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SHRM-Rio Grande Valley
McAllen Texas
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HUMAN RESOURCE LEGISLATIVE, ADMINISTRATIVE & REGULATORY UPDATE

Presented
by

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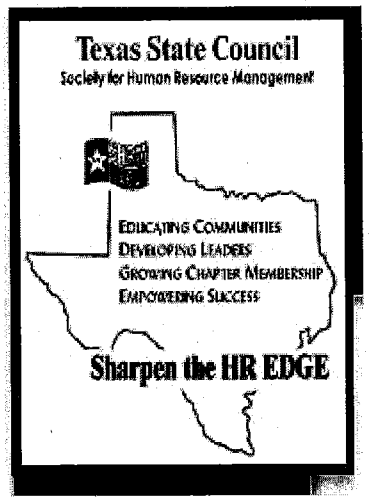
SHRM Texas State Council



- Expand Communication between SHRM Chapters, SHRM State Councils, and the appropriate Regional Council
- *Benefits of Membership*
  - Information
    - Resource Awareness
    - Exposure to Legislative Updates
  - Education
    - Professional Development
    - Programs and Speakers
    - PHR and d Certification
  - Networking

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PENDING FEDERAL HR RELATED LEGISLATION

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Non-Federal Employee Whistleblower Protection (S. 241)

- Would protect nonfederal employees from employer retaliation for disclosing "gross mismanagement or waste" of federal funds
- Would prohibit employers from discharging, demoting or otherwise discriminating against nonfederal employees for participating in any disclosure of misuse of federal funds
- Misuse would include gross mismanagement of an agency contract, a gross waste of federal funds, a danger to public safety caused by the use of federal funds, an abuse of authority related to federal funds, or a violation of law related to a federal contract
- Cleared Senate Committee April 25, 2012

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Rebuild America Act (S. 2252)

- Introduced March 29, 2012
- Would seek to create jobs through investments in areas such as infrastructure and manufacturing
- Would increase minimum wage to $8.10 an hour in the first year of enactment
- Thereafter minimum wage would rise to $9.80 and after that would be indexed to inflation
- Would require employers with 15 or more employees to provide workers with up to seven (7) days of paid sick leave

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Minimum Wage (H.R. 4901)

- Introduced on June 6
- Would increase "tipped" employees base pay to $7.00/hour and index future increases in the federal minimum wage rate

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Legal Workforce Act (H.R. 2164)

- Would mandate use of E-Verify for all new hires
- Would totally eliminate use of paper I-9's
- Would provide a "safe harbor" from prosecution for hiring undocumented workers

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Fair Employment Opportunity Act of 2011 (H.R. 12) (S.1471)

- Would prohibit employers from refusing to consider unemployed workers for available positions
- Would prevent employers from including language in job postings that "unemployed" should not apply

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Employment Non-Discrimination Act "ENDA" (H.R. 1397) (S. 811)

- Would create federal protections against workplace discrimination based on sexual orientation and gender identity
- Would make it illegal for employers with 15 or more employees
- Has bi-partisan support

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Paycheck Fairness Act (H.R.1519) (S.797)

- Would amend FLSA to expand remedies for gender discrimination in compensation
- Would allow compensatory and punitive damages
- Would limit affirmative defense available to employers:
  - *Currently*, Equal Pay Act provides that employers may justify pay differential between female and male employees showing disparity is based on "any factor other than sex"
  - Would require that the "other factor" must be a "bona fide factor," such as education, training or experience
  - Employer would have to demonstrate that the factor is NOT based on a sex-based differential, is job-related and is consistent with business necessity

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Paycheck Fairness Act, contd.

- On May 23 seven Democratic senators urged Congress to approve legislation
- On May 31 House rejected a procedural move to bring the Act to the floor for debate
- On June 5 Senate rejected, on a 52-47 party-line vote, a motion to begin debate on legislation
- Therefore, legislation is basically dead for this Congressional term

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Fair Pay Act of 2011 (H.R. 1493) (S.B. 788)

- Would amend Equal Pay Act to require ***equal pay for equivalent jobs***
- "Equivalent jobs" means jobs that may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions.
- Puts burden on employer to justify different pay for men and women performing equivalent jobs
- Introduces extensive new recordkeeping requirements
- Allows compensatory and punitive damages for violations

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Healthy Families Act (H.R. 1876) (S. 984)

- Would apply to employers with 15 or more employees
- Would require up to 7 days of paid sick leave per year on an accrual basis to all "full-time" employees in order to care for themselves, children or spouse
  - 1 hour of paid sick leave for every 30 hours worked to a maximum of 56 hours

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Equal Employment for All Act (H.R. 321)

- Would amend the Fair Credit Reporting Act
- Would prohibit use of consumer credit checks against prospective and current employees for purpose of making adverse employment decisions (including hiring, promotions, transfers and terminations) even if employee consented
- Would allow use only if job required checking for national security or FDIC clearance, for state or local government agency or for a supervisory, managerial, professional, or executive position at financial institution

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Family and Medical Leave Inclusion Act (H.R. 2364, S. 1283)

- Would allow employees to take FMLA leave for same-sex partner or spouse and children, siblings or grandparents of domestic partners

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Protecting Jobs from Government Interference Act (H.R. 2587) (S. 1523)

- Would prevent NLRB from ordering employer to
  - Restore any operations
  - Rescind any relocation or transfer
  - Make an investment at a particular plant, facility or location
- SHRM has alerted all members to call Congress in support of Bill

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Pregnant Workers Fairness Act

- Introduced May 8
- Would protect pregnant workers from discrimination
- Would require employers to make "reasonable accommodations" for pregnant workers
- Forbid employers from denying employment opportunities to a job applicant or employee, if denial is based on the need of the employer to make "reasonable accommodations" to known limitations related to the pregnancy or childbirth

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Password Protection Act
Social Networking Online Protection Act (SNOPA)

- Introduced May 9 and April 27, respectively
- Would prohibit employers from requiring employees or applicants to provide passwords or access to private online accounts such as social media websites or email accounts
- Would bar disciplinary action against employees who refused to "volunteer" such information

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Veterans' Job Corps Act (H.R. 5683)
Veterans Jobs Act (H.R. 5712)

- H.R. 5683 introduced May 9
  - Would create a national jobs program for veterans
  - Would encourage hiring veterans to use skills developed in the military to serve as first responders, employees at national parks, or other community workers
- H.R. 5712 introduced May 10
  - Would create mentoring program for veterans
  - Would authorize a pilot program to allow local business leaders to act as mentors for veterans going through existing federal transition assistance programs

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Military Job Training Bill Signed (S. 2239, H.R. 4155)

- On July 23 President Obama signed into law legislation that would allow veterans to use military training skills to satisfy training or certification requirements for federal licenses

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Forewarn Act (S. 3297)

- Filed June 14
- Would expand the scope of the WARN Act
- Would drop threshold from 100 employees to 75
- Would lower the plant closing trigger from 50 employees to 25
- Would expand the notice period from 60 days to 90

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Ban the Box Act (H.R. 6220)

- Introduced to U.S. House on July 26, 2012
- Would prohibit employers from asking applicants about criminal background until after making a conditional job offer
- Exception to rule would be in event of unreasonable risk to the safety of specific individuals or to the general public

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Recent Federal HR Regulations

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Proposed NLRA Rights Poster

- NLRB has published a Rule that would require many employers to notify employees of their rights under the National Labor Relations Act (NLRA) by posting a notice
- The Rule would apply to private-sector employers subject to the NLRA, excluding agricultural, railroad and airline employers
- Would require employers that customarily communicate with employees on Internet or Intranet sites to post the NLRB notice electronically

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NLRA Posting Postponement

- On April 17, 2012 U.S. Court of Appeals for the District of Columbia Circuit enjoined the National Labor Relations Board from enforcing the regulation on April 30th

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NLRB Posters

- www.nlrb.gov/concerted-activity, a website which explains protected concerted activity to non-union worker

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NLRB "Quick Election" Regulations

- On December 22, 2011, the NLRB Union Election Process was amended when the Final Rule was published
- The final rule became effective April 30, 2012
- The new rule changes would result in a significant shortening of the time in which a union election can be conducted
- It would make it more difficult for employers to challenge an election

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NLRB "Quick Election" Regulations (Continued)

For example,

- Hearing officers would have authority to limit hearings to genuine issues of fact material concerning representation
- Post-hearing briefs would be allowed only if permitted by hearing officers
- Right to seek Board review of regional directors' pre-election rulings would be eliminated
- Would make NLRB review of post-election disputes discretionary

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NLRB "Quick Election" Regulations (Continued)

- Federal district court in Washington, D.C., ruled May 14 that the National Labor Relations Board failed to assemble a quorum for its final vote on changes in the board's representation case rules and that the changes that went into effect April 30 are invalid and unenforceable

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NLRB Asked for Reinstatement of Quick Election Rule

- On June 11 NLRB filed a motion asking a federal court to reconsider its recent ruling invalidating the NLRB Quick Election regulation
- NLRB contended in its motion that a Board member was "present and participating" in an "electronic room" when the 2 Board members approved the rule changes December 16, 201

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Court Will Not Reconsider NLRB Election Rule

- Federal district court in Washington, DC, on July 27, refused to reconsider its decision
- Therefore, Court decision stands, but NLRB can vote again

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Revisions to I-9 Regulations

- Department of Labor announced March 27th that it is seeking comment on its revised Form I-9
- Changes include expanded instructions and a revised layout; new, optional data fields to collect the employee's email address and telephone number; and new data fields to collect the foreign passport and number and country of issuance

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EEOC Final Rule on Disparate Impact Under ADEA

- Final rule published on March 30th amending Age Discrimination in Employment Act regulations to conform with U.S. Supreme Court decisions that recognized ADEA disparate impact claims and put the burden on employers to prove the Act's "reasonable factors other than age" (RFOA) defense
- ADEA prohibits policies and practices that have effect of harming older individuals more than younger individuals, unless the employer can show that the policy or practice is based on "reasonable factors other than age"

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EEOC Final Rule on Disparate Impact Under ADEA (Continued)

- Will require employers to undertake costly disparate impact analyses for virtually every employment decision
- Rule will allow EEOC and plaintiffs' lawyers to "second guess" even "routine" business decisions affecting older workers
- Rule took effect April 30

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OFCCP Proposed Rule – Hiring Disabled

- OFCCP in December 2011 published Proposed Rule to revise existing Section 503 of the Rehabilitation Act regulations on federal contractors' nondiscrimination and affirmative action obligations to persons with disabilities
- Proposal would require covered federal contractors to meet 7 percent utilization "goals" for persons with disabilities in all job categories and 2 percent utilization "goals" for individuals with certain targeted disabilities
- Comment period closed in February 2012

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OFCCP Proposed Rule – Hiring Disabled (Continued)

- Approximately 400 groups and individuals submitted comments on the proposed changes
- On May 23 group of federal contractors and HR professionals sent letter to Labor Secretary Hilda Solis expressing concerns about proposed rule
- Letter warned that a "fundamental transformation" from a "good faith effort" to a "rigid approach" tied to numerical goals would have "a serious negative impact on workplace relations"

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OFCCP Proposed Rule – Hiring Disabled (Continued)

- Further, Proposal's "confusing, intrusive, and unworkable requirements" that job applicants and employees "self-identify" as having a disability "violates the letter and spirit" of the ADA
- On June 6 OFCCP Director Patricia Shiu said "good faith efforts" have not worked
- Proposed regulations represent the "most significant" policy change in OFCCP's history

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OFCCP Proposed Rule – Hiring Disabled (Continued)

- A 7 percent goal is not a quota or ceiling
- Final regulations are due out by the end of this year

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OFCCP

- HR Policy Association study estimated that contractors subject to OFCCP potentially could incur $2.6 billion in total annual recurring costs
- OFCCP in its NPRM estimated the total annual cost of its proposal to be $29.5 million
- Recurring costs of $51.6 million per year

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OFCCP

- On May 22 notice published seeking public comment on information collection proposal related to application procedures for supply and service federal contractors requesting permission to develop functional affirmative action programs (FAAPs)
- Public comments were due July 23, 2012

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Proposed FMLA Rule Changes

- Deadline extended for comments on proposed changes to the Family and Medical Leave Act (FMLA) from April 16 to April 30, 2012
- Proposed rule would change the way employers track FMLA leave at different times of the day or shift
- Would extend FMLA's military family leave provisions to the family members of veterans for up to five years after the service member leaves the military
- Would extend qualifying exigency leave to employees whose family members serve in the regular armed forces

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EEOC

- On June 5 EEOC sought public input on strategic enforcement plan it is developing after approving a new four-year strategic plan earlier this year
- Comments must have been submitted by 5:00 p.m. on June 19 to strategic.plan@eeoc.gov

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Strategic Employment

- Commission received input on its development of a strategic enforcement plan
- Plan calls for the commission to develop a separate strategic enforcement plan by September 30, 2012
- Most comments said EEOC should continue the systemic program's class cases involving large groups of claimants
- Should prioritize vulnerable populations, like
  - ADA cases involving metal disabilities
  - Immigrant workers – challenging employers' English-only rules

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EEOC

- Nondisplacement of Qualified Workers Under Service Contracts
- Would require employers keep workers who may have been part of the reason why a follow-on contract was not awarded
- Expected to take effect prior to November 2012

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HR RELATED ADMINISTRATIVE ACTION

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EEOC Enforcement Guidance on Arrest & Convictions

- On April 25 EEOC issued enforcement guidance on potential discrimination resulting from employer's use of individuals' arrest and conviction records to make hiring and other employment decisions
- Employers may violate Title VII if they intentionally discriminate among individuals with similar criminal histories or if their policies and practices have a disproportionate adverse impact based on race, national origin, or other protected category, and employers are not able to demonstrate "business necessity"

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EEOC Enforcement Guidance on Arrest & Convictions (Continued)

- Employers should evaluate policies and processes regarding the use of criminal history
- Criminal background screens that do not include individualized assessment are more likely to violate Title VII
- Employers should only request information that is job-related
- Guidelines recommend "banning the box" on job applications

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EEOC Enforcement Guidance on Arrest & Convictions (Continued)

- On May 10, the House of Representatives pushed back the guidance, by passing an appropriations bill that will prohibit the use of EEOC funds to implement, administer or enforce the guidance

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Discrimination Against Transgender Individuals Violates Title VII

- On April 27 EEOC issued a decision that found discrimination against a transgender individual is discrimination based on sex, and therefore violates Title VII
- Although the decision related to a federal employee, the EEOC will likely apply such action to private employers and their employees

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OFCCP Activity

- Increased staffing and more intense compliance reviews for federal contractors
- Focus on federal contractors' nondiscrimination in compensation and affirmative action obligations particularly military veterans with disabilities
- 35% increase in staff over past 2 years – 200 new compliance officers
- Reinvigorating Affirmative Action
- Includes benchmarks for recruiting and hiring veterans and individuals with disabilities
- Good faith efforts no longer sufficient

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DOL FY 2011-2016 Strategic Plan

- Wage and Hour Division and Department of Treasury joint initiative regarding misclassification of employees as independent contractors is Strategic Goal No. 1

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IRS: Voluntary Classification Settlement Program ("VCSP")

- On September 21, 2011, IRS announced the VCSP, an amnesty program that allows eligible taxpayers to voluntarily reclassify certain workers as employees for federal employment tax purposes and obtain relief similar to that under the IRS' current Classification Settlement Program ("CSP").
- Under VCSP, IRS waives fines and interest penalties for employers that have misclassified employees as independent contractors.

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IRS: Voluntary Classification Settlement Program ("VCSP") (Continued)

- Current CSP is available *only in connection with an IRS audit*. The VCSP, however, is available to taxpayers who are *not being audited by the IRS or DOL*.
- Taxpayer must use IRS Form 8952, *Application for Voluntary Disclosure Classification Settlement Program*.

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EEOC Credit History Checks

EEOC recently filed a nationwide class action complaint against a for-profit education provider alleging practice of checking the credit histories of job applicants and employees is racially discriminatory under Title VII of the 1964 Civil Rights Act

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EEOC – Unemployment Discrimination

- Employers that shun out-of-work applicants could face discrimination action
- Heightened scrutiny of all pre-employment screening practices against companies that routinely pass over unemployed job candidates
- Not a protected class but a disparate impact
- EEOC looking for employers that have an absolute prohibition on hiring unemployed individuals

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EEOC

- EEOC provides discrimination charge data by state
  - Made available private sector discrimination charge statistics for each of the 50 states covering the past three fiscal years, the agency announced May14
  - Previously provided such information only on "special request" the spokeswoman said
  - The state level via reports posted on their website www.eeoc.gov/eeoc/statistics/enforcement/charges_by_state.cfm

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Internal Investigation Retaliation

- 2nd Circuit joined 5th, 6th, 7th, 9th and 11th Circuits, in holding that Title VII's prohibition against retaliation based upon an individual's participation in an investigation is not triggered when the investigation was internal to the employer
- Investigation must be one conducted by the EEOC
- The remaining gray area is whether the protection would apply if the internal investigation was launched in response to the filing of an EEOC claim, which was not the case here. *Townsend v. Benjamin Enterprises* (2nd Cir. 5-12)

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NLRB Guidance

- On May 4 National Labor Relations Board issued casehandling instructions for regional office handling immigration issues in unfair labor practice compliance proceedings
- Regional directors should demand a "full accounting" of any immigration-related evidence a respondent expects to offer in an NLRB proceeding
- Regional directors should oppose the improper use of subpoenas to harass employees, consult NLRB's Division of Advice in appropriate cases to determine whether an employer's misuse of NLRB subpoenas was itself an unfair labor practice

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NLRB – Social Media

- On May 30 Acting NLRB General Counsel issued new report on employees' social media use, describing six corporate policies that he alleges interfered with the rights of workers under the National Labor Relations Act
- Memorandum OM 12-59, the third report on social media in less than a year
- NLRB continues to take the position that overbroad company rules and policy statements violate the NLRA

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NLRB At-Will

- National Labor Relations Board will target as overbroad the language employers use to communicate at-will employment policies to their workers
- Phrases in employee handbooks could trigger claims against employers

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NLRB

- NLRB awaits court decision in *Roundy's Inc.* case
- Decision expected before November presidential election
- Board may use decision to give workers OK to use employer email systems to solicit union support
- NLRB may state that employers who allow any nonbusiness use of email systems must allow use for union purposes
- Employers will be faced with either banning all personal use of email system or permitting emails containing commercial solicitations, including pro-union mailings

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NLRB

- In *Banner Estrella Medical Center*, NLRB ruled that employer's request to employees not to discuss workplace investigation with coworkers while investigation was ongoing violated employees' right to engage in protected concerted activity

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Immigration - President Blocks Deportation

- On June 15 DHS announced that effective immediately it will not deport young adults brought into the United States illegally when there were children and will allow them to apply for work authorization
- Eligible individuals will receive deferred action for a period of two years, subject to renewal
- Eligibility criteria:
  - Came to the United States under the age of sixteen;
  - Have continuously resided in the United State for at least five years before June 15 and are now present in the United States;

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Immigration - President Blocks Deportation (Continued)

- Are currently in school, have graduated from high school, have obtained a general education development certificate, or are honorably discharged veterans of the Coast Guard or armed forces of the United States;
- Have not been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, and do not otherwise pose a threat to national security or public safety; and
- Are not above the age of 30

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DOL Investigations

- DOL conducting surprise wage & hour investigations at employer worksites
  - Be prepared and have a plan
  - Have experienced point person
  - Notify legal counsel
  - Know your rights
- DOL may want
  - Documents
  - To interview employees
    - Exempt
    - Non-exempt

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Sequestration – The WARN Act

- Budget Control Act of 2011 ("BCA") authorized raising the debt ceiling
- Put process in place to reduce the federal deficit
- Imposed budgetary process known as sequestration to implement total of $1.2 trillion in automatic spending cuts through fiscal year 2021 which will begin January 2, 2013, unless Congress passes a bill which the president signs to avert such a result
- Employers who perform government contracts, the decline in new government work caused by funding reductions
- May cause employers to consider terminating or laying off employees
- Important to understand Worker Adjustment and Retraining Notification (WARN) Act

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Employers on OSHA Severe Violators List

- As of the end of June, 330 establishments were designated as severe violators
- July 2011, reported that 182 employers had been cited
- List was instituted in July 2010 to bring additional enforcement on "employers who willfully and repeatedly endanger workers by exposing them to serious hazards"
- To be declared a severe violator, as establishment must have experienced a fatality or an accident that hospitalized at least three workers or have been cited for significant violations of OSHA standards

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Unemployment Compensation

- Freshly unemployed workers no longer eligible for federal UI benefits
- U.S. workers who lose their jobs after July 2, 2012, through no fault of their own, will not be eligible for federal emergency unemployment insurance benefits and will have to rely solely on state UI benefits
- Average state UI benefits run 26 weeks

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Unemployment Compensation

- As a result of the state's improving unemployment rate, Texas is no longer eligible for federally funded extended benefits which paid out-of-work Texas up to additional 13 weeks of unemployment benefits
- May 12, 2012, marked last payable week of extended benefits

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Mortgage Loan Officers

- In its March 24, 2010 Administrative Interpretation, the DOL concluded that the typical mortgage loan officer's primary duty is actually making sales for the employer to homeowners, a duty which does not support FLSA administrative exemption
- In January 2011, DoL policy sued in D.C. federal court
- June 6, 2012 *Mortgage Bankers Ass'n v. Solis*, the court found that DOL's arguments that its 2010 position was consistently with the 2004 FLSA regulations

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COURT CASES

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Wage & Hour

- $99 Million Overtime Settlement
  - On May 31 Federal Court gave final approval to a $99 million settlement of nationwide FLSA class action on overtime claims
  - Issue: Whether pharmaceutical representatives were exempt or non-exempt

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Wage & Hour

- (*Christopher v. SmithKline Beecham Corp. d/b/a GlaxoSmithKline)*
  - On June 18 U.S. Supreme Court held that pharmaceutical sales representatives who encourage doctors to prescribe use of a company's products are "outside salesmen" who are exempt from overtime provisions
  - *DOL argued that pharmaceutical "detailers" were FLSA non-exempt because they did not make sales to the physicians they contacted*
  - *DOL argued that exemption did not cover the drug sales representatives because their job was to promote the company's drugs, not to make final sales*

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FLSA Suits Hit Record High in 2012

- Total of 7,064 FLSA cases were filed in the reporting year that ended March 31, 2012, up from 7,006
- Very active area of practice

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QUESTIONS ?

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