we get started...

- Having technical difficulties?
  - Use the Q&A function to let us know OR email tabitha.rhoda@icemiller.com

- To submit questions during the webinar, use the Q&A function. Questions will be answered at the conclusion of the webinar.

Presented by:

Paul L. Bittner
Christopher S. Sears
I. The NLRA and NLRB Are Four Letter Words

II. White Collar Just Got More Expensive

III. Employee Benefits Update
I. THE NLRA AND NLRB ARE FOUR-LETTER WORDS

The National Labor Relations Act is not just for union employers anymore
Background: NLRA and Section 7 Rights

- NLRA enacted 1935 to encourage organizing
- Overseen and administered by NLRB
- Covers most private-sector employers
- Covers most non-supervisory employees
- Section 7 provides covered employees with,
  - the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . the right to refrain from any or all of such activities . . .
In 2014, union membership was 6.6% of the private sector.
Symptoms or Searching?

- Symptoms of a broken system or reasons to search for relevance in the modern labor arena?
- NLRB sees two “cures”
  - Get *more* and *faster* elections and more union-represented workers
  - New election procedures: decrease election timeframes, modify hearing/appeals
- Get into more workplaces (i.e., non-union)
  - Attention to employer policies
  - PCA in the non-union workplace
New NLRB

“Quickie” Election Rules
## New NLRB Election Rules (Highlights)

- **Effective April 14, 2015**
- **New and Old**

<table>
<thead>
<tr>
<th>Election petitions, notices, and voter lists can be transmitted electronically</th>
<th>No electronic filing of petitions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Petition form includes union’s preference on election details (date, time, place, and method)</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Notice of petition must be posted</th>
<th>No posting required until election notice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hearing set 8 days after notice served</td>
<td>Hearing practice varies</td>
</tr>
<tr>
<td>Hearing on whether there is a question concerning representation only – i.e., whether to conduct an election</td>
<td>Hearing on unit issues, election format</td>
</tr>
</tbody>
</table>
## New NLRB Election Rules

<table>
<thead>
<tr>
<th>Oral argument only, no post-hearing briefs allowed without special permission</th>
<th>Briefs allowed 7 days after close of hearing, with extensions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Election scheduled for <strong>earliest date practicable</strong></td>
<td>Waiting period; presumptive 42-day period from filing of petition</td>
</tr>
<tr>
<td>Request for review may be filed, but no waiting period or automatic stay of election</td>
<td></td>
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<tr>
<td>Objections to election must be accompanied by written offer of proof</td>
<td></td>
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<tr>
<td>Post-election hearing 21 days after tally of ballots</td>
<td></td>
</tr>
<tr>
<td>Board is not required to review RD post-election decisions</td>
<td>Board required to review disputes</td>
</tr>
</tbody>
</table>
NLRB “Quickie” Election Rules: Outcomes

- Significant increase in number of petitions
- Significant decrease in election periods
  - 23.3 day average
- Several elections in less than 19 days
Review of Potential Outcomes

- 1 – 14 days 89%
- 15 – 21 days 86%
- 22 – 28 days 78%
- 29 – 35 days 72%
- 36 – 42 days 60%
- 43 or more days 61%

Source: Labor Relations Institute, 2015
Focus on Employer Rules-Non-union Employers
NLRB Expands Focus – Rules and Policies

- Section 7 protects the right of both *unionized* and *non-unionized* private-sector employees (with limited coverage exceptions) to engage in protected concerted activity.
  - Protected = concerning wages, hours, and other terms and conditions of employment.
  - Concerted = for mutual aid or protection; by, with, or on the authority of other employees; inducing others to prepare for group action.
- Employers may violate 8(a)(1) by adopting policies that tend to have a chilling effect on such activity—*even if such policies remain unenforced*.
- Board has closely scrutinized employee handbooks and other written policies in unionized and non-unionized environments alike.
- Effects – ULP, reinstatement/backpay, overturn election, etc.
Employer Rules Cases – Confidentiality

- Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives.

- Thus, an employer's confidentiality policy that either specifically prohibits employee discussions of terms and conditions of employment—such as wages, hours, or workplace complaints—or that employees would reasonably understand to prohibit such discussions, violates the Act.

Note: Material in this section is quoted or summarized from GC Memo 15-04 (March 18, 2015)
Employer Rules Cases – Confidentiality

- **Unlawful Rules (cont.)**

- Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information. Do not discuss work matters in public places.

- If something is not public information, you must not share it.

- Confidential Information is: "All information in which its [sic] loss, undue use or unauthorized disclosure could adversely affect the [Employer's] interests, image and reputation or compromise personal and private information of its members."
Employer Rules Cases – Confidentiality

Confidentiality rules are found “facially lawful [when]:

1) they do not reference information regarding employees or employee terms and conditions of employment,
2) although they use the general term "confidential," they do not define it in an overbroad manner, and
3) they do not otherwise contain language that would reasonably be construed to prohibit Section 7 communications.”

Also, can be read in context, as with the last rule which was “nestled in” conflicts of interest and SEC compliance rules.
Rules that prohibit employees from engaging in "disrespectful," "negative," "inappropriate," or "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful. See *Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (Dec. 16, 2014).

A rule that bans false statements will be found unlawfully overbroad unless it specifies that only maliciously false statements are prohibited. *Id.* at 4.
Employer Rules Cases – Employee Conduct

Unlawful Rules

[B]e respectful to the company, other employees, customers, partners, and competitors.

Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."

No "[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management."
Unlawful Rules (cont.)

Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative.

Do not make "[s]tatements "that damage the company or the company's reputation or that disrupt or damage the company's business relationships."

Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments."

"Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail. ..."
Rule that requires “employees to be respectful and professional to coworkers, clients, or competitors, but not the employer or management, will generally be found lawful.”

Rules prohibiting conduct that amounts to insubordination would also not be construed as limiting protected activities. See Copper River of Boiling Springs, LLC, 360 NLRB No. 60 (Feb. 28, 2014).

Rules that employees would reasonably understand to prohibit insubordinate conduct have been found lawful.
Protected Concerted Activity—Social Media
What is Protected Concerted Activity?

- The topic is **protected**: wages, hours and other terms and conditions of employment

- The activity is **concerted**
  - For mutual aid or protection
  - With or on the authority of other employees
  - Inducing others to "prepare for" group action
  - [Not required if pre-emptive]

- Does not do so in a way that **loses protection**:
  - Knowingly and materially false (maliciously untrue)
  - Extreme accusations
  - Disloyalty
  - Actual confidentiality/trade secrets (beyond sensitive information or subjects)
  - Too profane or vulgar
  - Violates other policies or laws
Social Media Policies are **unlawful** if:

- Prohibit release of "confidential guest, team member, or company information."
- Prohibit discussion of confidential information in break room, at home, or in open areas.
- Require employees to secure employer permission before posting potential prohibited information.
- Prohibit posting of "offensive, demeaning, abusive, or inappropriate remarks" online.
- Warn employees not to incorporate employer logos, trademarks, or other assets in your posts.
- Suggest that employees "think carefully" about friending co-workers online.
- A model/approved social media policy is contained in GC Memorandum 12-59 (May 30, 2012).
Employee Use of E-Mail:

*Purple Communications, Inc.*, 361 NLRB No. 126 (2014)
“We adopt a presumption that employees who have been given access to the employer’s email system in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment while on nonworking time, absent a showing by the employer of special circumstances that justify specific restrictions.”
Could There Be More?
**Micro-Units**

- *Specialty Healthcare*, 357 NLRB No. 83 (2011)
  - Approved "micro-units" of one department or one job classification (in this case only nursing assistants)
  - Board precedent generally favored "wall-to-wall" units – "an appropriate unit," not necessarily "the most appropriate unit“ – but still including other employees sharing a “community of interests”
  - Now, presumptively appropriate is any “readily identifiable group that share a community of interest”
  - Burden on employer to “demonstrate that the excluded employees share an overwhelming community of interest with the included employees.”
Joint Employer Status

- Efforts by Board to create joint liability between entities as “joint employers”
- Particularly in franchise relationships
- Current standard: joint employers if “share or codetermine those matters governing the essential terms and conditions of employment”; entity must “meaningfully affect” hiring, firing, discipline, supervision, and direction.
- GC pressing for “totality of circumstances”; entity wields “sufficient influence” over working conditions such that “meaningful bargaining could not occur in its absence”
II. WHITE COLLARS JUST GOT MORE EXPENSIVE
What do the proposed regulations change?

- Changes the salary “level,” i.e., amount required for the “white-collar” exemptions
- White-collar exemptions affected are the following:
  - Executive
  - Administrative
  - Professional
  - Computer Related
What do the proposed regulations change? (Cont'd.)

- Salary required is $921 week (current salary level is $455)
- Subject to annual adjustment
- Computer related professionals can still be paid hourly - $27.63
What do the proposed regulations change? (Cont'd.)

- Highly-compensated employees
  - Salary + compensation = $122,148 (up from $100,000)
  - Subject to annual adjustment
  - Must still get weekly minimum required salary
How is the annual adjustment calculated?

- Salary will be adjusted on an annual basis
  - Minimum 60-day notice from the Secretary of Labor
- The DOL is considering two methods
  - Fixed percentile of earnings for full-time salaried workers
  - Changes to the Consumer Price Index for All Urban Consumers (“CPI-U”)
What don’t the proposed regulations change?

- White-collar “duties” tests
- Other exemptions, e.g.,
  - Outside sales employees
  - Section 7(i) Retail and Service
  - Motor carrier exemption
  - Sugar beet processors (there really IS an exemption), etc.
What don’t the proposed regulations change? (Cont’d.)

- The DOL alluded to changing duties and/or salary basis
  - “Logical outgrowth” doctrine
  - Duties tests still up for grabs in the final rule
  - Stay tuned
Who may be affected by these proposed regulations?

- The DOL estimates 4.6 million would be affected.
- Common job classifications include entry-level managers, some entry and mid-level administrative employees and entry level professionals.
- Common industries include some office and professional workers, retail, food service, hospitality and service industries.
What must an employer do now?

- Evaluate exempt positions to determine who is in the range, i.e., $23,660 – approximately $55,000.
- Salary ≠ exemption.
  - Can be salaried, non-exempt if duties test not met
Some Options, If Implemented

- Can raise salary over the minimum for those who are close
- Can still pay salary, plus overtime
  - Consider changing to fixed salary for fluctuating hours or the fluctuating workweek (“FWW”)
- Can change to hourly compensation plus overtime

What must an employer do now? (Cont’d.)
Potential Trouble Spots

- Scheduling and “off-the-clock” work
- Timekeeping
- Regular rate and bonuses
- Working from home or smartphone/emails
- State law compliance
When do we expect them?

- Between June and November 2016
- Over 200k comments
- May be slightly lower salary ($47k) and can include non-discretionary bonuses.
The Patient Protection and Affordable Care Act
King v. Burwell

Supreme Court granted cert in King v. Burwell to determine whether regulators' interpretation of PPACA that subsidies are available on federally run exchanges is entitled to deference or was beyond its authority.

- 34 states with federally run exchanges
- Argued March 4, 2015
- Decision issued on June 25, 2015

Supreme Court (6-3) ruled for the government and upheld the subsidies in all states.
Employers' ACA compliance efforts must continue.

- Identify full-time employees using ACA measurement and stability periods and offer affordable, minimum value coverage (or risk paying an employer penalty).
- Employer mandate starts for employers with 50 to 99 employees on January 1, 2016.
- Prepare for the ACA's employer reporting obligations.
- Pay fees for the Patient Centered Outcomes Research Institute and the Transitional Reinsurance Program.
- Analyze the cost of their employer-sponsored coverage in light of the upcoming tax on high cost health insurance (the so-called "Cadillac tax").

No significant court challenges to the ACA at the present time.

Any future modifications will have to come from Congress.
PPACA EMPLOYER REPORTING
New Reporting Requirements

- New tax reporting requirements are foundation of IRS enforcement of tax provisions of ACA:
  - Individual mandate (Code § 5000A) – which individuals owe penalties for failing to maintain health coverage?
  - Employer mandate (Code § 4980H) – which employers owe penalties for failing to offer affordable, minimum value coverage to full-time employees?
  - Premium tax credits (Code § 36B) – which individuals are eligible to receive premium assistance for coverage purchased on the Marketplace?
- Calendar year reporting regardless of plan year
- Important to have systems in place to track required information early in 2015.
Payer Reporting – IRC 6055

- Insurer if a fully insured group health plan, or plan sponsor (generally, employer or trustees) if a self-insured group health plan, must report coverage information to IRS in a new annual return to ensure that individuals are complying with the individual mandate and obtaining minimum essential coverage

  - Name, address, and TIN of each "responsible individual" (primary insured)
  - Name and TIN of each individual covered under the policy or plan
  - For each covered individual, the months for which for at least one day the individual was enrolled in coverage and entitled to receive benefits
Large employers must report the terms and conditions of the health care coverage provided to full-time employees for the year in a new annual return for IRS to determine whether employer provides adequate coverage to avoid shared employer responsibility penalties.

- Certification as to whether the employer offered to its full-time employees and their dependents the opportunity to enroll in "minimum essential coverage" under an eligible employer-sponsored plan, by calendar month.
- The months during the calendar year for which coverage under the plan was available.
- Each full-time employee's share of the lowest cost monthly premium (self-only) for coverage providing minimum value offered to that full-time employee under an eligible employer sponsored plan, by calendar month.
- The number of full-time employees for each month during the calendar year.
- The name address and taxpayer ID for each full-time employee during the calendar year and the months, if any during which the employee was covered under the plan.
Timing of Filings

- Voluntary for 2014, mandatory for 2015
- C-Forms: Employers subject to both 6055 and 6056 reporting will report on new Form 1095-C to employees by January 31 and on new Form 1094-C to IRS by February 28 (March 31 if filing electronically).
- B-Forms: Employers not subject to 6056 reporting will report on a new Form 1095-B to employees by January 31 and on new Form 1094-B to IRS by February 28 (March 31 if filing electronically).
- Electronic reporting to IRS is mandatory if 250 or more returns are filed by the employer for that calendar year.
- Automatic extension of 30 days (with possibility of another extension of 30 days) for filing with the IRS: Form 8809.
- Discretionary extension of 30 days to furnish forms to individuals: Must write IRS and request – NOT AUTOMATIC
# Employer-Provided Health Insurance Offer and Coverage

**Part I** Employee

<table>
<thead>
<tr>
<th></th>
<th>Employee</th>
<th></th>
<th>Applicable Large Employer Member (Employer)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Name of employee</td>
<td>2</td>
<td>Social security number (SSN)</td>
</tr>
<tr>
<td>3</td>
<td>Street address (including apartment no.)</td>
<td>8</td>
<td>Employer identification number (EIN)</td>
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<tr>
<td>4</td>
<td>City or town</td>
<td>5</td>
<td>State or province</td>
</tr>
<tr>
<td>6</td>
<td>Country and ZIP or foreign postal code</td>
<td>9</td>
<td>Street address (including room or suite no.)</td>
</tr>
</tbody>
</table>

**Part II** Employee Offer and Coverage

<table>
<thead>
<tr>
<th></th>
<th>All 12 Months</th>
<th>Jan</th>
<th>Feb</th>
<th>Mar</th>
<th>Apr</th>
<th>May</th>
<th>June</th>
<th>July</th>
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<tbody>
<tr>
<td>14</td>
<td>Offer of Coverage (enter related code)</td>
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<td>15</td>
<td>Employee Share of Lowest Cost Monthly Premium, for Self-Only Minimum Value Coverage</td>
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<td>16</td>
<td>Applicable Section 4980H Safe Harbor (enter code, if applicable)</td>
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</table>

**Part III** Covered Individuals

If Employer provided self-insured coverage, check the box and enter the information for each covered individual. □

<table>
<thead>
<tr>
<th></th>
<th>Name of covered individual(s)</th>
<th>SSN</th>
<th>(d) DOES SSN Is Not Available</th>
<th>(e) Covered All 12 Months</th>
<th>(f) Months of Coverage</th>
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</thead>
<tbody>
<tr>
<td>17</td>
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</tbody>
</table>

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions.

*Cat. No. 807259M*

Form 1095-C (2015)
Form 1094-C

Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns

Information about Form 1094-C and its separate instructions is at www.irs.gov/form1094c

Part I  Applicable Large Employer Member (ALE Member)

1. Name of ALE Member (Employer)

2. Employer identification number (EIN)

3. Street address (including room or suite no.)

4. City or town

5. State or province

6. Country and ZIP or foreign postal code

7. Name of person to contact

8. Contact telephone number

9. Name of Designated Government Entity (only if applicable)

10. Employer identification number (EIN)

11. Street address (including room or suite no.)

12. City or town

13. State or province

14. Country and ZIP or foreign postal code

15. Name of person to contact

16. Contact telephone number

For Official Use Only

17. Reserved

18. Total number of Forms 1095-C submitted with this transmittal

19. Is this the authoritative transmittal for this ALE Member? If "Yes," check the box and continue. If "No," see instructions

Part II  ALE Member Information

20. Total number of Forms 1095-C filed by and/or on behalf of ALE Member

21. Is ALE Member a member of an Aggregated ALE Group?

   □ Yes  □ No

   If "No," do not complete Part IV.

22. Certifications of Eligibility (select all that apply):

   □ A. Qualifying Offer Method  □ B. Qualifying Offer Method Transition Relief  □ C. Section 4980H Transition Relief  □ D. 98% Offer Method

Under penalties of perjury, I declare that I have examined this return and accompanying documents, and to the best of my knowledge and belief, they are true, correct, and complete.

Signature   Title   Date

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions.
<table>
<thead>
<tr>
<th>(a) Minimum Essential Coverage Offer Indicator</th>
<th>(b) Full-Time Employee Count for ALE Member</th>
<th>(c) Total Employee Count for ALE Member</th>
<th>(d) Aggregated Group Indicator</th>
<th>(e) Section 4980H Transition Relief Indicator</th>
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<tbody>
<tr>
<td>23  All 12 Months</td>
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<td>24  Jan</td>
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### Part IV  Other ALE Members of Aggregated ALE Group

Enter the names and EINs of Other ALE Members of the Aggregated ALE Group (who were members at any time during the calendar year).

<table>
<thead>
<tr>
<th>Name</th>
<th>EIN</th>
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<tbody>
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<td>51</td>
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<td>36</td>
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Penalties can be imposed for: (1) failing to timely file a return or provide statements; and/or (2) failing to provide a correct or complete statement.

- Each failure has a penalty of $250 per failure ($500 for intentional failures), subject to a $3 million cap annually.
- Each employee’s statement could be a single failure.
- Example: If an employer fails to report a full-time employee on Form 1094-C and fails to provide that employee with a Form 1095-C, there are two failures for that single employee and there would be a $200 penalty.

- No penalties for returns filed in 2016 (for 2015) if good faith effort is made to comply.
- Available only for incorrect or incomplete information reported on the return or statement (including TINs and dates of birth).
- No relief if fail to timely file an information return or furnish a statement.
IRS Issues Initial Guidance on Cadillac Tax

- Code Section 4980I imposes an excise tax on high-cost health plans
  - 40% tax on value of “applicable employer-sponsored coverage” above a threshold (“excess benefit amount”)
    - $10,200 for self-only coverage in 2018
    - $27,500 for other than self-only coverage in 2018
  - Adjustments for inflation, age, gender, qualified retirees, multiemployer plans, and high-risk professions
    - Qualified retirees and high-risk professionals: $11,850 / $30,950
  - IRS considering how to apply when an employee is covered under both self-only and other than self-only coverage
  - 100% tax if employer does not accurately report excess benefit amount
IRS Issues Initial Guidance on Cadillac Tax

- IRS Notice 2015-16 provides initial guidance on the excise tax
- What is included in “applicable employer-sponsored coverage?”
  - HSAs: employer contributions, including employee salary reductions
  - On-site medical clinics: Likely won’t apply if clinic provides only *de minimis* medical care (many provide much more)
  - Limited scope dental and vision: still under consideration
IRS Issues Initial Guidance on Cadillac Tax

- What is included in “applicable employer-sponsored coverage?”
  - EAPs: still under consideration, but EAPs that are “excepted benefits” will not likely count
  - Executive physical programs: expected to count
  - HRAs: will count (but IRS still determining how to value – perhaps based on the amounts made newly available each year, not including carryover amounts)
  - Health FSAs: IRS believes these should count (even employee salary reduction contributions)

- Determine value of coverage based on coverage in which employee is enrolled (not coverage that is merely offered)
- Value of coverage is determined on COBRA principles, but complicated rules may exist to determine the cost for “similarly situated” individuals
Supreme Court’s Same-Sex Marriage Decision and Health Benefits (Obergefell v. Hodges)
United States v. Windsor

United States v. Windsor, decided on June 26, 2013, found section 3 of DOMA unconstitutional on the grounds that it violated the equal protection and due process guarantees under the Fifth Amendment to the U.S. Constitution.

- Did not address section 2 of DOMA - states could still refuse to recognize same-sex marriages legally entered into in another state.
- Did not address whether a state law prohibiting same-sex marriage violated the U.S. Constitution.
- 35 states at the time of the Windsor decision did not recognize same-sex marriage.
Obergefell v. Hodges

- Obergefell v. Hodges, decided on June 26, 2015, found that the Fourteenth Amendment to the U.S. Constitution requires a state to license a same-sex marriage and to recognize a same-sex marriage lawfully licensed and performed in another state.

- Invalidates section 2 of DOMA.

- Invalidates the laws in the 14 states that currently do not recognize same-sex marriages.
Different Treatment in Benefit Plans

State and Local Governmental Employers - NO

- The Fourteenth Amendment's equal protection clause applies to all state and local governmental employers, and, therefore, the Obergefell decision means that governmental employers cannot make any distinctions between same-sex and opposite sex spouses.

- Impacted features may include:
  - Eligibility
  - Survivor and death benefits
  - Beneficiary provisions
  - QDROs
  - End imputed income of value of same-sex benefits

- Governmental employers must recognize same-sex spouses for qualified retirement plan purposes.
Different Treatment in Benefit Plans (cont'd)

- Private and Tax-Exempt Employers - RISKY
  - Risk a claim under Title VII of the Civil Rights Act, prohibiting sexual discrimination, which generally applies to all employers with 15 or more employees.
    
    **EXAMPLE:** The EEOC has suggested that if spousal benefits are provided to a male employee's wife but not to a female employee's wife, the employer has discriminated against the female employee.
  
  - Generally, ERISA will preempt a claim made under state laws which bar discrimination on the basis of sexual orientation or on the basis of sex (where the provisions may be stronger than Title VII).

  - *Cote v. Walmart:* Filed in Federal District Court in Boston alleging gender discrimination for failing to offer benefits to same sex spouse. Seeking class certification.

  - Private and tax-exempt employers must recognize same-sex spouses for qualified retirement plan purposes.
Churches and Religious Employers - UNCLEAR

- Churches are not exempt from Title VII’s prohibition on sex discrimination.
- Many state sex and sexual orientation non-discrimination laws exempt churches, but need to review definition of “church” to see how broad.
- Risk to federal tax-exempt status.

Defenses:

- Free exercise clause of First Amendment protects religious speech and conduct.
- Potential defenses under Religious Freedom Restoration Act (RFRA) (e.g. Hobby Lobby, Little Sisters of the Poor) or state RFRA laws.
- Church employers must recognize same-sex spouses for qualified retirement plan purposes.
Proposed IRS Regulations

- On October 21, 2015, IRS issued proposed regulations to codify *Windsor* and *Obergefell*. For all federal tax purposes:
  - Marriages of couples of the same-sex will be treated the same as marriages of couples of the opposite-sex.
  - Terms such as “husband,” “wife,” and “husband and wife” will be interpreted in a neutral way to include same-sex spouses as well as opposite-sex spouses.
  - A marriage of two individuals will be recognized for federal tax purposes if that marriage would be recognized by any state, possession, or territory of the U.S.
  - Does not include registered domestic partnerships, civil unions, or similar arrangements.
EEOC Proposed Wellness Program Rules
Legal Requirements for Wellness Programs

- Health Insurance Portability and Accountability Act of 1996 (HIPAA)
- Americans With Disabilities Act (ADA)
- Genetic Information Nondiscrimination Act (GINA)
- Internal Revenue Code
- Anti-Discrimination Laws
- Privacy Rights/Lifestyle Protection
- Employee Retirement Income Security Act of 1974 (ERISA)
- Health Care Reform (HCR)
Legal Requirements for Wellness Programs

Why is the EEOC involved?

- ADA prohibits discrimination based on disability.
- Imposes strict confidentiality requirements on the disclosure of medical information.
- Limits the circumstances under which an employer may make disability-related inquiries of employee or require the employee to have a medical examination:
  - **Disability related inquiry** – any question that is likely to elicit information about a disability [*most health risk assessments*]
  - **Medical examination** – procedure or test that seeks information about physical or mental impairment or health [*e.g., cholesterol testing or blood pressure screening*]
Americans With Disabilities Act (ADA)

- **Pre-employment?**
  - Limits until post-offer, then OK

- **Post-employment?**
  - Must be job-related and consistent with business necessity
  - Usually requires objective evidence and individualized analysis

**Important Exception Under ADA:** *Disability-related inquiries and medical exams are permitted under the ADA if they are made in the context of a voluntary wellness program.*

- The EEOC takes the position that a wellness program is "voluntary" so long as an employer does **not**:
  - require participation or
  - penalize nonparticipation
On April 20, 2015, the EEOC issued its long-awaited proposed rule on wellness programs.

It generally tracks the HIPAA wellness rules, with some important exceptions.

EEOC not yet effective, but EEOC has stated that it is unlikely that a court or the EEOC would find an ADA violation if an employer were following the proposed rules.

Proposed rules has five essential requirements.
Wellness Programs – EEOC Proposed Rule

- First Element: Employee health program, including any disability-related inquiries or medical examinations that are part of such programs, must be reasonably designed to promote health or prevent disease.
  - Similar to HIPAA wellness rules requirements.
  - Program must have a reasonable chance of improving the health of, or preventing disease in, participating employees.
  - Program must not be overly burdensome.
  - Program must not be a subterfuge for violating the ADA or other laws preventing employment discrimination, or highly suspect in the method chosen to promote health or prevent disease.
Acceptable: Conducting an HRA and/or a biometric screening of employees for the purpose of alerting them to health risks of which they may have been unaware would meet this standard.

Acceptable: Use of aggregate information from employee HRAs by an employer to design and offer health programs aimed at specific conditions that are prevalent in the workplace would meet this standard.

Not Acceptable: Collecting medical information on a health questionnaire without providing employees follow-up information or advice, such as providing feedback about risk factors or using aggregate information to design programs or treat any specific conditions would not be reasonably designed to promote health.

Not Acceptable: A program is not reasonably designed to promote health or prevent disease if it imposes, as a condition to obtaining a reward, an overly burdensome amount of time for participation, requires unreasonably intrusive procedures, or places significant costs related to medical examinations on employees. It is also not acceptable if the program exists mainly to shift costs from the covered entity to targeted employees based on their health.
Wellness Programs – EEOC Proposed Rule

- Second Element: The program must be voluntary.
  - Employee cannot be required to participate.
  - Employee cannot be denied coverage under any group health plan or particular benefit packages within a group health plan for non-participation, nor can benefits be limited for employees who do not participate.
  - Employer cannot take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees for not participating.
Wellness Programs – EEOC Proposed Rule

New Notice Requirement: Employer must provide employees a written notice that:

- Is written so that the employee from whom medical information is being obtained is reasonably likely to understand it;
- Describes the type of medical information that will be obtained and the specific purposes for which the medical information will be used; and
- Describes the restrictions on the disclosure of the employee's medical information, the employer representatives or other parties with whom the information will be shared, and the methods that the covered entity will use to ensure that medical information is not improperly disclosed (including whether it complies with the HIPAA Privacy Rule).
Wellness Programs – EEOC Proposed Rule

Third Element: Incentives (financial or in-kind) must not exceed a **30 percent limit** of the total cost of employee-only coverage.

- Incentive can be in the form of a reward or a penalty.
- All rewards for all wellness programs connected with the group health plan must be combined and may not exceed the 30 percent limit.
- Limit applies to participatory or health-contingent programs, or any combination of the two.

- This roughly aligns with the HIPAA wellness rule limits; however, HIPAA's allowance to extend the limit to 30 percent of the cost of family coverage if family members are eligible to participate is conspicuously absent from the EEOC regulations.
Wellness Programs – EEOC Proposed Rule

- Note that this would extend a financial limit to a HIPAA participatory program if the HIPAA participatory wellness program involves disability-related inquiries and/or medical examinations.
- Not all participatory wellness programs require disability-related inquiries or medical examinations such as attending nutrition, weight loss, or smoking cessation classes. These kinds of participatory wellness programs would not be subject to the EEOC's limit on incentives.
- This limit would not prevent employers from taking advantage of the HIPAA rules' allowance of a 50 percent incentive for tobacco-related wellness programs as long as the program did not involve disability-related inquiries or medical examinations.
- Smoking cessation that merely asks employees whether or not they use tobacco (or whether or not they ceased using tobacco upon completion of the program) is not an employee health program that includes disability-related inquiries or a medical examination and could still utilize the HIPAA rules' allowance of an incentive up to 50 percent of the cost of the coverage.
- A program that required employees to undergo a blood test or other medical examination to conclusively demonstrate the absence of tobacco use would involve a medical examination and would have to confine the reward to the 30 percent limit (even though HIPAA might have otherwise allowed an incentive of up to 50 percent).
Wellness Programs – EEOC Proposed Rule

- **Fourth Element:** Reasonable accommodations must be provided, absent undue hardship, to enable employees with disabilities to earn whatever financial incentive an employer offers.

- Similar to the HIPAA wellness rules' requirement to provide a reasonable alternative for health-contingent programs.

- ADA would also require a reasonable accommodation under a participatory wellness program subject to the ADA.
Examples.

- An employer that offers a financial incentive to attend a nutrition class, regardless of whether employees reach a healthy weight as a result, would have to provide a sign language interpreter so that an employee who is deaf and who needs an interpreter to understand the information could earn the incentive (as long as providing the interpreter would not result in an undue hardship to the employer).

- An employer would, absent undue hardship, have to provide written materials that are part of a wellness program in alternate format, such as in large print or on computer disk, for someone with a vision impairment.

- An employer that offers a reward to completing a biometric screening that includes a blood draw would have to provide an alternative test so that an employee with a disability that makes drawing blood dangerous can participate and earn the incentive.
Wellness Programs – EEOC Proposed Rule

Fifth Element: **Confidentiality requirements must be observed.**

- In general, information obtained from disability-related inquiries and medical examinations may only be provided to an employer in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of an employee.
- An exception exists for the administration of a health plan.
- HIPAA Privacy Rule must be observed, which will generally ensure compliance with the ADA's confidentiality obligations.
Other Reminders
Other Developments

- New Genetic Information Nondiscrimination Act Proposed Regulations on Spousal HRAs
- DOL officially puts kibosh on premium reimbursement arrangements in ACA FAQs Part XXII (November 6, 2014).
- IRS severely limited determination letter program.
- Continued DOL and IRS audits on all benefit plans.
- HIPAA Privacy and Security Phase 2 Audits
Questions?
This presentation is for general informational purposes only and is not specific legal advice. Please contact your attorney and discuss such matters within the attorney-client relationship for specific legal advice regarding this subject matter.