THOMPSON HINE

The Law At Work

Spring 2013

Counseling

Unpaid Interns: Educational Opportunity or Employer Pitfall?

By Nancy M. Barnes

It is that time of year again – summer internship season. With the downturn in the economy in 2007 and 2008, an increasing number of employers started using internships as a way to complete work and recruit potential future employees without increasing employee headcount. At the same time, swarms of college and graduate students began looking for opportunities to gain work experience and credentials for their résumés, and, in exchange, many were more than willing to work for free. It sounds like a win-win situation, but unless an internship meets the Department of Labor's (DOL) requirements for a training program, a for-profit, private sector employer[1] might be setting itself up for a future of legal headaches.

Recent headline-grabbing lawsuits brought by former interns against the Charlie Rose Show, Fox Searchlight Pictures and the Hearst Corporation illustrate the pitfalls of managing an internship program – particularly where interns are working long hours and sometimes doing what appear to be menial tasks. The increasing number of intern lawsuits has not gone unnoticed by plaintiffs' attorneys, who have established websites and blogs inviting interns to share their experiences and receive a free analysis of their legal status. In addition, the DOL has indicated that the internship proliferation has caught its attention and will be the subject of enforcement actions and audits where appropriate. Employers who choose to hire interns can decrease their risk and potential exposure by ensuring that their programs meet the six-part DOL test for a training program.

[1] By contrast, the public sector and nonprofit organizations typically can make available unpaid internship experiences provided the interns have no expectation of being compensated for their services.

For more details on any of the topics covered in *The Law At Work*, please contact the authors via the links at the end of each article or Tim McDonald, editor-in-chief. For information on our Labor & Employment practice, please contact Stephen Richey, practice group leader.

The DOL begins its analysis with the Fair Labor Standards Act (FLSA), which broadly defines "employ" as "suffer or permit to work." As a result, interns in the for-profit private sector most often will be found to be employees, who in turn are entitled to minimum wage and overtimeunless they meet the requirements for trainees. Do your interns meet these criteria?

- The internship is similar to training that would be provided at an educational institution. (This can be accomplished with a college providing oversight and educational credit. In addition, employers should avoid having interns perform administrative tasks, such as filing, where it would be difficult to argue that the intern is receiving an educational benefit from the work experience).
- The experience is for the benefit of the intern.
- The intern does not displace a regular employee. If the employer would have hired another employee but for the intern, the intern is likely an employee.
- The employer derives no immediate advantage from the internship and is occasionally impeded.
- The intern is not entitled to a job at the end of the internship, which is of a fixed duration. Using internships in the place of probationary periods for a potential new employee is impermissible.
- Both the employer and the intern understand that no wages will be paid.

Failure to meet these requirements can result in a whole host of legal problems starting with individual or collective actions for unpaid wages and overtime. Moreover, an employer may face additional liability for unpaid taxes, unemployment compensation, employee benefits, workers' compensation and other claims brought under the applicable state's laws. Taking proactive steps before hiring interns can turn an uncertain situation into a win-win for all involved.

For more information and best practices in employing interns, contact Nancy M. Barnes.

Health & Welfare

Health Care Reform for the HR Professional

By Julia Ann Love

The Supreme Court did not overturn the Patient Protection and Affordable Care Act, President Obama won re-election and the Mayan calendar did not accurately predict the end of the world, so health care reform is here to stay … and it's time to coordinate efforts to prepare your organization for the impact.

Pay or Play Mandate

Beginning in 2014, all applicable large employers (generally those with 50 or more full-time equivalent employees) must offer substantially all full-time employees and their children group health plan coverage or risk being subject to a penalty for failure to offer coverage.

If an applicable large employer offers no group health plan coverage *and* any of the employer's full-time employees purchase insurance through a state exchange *and* receive a premium tax credit or cost-sharing subsidy, the employer is liable for a penalty in an amount equal to $2,000 times the employer's number of full-time employees, less 30.

If an applicable large employer offers group health plan coverage that is either unaffordable or fails to offer minimum value *and* any of the employer's full-time employees purchase insurance through a state exchange *and* receive a premium tax credit or cost-sharing subsidy, the employer is liable for a penalty in an amount equal to $3,000 times the number of full-time employees who purchase coverage through a state exchange and receive a premium tax credit or cost-sharing subsidy. This penalty is capped at the amount of the penalty the employer would be required to pay if the employer failed to offer any group health plan coverage ($2,000 times the number of the employer's full-time employees, less 30).

As a result, employers subject to the pay or play mandate should already be evaluating the following:

- *Not offering group health plan benefits to employees.* While this may seem like an attractive option from a total cost and resources standpoint, employers must take into consideration their ability to attract and retain talent. Historically, group health plan benefits have been viewed as valuable by employees and potential employees, but this may change in the future depending on the success of the state exchanges. Human resources, benefits, strategic planning and business unit heads need to work together to determine talent acquisition and retention strategies, including the role of the employer's group health plan in the total compensation strategy.

- *How to determine full-time employee status.* Proposed Regulations and other sub-regulatory guidance set forth a complicated system for determining full-time employee status. Every employee must be classified as either an "ongoing" or "new hire" employee, and further classified as a "full-time," "variable hour" or "seasonal" employee.

  - For this purpose, an ongoing employee is one who has been employed for at least one complete measurement period (the look-back period over which an employer is permitted to determine full-time employee status), and a new hire employee is one who has not been employed for at least one complete measurement period.

  - A full-time employee is one who is reasonably expected to work on average at least 30 hours per week during a measurement period. A variable hour employee is one who is not reasonably expected to work on average at least 30 hours per week. A seasonal employee is one who may be reasonably expected to work on average at least 30 hours per week, but who is not reasonably expected to work for more than one season.

Human resources and HRIS personnel need to be trained to appropriately classify all existing and future employees as ongoing or new hire employees and as full-time, variable hour or seasonal employees.

- *How to count and track hours for purposes of determining full-time employee status.* The Proposed Regulations require that actual hours be tracked for hourly employees. However for non-hourly employees, the Proposed Regulations provide that employers may track actual hours or use a daily (eight hours per day) or weekly (40 hours per week) equivalency. Note that equivalencies may not be used if their use will result in significantly understated hours. The Proposed Regulations also provide special rules for employees of educational institutions and

require additional hours of service to be credited for employees on FMLA leave, USERRA leave or leave for jury duty.

This is a significant change from existing practice for most employers who currently determine group health plan eligibility based on expected hours rather than actual hours. As a result, employers need to work with their payroll and benefits groups to establish guidelines and systems for accurately and consistently determining hours of service.

- *How to treat new hire employees who have a change in status during their initial measurement period.* The Proposed Regulations provide that if a new hire employee changes status during his or her initial measurement period from a variable hour or seasonal employee to a full-time employee, the employer must offer group health plan coverage to that employee by the earlier of the first day of the fourth month after the change in status or the first day of the first period of coverage (the stability period) if the employee worked on average at least 30 hours per week during the initial measurement period.

  This rule requires employers to have processes and systems in place to evaluate an employee's status whenever the terms of the employment relationship change.

- *How to treat rehired employees and employees returning from unpaid leaves of absence.* Under the Proposed Regulations, an employer may treat a rehired/returning employee as a new hire employee if no hours of service are credited for a period of at least 26 weeks or no hours of service are credited for a period of time that is greater in length than the immediately preceding period of employment. All other rehired/returning employees must be treated as continuing employees. This means that they must be returned to the same status they had when they left, which includes coverage as of the date of rehire/return, if applicable.

  Likewise, this rule requires employers to have processes and systems in place to evaluate an employee's status immediately upon rehire or return to employment.

Employer Notice of the Exchanges

In late summer or fall of 2013, employers will be required to provide all active employees with a written notice of the exchanges. This notice is intended to inform employees of the availability of a state exchange in their state of residence in advance of the open enrollment period for the exchange, and must include the following information:

- *Basic exchange information.* The existence of an exchange in the employee's state of residence, the services provided by the exchange and how the employee may contact or access the exchange.

- *Cost.* Whether the employer's plan provides minimum value and, if the employer's plan does not provide minimum value, that the employee may be eligible for a premium subsidy or a cost-sharing reduction if he or she purchases coverage through the exchange.

- *Ramifications.* If an employee purchases coverage through the exchange, he or she will lose any available employer contribution for the employer's plan.

While the Departments of Labor and Health and Human Services have each indicated that model notices will be published, to date no such models have been made available.

In the meantime, employers should prepare by:

- Becoming educated on the exchanges being made available in the states in which their employees reside so they may answer questions raised by employees and their dependents.

- Determining whether their current group health plan provides minimum value and, if not, whether any action will be taken to change the coverage to minimum value coverage for 2014.

Coordination

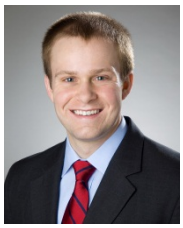
Now more than ever, various functions within an organization, including human resources, benefits, talent acquisition, tax and payroll, must coordinate efforts in order to comply with the Pay or Play Mandate and the various disclosure obligations under the Affordable Care Act. Effective coordination will result in more efficient and cost-effective compliance with the Affordable Care Act mandates.

For more information about group health plan coverage and the Patient Protection and Affordable Care Act, contact Julia Ann Love or any of Thompson Hine's employee benefits lawyers.

Compensation

New Directive for Analyzing Pay Discrimination Claims Involving Contractors

By Matthew R. Kissling and Staci M. Jenkins



The Office of Federal Contract Compliance Programs (OFCCP) recently revamped its approach to investigating potential pay discrimination involving federal contractors. Effective February 28, 2013, OFCCP rescinded the Bush administration-era guidance for compensation discrimination and swapped it for its new Policy Directive 307. This new guidance aligns OFCCP's investigative procedures with the traditional Title VII principles for addressing individual claims of compensation discrimination.

The new directive provides a complex description of the procedures and protocols OFCCP will now follow when conducting compensation investigations. The stated goal of the directive is to provide clarity and transparency to contractors about OFCCP's compensation investigation procedures. Importantly, Directive 307 implements a case-by-case approach to compensation discrimination investigations, where OFCCP investigators have a "range of investigative and analytical tools" at their disposal.

Under Directive 307, investigators will initially conduct a preliminary analysis of a contractor's compensation data, considering a number of quantitative and qualitative factors. The quantitative factors at an investigator's disposal include the size of the overall average pay difference based on race and gender; the size of the largest average pay difference within affirmative action plan job groups, or the contractor's existing salary band or pay grade system; the number of job groups or grades where average pay differences based on race or gender exceed a certain threshold; and the number of employees affected by race- or gender-based average pay differences within job groups or grades.

During the preliminary analysis, investigators may also consider a number of qualitative factors, including compliance history, OFCCP or EEOC complaints, anecdotal evidence, potential violations involving other employment practices, and data integrity issues. Importantly, Directive 307 makes it clear that these factors are not exclusive, and that an OFCCP investigator is not required to consider any or all of them during a preliminary analysis.

Once the preliminary analysis is complete, Directive 307 identifies tools that an investigator may use to determine the best course of action. Recognizing that the "best approach for a case depends upon the underlying facts," Directive 307 identifies three key questions for every compensation investigation:

1. Is there a measurable difference in compensation on the basis of sex, race or ethnicity?

2. Is there any difference in compensation between comparable employees under the contractor's wage or salary system?

3. If so, is there a legitimate, nondiscriminatory reason for the difference?

To answer these questions, investigators can utilize statistical analyses (i.e., regression analyses), nonstatistical studies (i.e., comparative or cohort analyses), anecdotal evidence, and review of workforce data and compensation policies. An investigator is also free to conduct employee interviews and to review a contractor's policies and practices. However, Directive 307 again makes it clear that an investigator is not limited to any of these tools.

Perhaps the broadest impact of Directive 307 is that it now instructs investigators to examine "all employment practices that have the potential to lead to compensation disparities." These practices include "access to opportunities," "policies and practices," and any observed differences in pay or benefits. In particular, OFCCP provides several examples of potentially troublesome employment practices:

- *Differences in salary or hourly rate.* Under a "highly subjective" salary system, Hispanic customer service agents are paid less than Caucasian employees in the same or similar positions.

- *Differences in job assignment or placement.* At a grocery store, men are hired into higher-paying meat department positions, while women are disproportionately assigned to lower-paying bakery department jobs.

- *Differences in training or advancement.* Management training is only available if an employee is recommended by a manager. Certain managers only refer Caucasian males for the training, so promotions to management are disproportionately given to Caucasian males.

In light of Directive 307's new case-by-case approach for compensation investigations, contractors should expect to see significant variations in how OFCCP will approach issues of compensation discrimination. Importantly, OFCCP is now more likely than ever to make a finding of compensation discrimination during a routine investigative audit.

- *Differences in earning opportunities.* African-American sales workers are disproportionately assigned to less-lucrative sales territories.

- *Differences in access to increases and add-ons.* Female lawyers who receive the same salary as male colleagues earn less in annual bonuses.

In light of Directive 307's new case-by-case approach for compensation investigations, contractors should expect to see significant variations in how OFCCP will approach issues of compensation discrimination. Importantly, OFCCP is now more likely than ever to make a finding of compensation discrimination during a routine investigative audit. Contractors should expect that OFCCP will utilize a number of different methods to analyze their compensation data, and that no single investigation will be the same.

Using Directive 307 as guidance, contractors should consider performing pre-submission reviews of their data and information under the **same standards** that OFCCP will use to evaluate it. They should also consider examining their routine employment policies and practices to determine whether there is potential for compensation disparities between different protected classes.

For more information or help in understanding how this new directive might affect your operations, please contact any member of our Labor & Employment group.

Immigration

USCIS Issues New I-9 Form – Employers Must Use Revised Form by May 8, 2013

By Sarah C. Flannery

On March 7, 2013, U.S. Citizenship and Immigration Services (USCIS) announced its publication of a revised Form I-9. This form is used by employers to verify employees' identification and work authorization. USCIS is encouraging employers to begin using the new form immediately, but there will be a 60-day grace period before its use becomes mandatory. Employers must use the new form, which is marked with a revision date of 3/8/13, beginning on May 8, 2013. The new form should only be used for new hires and for reverification of existing employees when required by law.

Employers must use the new form, which is marked with a revision date of 3/8/13, beginning on May 8, 2013 … Employers who use electronic I-9 forms should be sure to update the electronic system. Employers using hard copy forms should ensure that all employees responsible for I-9 compliance are aware of the new form.

Employers who use electronic I-9 forms should be sure to update the electronic system. Employers using hard copy forms should ensure that all employees responsible for I-9 compliance are aware of the new form. The new form, along with its instructions, is available at http://www.uscis.gov/files/form/i-9.pdf. This transition presents a good opportunity for employers to revisit their I-9 policies and perhaps consider conducting a compliance audit.

The new form does not substantively change the I-9 process nor the list of acceptable documents. It revises the instructions, revamps the layout and adds new data fields in part 1. The changes are intended to minimize errors in the completion of the form. The instructions, which have expanded from two pages to six, still leave some major pitfalls for employers unaddressed.

For example, as we approach summer, a time when many companies hire interns and recent graduates, it is worth noting a limitation on hiring foreign student graduates because this is not something addressed in the instructions. Most foreign students are entitled to one year of post-graduate work authorization so they can work in a field related to their degree. Some who pursued degrees in technical areas of study such as math, science or engineering are eligible for an additional period of work authorization. That additional period of work authorization, however, does not entitle them to work for any employer they choose;

there are limitations. In an effort to encourage employers to participate in E-Verify, a voluntary federal program to check employees' identity and work authorization, USCIS has mandated that foreign students with this extended period of work authorization can work only for employers who participate in E-Verify. Employers must be aware of this and know that they cannot hire these individuals unless they participate in E-Verify. While this is not covered in the instructions to the Form I-9, it is addressed in the 66-page Handbook for Employers, Guidance for Completing Form I-9. This is also a good resource to have alongside the instructions and can be located at: http://www.uscis.gov/files/form/m-274.pdf

For more information, please contact Sarah C. Flannery.

Workers' Compensation

Ohio Law – A Defense to Remember

By Janis B. Rosenthal and Philip B. Cochran

One of the most frequently litigated issues under the workers' compensation laws of Ohio is whether an injured worker should be precluded from receiving benefits due to his "voluntary abandonment" of employment. Obviously, both temporary total and permanent total disability compensation are costly benefits to the employer in a workers' compensation claim. Voluntary abandonment is an affirmative defense to an injured worker's request for temporary total disability or permanent total disability compensation.

The evolution of voluntary abandonment started in 1985 when the Ohio Supreme Court decided a case in which an individual quit his job and later requested temporary total disability benefits. Over the years, the voluntary abandonment defense has been expanded to include situations where an injured worker is fired for violating an employer's written work rule and later requests temporary total disability. The circumstances under which that defense applies, however, are not always so clear.

Retirement

In *State, ex rel., Jones & Laughlin Steel Corp. vs. Industrial Commission* (1985), 22 Ohio App. 3d 145, the injured worker made a voluntary choice to retire from his job and further indicated that he was retiring from the entire workforce. His request for temporary total disability benefits subsequent to his retirement was disallowed.

The Ohio Supreme Court held that the injured worker's inability to work was not the result of his industrial injury but rather was due to a voluntary action he took, i.e., retirement from the workforce. In other words, his voluntary choice to retire prevented the injured worker from returning to his job even if he were physically able to do so.

On August 21, 2012, the Ohio Supreme Court decided *State, ex rel., Rouan v. Industrial Commission*, 133 Ohio St. 3d 249. The court held that when determining whether an employee's retirement bars a subsequent request for temporary total compensation, two considerations must be evaluated: Was the retirement precipitated by the industrial injury or allowed conditions in a claim, and did the claimant remain in the workforce after retiring? In this case, it concluded that a voluntary abandonment occurred when the employee retired as a result of a nonindustrial injury.

Ms. Rouan suffered a leg injury in 2004. She received temporary total benefits until mid-2005 when her physician found she had reached maximum medical improvement. Also in 2005, she was approved for a disability retirement, with the Ohio Public Employees Retirement System attributing her inability to work exclusively to a major depressive disorder condition that was *not* an allowed condition in her industrial claim. Ms. Rouan never returned to the workforce. Starting in 2007, she filed various claims for total disability. Ultimately, the Supreme Court held that Ms. Rouan had voluntarily abandoned the workforce when she retired due to a nonindustrial condition and upheld the denial of her workers' compensation claim.

Voluntary Quit

In a similar and perhaps more clear-cut case, the Ohio Supreme Court held that a claimant voluntarily abandoned his former position of employment when he quit for reasons unrelated to his industrial injury. See *State, ex rel., McGraw vs. Industrial Commission*, 56 Ohio St. 3d 137 (1990). In this case, the employee, who had a compensable workers' compensation claim, quit his job at the employer of record and moved to Pennsylvania, where he worked sporadically in different jobs. The court affirmed the Industrial Commission's denial of temporary total disability benefits, holding:

> In the case before us, appellant quit his job at which he was injured for reasons unrelated to his injury. Even if appellant were able to perform his former duties, his own actions eliminated any opportunity for return to that position at Kenworth long before his alleged disability arose.

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Involuntary Departure From Work

Not all retirements are voluntary abandonments, however. In *State, ex rel., Rockwell International vs. Industrial Commission* , 40 Ohio St. 3d 44 (1988), the claimant retired from Rockwell and later requested temporary total disability compensation. The claimant established the reason he decided to retire was that he could no longer withstand the physical aspects of his job as a result of his allowed industrial injuries. The court held that the claimant's departure from work was involuntary and therefore not a voluntary abandonment of employment.

Conclusion

One thing is clear: The voluntary abandonment area of workers' compensation law, more than any other, requires close fact analysis on a case-by-case basis. Be prepared to present work rules, applications for retirement and medical records supporting your defense.

For more information about workers' compensation law, contact Janis B. Rosenthal or Philip B. Cochran.

Traditional Labor

Noel Canning: Where Does Labor Law Stand Now?

By Eric S. Clark and Megan S. Glowacki

Setting the Stage

In January 2012, Senate Republicans had been working for months to deny President Obama the ability to make three appointments to the National Labor Relations Board (NLRB). Some GOP senators believed this blockade would effectively shut down the five-member board, which they believed tends to favor labor interests.

The President attempted to maneuver around this blockade by preparing to make appointments while the Senate was in recess. In an effort to counter this maneuver, Republican senators avoided a recess and technically kept the Senate doors open in a pro forma session.

Notwithstanding the pro forma session, on January 4, 2012, President Obama appointed NLRB members Terence Flynn (R) , Richard Griffin (D) and Sharon Block (D). The President took the position that, despite technicalities, in reality the Senate was in recess, thereby allowing him to exercise his right to make recess appointments not subject to Senate confirmation.

The Opening Act: An Aggressive 2012 Board

The newly appointed Board, with its Democratic majority, issued numerous significant decisions in 2012. Several reversed long-established Board precedent, confounded employers and demonstrated an aggressive and activist agenda. Those decisions tightly narrowed the ability to issue social media policies and terminate employees for social media posts; forced employers to disclose witness statements obtained without a confidentiality promise; proscribed mandatory dispute resolution programs; required employers to respond promptly to union requests for information, even when the information requested may be irrelevant; and obliged employers to deduct union dues even after a collective bargaining agreement expires.

The Plot Twist: The *Noel Canning* Decision

In 2012, Noel Canning, a Washington state bottler and distributor of soda products, petitioned the D.C. Court of Appeals for review of an NLRB decision finding that Noel Canning violated the National Labor Relations Act by refusing to execute a collective bargaining agreement reached with the Teamsters union. But, Noel Canning argued more than the merits of the Board's decision. It also questioned the Board's authority to issue the decision altogether on constitutional grounds, arguing that because the Senate was not actually in recess at the time of the appointments, the three newly appointed members of the Board were never validly appointed. Thus, the Board lacked authority to issue a decision because a quorum did not exist.

On January 25, 2013, the D.C. Court of Appeals issued a blockbuster decision that spun traditional labor law into another cycle of uncertainty. The court agreed with Noel Canning, ruling that the January 4, 2012 recess appointments of Flynn, Griffin and Block were invalid because they did not occur during an intersession recess of the Senate. (In a separate controversy, Flynn stepped down in May 2012 following allegations that he leaked confidential information during time as a staff lawyer at the agency.) The court held that the President could only make recess appointments during gaps between enumerated sessions of the Senate (*inter*session appointments) and not *intra*session recess appointments. Accordingly, a pro forma session is not a recess, and the appointments were ruled to be invalid.

The Second Act: The Board Ignores *Noel Canning*

The NLRB and the Department of Justice have adamantly opposed the D.C. court's decision. NLRB Acting General Counsel Lafe Solomon has reiterated that it has been the Board's longstanding practice not to acquiesce in adverse decisions by individual courts of appeals in subsequent proceedings involving different parties. In essence, the Board has ignored the *Noel Canning* decision. The Board has continued to issue decisions and hear, process and decide election petitions and unfair labor practice charges, notwithstanding *Noel Canning*.

The NLRB has decided not to seek en banc review of the *Noel Canning* decision. Instead, it will bring its challenge directly to the Supreme Court. It remains to be seen whether the Supreme Court will accept the Board's petition for certiorari.

The Dramatic Fallout

While employers wait for potential review by the Supreme Court, the D.C. court's ruling has ignited similar claims and appeals in federal courts alleging that the NLRB lacks the authority to act because it was not comprised of the necessary three-person quorum of properly appointed members. Although *Noel Canning* does currently provide employers with a potential avenue to overturn Board decisions by seeking review before the D.C. circuit, employers will have to wait. The court has already issued orders holding pending cases that raise the recess appointment issue in abeyance.

Employers are likely to flood other circuit courts with similar challenges. More than a dozen cases involving the recess appointment issue are now pending in the other appellate courts. However, as specifically noted by the D.C. Circuit in *Noel Canning,* other circuits may take a different view of the recess appointments.

An Uncertain End: How Should Employers React?

Although *Noel Canning* calls them into question, the Board's 2012 decisions remain Board law. The Board's ALJs and regional offices will likely continue to rely on and apply all of the Board's aggressive 2012 decisions. For now, employers should continue to accept them as the rule of law. But stay tuned for the third act: Supreme Court review (or lack thereof!).

For more information about the National Labor Relations Act, contact Eric S. Clark or Megan S. Glowacki.

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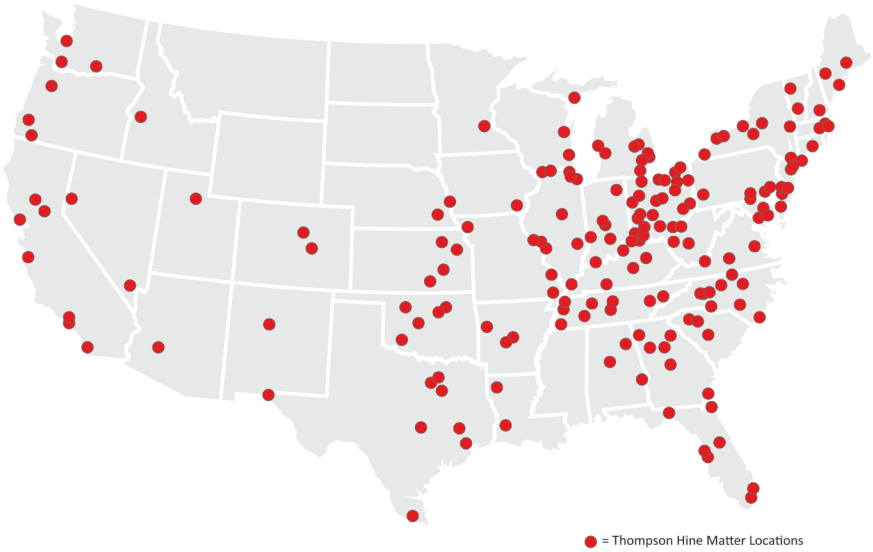

OSHA

Site-Specific Targeting

By M. Scott Young

For 2013 the Occupational Safety and Health Administration (OSHA) plans at least 1,260 randomly selected inspections of employer job sites with a focus on workplaces having above average injury and illness rates. OSHA's site-specific targeting (SST) became effective in January 2013, and OSHA has stated this will continue through January 2014. We would not be surprised if this SST program continues beyond 2014.

The SST program is OSHA's main programmed inspection plan for non-construction workplaces that have 20 or more employees. OSHA otherwise inspects job sites, typically with no advance notice, where they have reason to believe there is imminent danger, where there has been a reported catastrophe or fatal accident, where there is an employee complaint involving safety and health, or to conduct a follow-up inspection after a prior inspection. When during an inspection OSHA finds a violation of a federal safety regulation to which there is employee exposure, it can issue citations, assess fines and order the employer to comply with an applicable safety regulation, subject to contest rights and an adjudicatory process if pursued by the employer.

OSHA selects establishments for inspections under the SST program based on work site specific injury and illness rates. OSHA will consider days that an employee is away from work because of work injury and illness (DAFWII) and also days that an employee is away, restricted or transferred to another job because of work injury and illness (DART). The DAFWII case rate is the number of cases that involve days away from work per 100 full-time equivalent employees. Cases that involve only temporary transfers to another job or restricted work are not included. This is calculated based on (N/EH) x (200,000), where N is the number of cases involving days away from work, EH is the total number of hours worked by all employees during the calendar year and 200,000 is the base number of hours worked for 100 full-time equivalent employees. DART is calculated based on (N/EH) x (200,000), where N is the number of cases involving days away and/or restricted work activity and/or job transfers, EH is the total number of hours worked by all employees during the calendar year and 200,000 is the base number of hours worked for 100 full-time equivalent employees.

Pursuant to the SST program, throughout 2013 and through January 2014 OSHA is inspecting work sites with 20 or more employees that have the following DART and DAFWII case rates for 2010:

- Manufacturing establishments with a DART rate at or above 7.0 or a DAFWII case rate at or above 5.0 (only one of these criteria must be met).
- Non-manufacturing establishments (except for nursing and personal care facilities) with a DART rate at or above 15.0 or a DAFWII rate at or above 14.0 (only one of these criteria must be met).

Nursing and personal care establishments are also subject to OSHA inspections, though pursuant to a separate OSHA directive (CPL 03-00-016), which is also based upon injury and illness rates. Further, even if a work site has fewer than 20 employees at the time an OSHA inspector arrives on site to begin an inspection, that inspection will take place if the establishment has 10 or more employees and a calculated DART rate of 3.6 or greater or a DAFWII rate of 2.2 or greater or if records are not available.

Should an OSHA inspector arrive at your work site to inspect, (s)he likely will perform a comprehensive inspection focused on your company's compliance with applicable federal safety regulations. While it is important to cooperate with OSHA, an employer has rights. If you have questions about what to do and what not to do should an OSHA inspector show up at your work site, or if OSHA has performed an inspection with resulting citations and fines to your company, we may be able to help. We are experienced with all facets of OSHA matters, and can also advise on whether a company will likely be targeted for an inspection by OSHA's SST program.

For more information on the SST program or other matters relating to OSHA, please contact M. Scott Young or any member of our Labor & Employment group.

Supreme Court Update

DOMA or Not DOMA?

By Stephen Richey

Last year's blockbuster Supreme Court employment case involved the Patient Protection and Affordable Care Act, in which the Court affirmed the Act's constitutionality, paving the way for significant changes in virtually every employer's health insurance policies. This year's blockbuster case is *U.S. v. Windsor,* in which the Court will decide the constitutionality of the Defense of Marriage Act (DOMA). As Justice Ginsburg noted at oral argument, DOMA is implicated in more than 1,000 different federal laws.

In 1996, Congress passed and President Clinton signed DOMA, which defines marriage as the "union between one man and one woman." Its practical effect was to prohibit the federal government from recognizing same-sex marriage. DOMA's effects in the workplace are significant. For example, it prohibits same-sex couples from the receiving the benefits of the spousal protections under the Family and Medical Leave Act as well as spousal coverage under employer-sponsored health insurance.

DOMA's effect when enacted was modest. However, in the nearly 20 years since, the nation's attitude toward same-sex marriage has changed dramatically. In 2004, Massachusetts became the first state to legally recognize same-sex marriage. Since then, numerous states have recognized same-sex marriage, either through legislation or judicial action.

On March 27, 2013 oral argument in *Windsor* was held before the Supreme Court. Edith Windsor brought this lawsuit because she was forced to pay a substantial inheritance tax on the estate of her longtime partner, which she would not have had to pay if her partner had been of the opposite sex. Ms. Windsor challenged DOMA under the United States Constitution's Equal Protection Clause. Her attorneys argued that the right to marry was a fundamental right of each person and excluding gays from marriage violated their constitutional right to equal protection under the 14th Amendment.

It is anticipated that the Court will align along its traditional liberal and conservative lines, leaving Justice Anthony Kennedy as the swing vote. Reading the tea leaves from oral arguments, it seems likely that Justice Kennedy will join with Justices Kagan, Sotomayor, Ginsburg and Breyer in finding DOMA unconstitutional. The Court is expected to issue its decision in June of this year. Stay tuned.

For more information about DOMA, contact Stephen Richey.