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**New Challenges in Employment Law:
Heightened Responsibilities for Employers in an Era of
Accountability and Transparency**

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Introduction

This second part of a two-part presentation on new challenges in employment law looks to the future. It examines how recent expansions of longstanding legislation and the passage of new legislation during 2009, and evolving trends of accountability and transparency, increase the responsibilities of employers and impact the ways employees are managed.¹

Section I of this paper addresses the recently expanded employee protections in the areas of disability and genetic information discrimination, as well as family and medical leaves and related military leaves. A series of action items for employers to implement in response to these legislative changes appear at the end of this section.

Section II focuses on the elements of accountability and transparency that lie at the foundation of recent legislation enacted in response to the economic crisis. In addition to imposing the strict scrutiny of government agencies, these cornerstones of accountability and transparency shape the expectations of employees and expand the potential for whistleblower claims. Also included in this section is an overview of the E-Verify requirements. This era of heightened oversight requires employers to establish comprehensive compliance programs. Recommendations for these programs are presented in this section.

¹ This paper includes discussion of selected developments in employment law during 2009, and consideration of various trends in employment law going forward. This paper does not provide a comprehensive listing of all legislation, case law and developments relating to employment law, nor is it intended to provide legal advice. Readers are encouraged to consult with their own legal counsel about their own employment law needs.

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Section I. Disability Discrimination Amendments, GINA, and Changes to Family and Medical Leaves and Related Military Leaves

A. The ADA Amendments Act of 2008 and the EEOC's Proposed Regulations²

The Americans with Disabilities Act (“ADA”) was enacted in 1990. In September of 2008, the ADA was amended by the ADA Amendments Act of 2008 (“ADAAA”), with an effective date of January 1, 2009. On September 23, 2009, the EEOC issued its proposed regulations implementing the ADAAA (the “Proposed Regulations”).³

The primary purpose of the ADAAA is to restore the broad interpretation and application that Congress intended for the ADA when it was first enacted in 1990. The ADAAA will result in the disability laws being interpreted more broadly than they had previously.

The ADAAA sets forth directives that: the term “disability” shall be construed broadly; an impairment’s substantial limitation on a major bodily function is sufficient to constitute a disability; the ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) shall be disregarded in the primary disability analysis; and impairments that are episodic or in remission are disabilities if they would be substantially limiting when active. In furtherance of its directives, the ADAAA expresses the expectation that the EEOC’s revisions to its regulations will provide this broader coverage of the ADAAA. Consistent with this expectation, the EEOC issued the Proposed Regulations. The EEOC received more than 600 public comments to the Proposed Regulations during the comment period that ended November 23, 2009. A final rule implementing the ADAAA is expected in July of 2010. *See BNA Daily Labor Report*, 12/8/09, No. 233, page C-4.

- ***The Meaning of Disability under the ADAAA***

The newly effective ADAAA has the direct and immediate result of expanding the application of the definition of disability. The ADAAA defines disability as: (a) a physical or mental impairment that substantially limits a major life activity; or (b) a record of such an

² This paper addresses Title I of the ADA, as amended, which prohibits employment discrimination on the basis of disability. Colleges and universities may be subject to other titles of the ADA, as amended, or other statutes, such as the Rehabilitation Act, which also prohibit disability discrimination. For the most part, the ADAAA changes apply to the ADA’s other titles, including Title II (programs and activities of state and local government entities) and Title III (private entities that are considered places of public accommodation), and sections 501 (federal employment), 503 (federal contractors), and 504 (recipients of federal financial assistance and services and programs of federal agencies) of the Rehabilitation Act. For a summary of the ADAAA, *see* www.eeoc.gov/ada/amendments_notice.html.

³ The ADA Amendments Act of 2008 (“ADAAA”) (Pub. L. 110-325, 122 Stat. 3553) is codified at 42 U.S.C. § 12101 et seq. The current regulations appear at 29 C.F.R. §1630. References in this paper to the Proposed Regulations are found at 74 Fed. Reg. 48431 and the appendices thereto. Information in this paper regarding the Proposed Regulations is also based on commentary found at www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html. For the purposes of this paper, citations to specific provisions within the statutes and regulations are omitted. Interested readers should refer to the statutes and regulations for specific cite references. **NOTE:** At the time this paper was written, these Proposed Regulations have not become final.

impairment that substantially limited a major life activity; or (c) or when an entity (e.g., an employer) takes an action prohibition by the ADA based on an actual or perceived impairment.

- ***Major Life Activity***

The ADAAA contains an expansive non-inclusive list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The ADAAA also includes as major life activities the operation of major bodily functions including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The Proposed Regulations include sitting, reaching, and interacting with others as part of the non-exhaustive list of major life activities.

- ***Substantially Limit***

To have a disability (or to have a record of a disability), an individual must be substantially limited in performing a major life activity, as compared to most people in the general population. The term “substantially limits” is to be construed consistently with the purpose of the ADAAA to broaden the scope of its coverage. The ADAAA rejects former interpretations that an impairment must prevent, or significantly or severely restrict, the individual in performing a major life activity in order to be considered “substantially limiting.” Under the Proposed Regulations, determination of whether an individual is experiencing a substantial limitation in performing a major life activity is a common-sense assessment based on comparing an individual’s ability to perform a specific major life activity with that of most people in the general population. Thus, the focus is on how a major life activity is substantially limited, not on what the individual can do in spite of the impairment.

Over the years, employers have struggled with determining if a disabled person is substantially limited in working. Under the Proposed Regulations, an impairment substantially limits the major life activity of working when it substantially limits an individual’s ability to perform, or to meet the qualifications for, a “type of work.” The concept of a “type of work” replaces the former concepts of a “class” or “broad range” of jobs. For example, a type of work may include jobs such as commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs. A type of work may also be determined by reference to job-related requirements, such as jobs requiring repetitive bending, reaching or manual tasks; jobs requiring frequent or heavy lifting; and jobs requiring prolonged sitting or standing.

- ***Episodic Impairments and Conditions in Remission***

Under the ADAAA and the Proposed Regulations, an impairment that is episodic or in remission meets the definition of disability if it would substantially limit a major life activity when active. Therefore, chronic impairments with symptoms or effects that are episodic can be a disability even if the symptoms or effects would only substantially limit a major life activity when the impairment is active. The Proposed Regulations include epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder, and schizophrenia as examples of impairments that are episodic. Similarly, an impairment such as cancer that is in

remission, with a possibility that it could return in a substantially limiting form, meets the definition of disability under the ADAAA.

- ***Impairments that Consistently Meet the Definition of Disability***

The goal of the Proposed Regulations is to implement a broad interpretation of the ADAAA. Consistent with that goal is the premise that some impairments will consistently meet the definition of disability. Although the Proposed Regulations do not use the term *per se* disability, that concept is reflected therein. That is, the Proposed Regulations identify the following as examples of impairments that consistently meet the definition of disability: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

The Proposed Regulations anticipate that the individualized assessment of whether a substantial limitation exists can be done quickly and easily with respect to the aforementioned types of impairments, and will consistently result in a finding of disability. Practically speaking, however, it can be argued that the Proposed Regulations identify broad categories of *per se* disabilities, and thus eliminate the need for *any* individualized assessments as to the specified type of impairments. Presumably recognizing this reality, the Proposed Regulations also provide examples of impairments (such as asthma, back and leg impairments, and learning disabilities) that may be substantially limiting for some individuals, but not for others. Thus, the Proposed Regulations express recognition that those impairments may require somewhat more analysis to determine whether they are substantially limiting for a particular individual before they are deemed to consistently meet the definition of disability. Even then, however, the Proposed Regulations caution that the level of analysis required still should not be extensive.

- ***Temporary, Nonchronic Impairments of Short Duration***

Under the Proposed Regulations, temporary, non-chronic impairments of short duration with little or no residual effects usually will not be considered disabilities. The Proposed Regulations provide these examples of temporary, non-chronic impairments of short duration with little or no residual effects that are usually not disabilities: the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely. The appendix to the Proposed Regulations states that appendicitis and seasonal allergies that do not substantially limit a person's major life activities, even when active, are not disabilities. Additionally, the fact that an impairment is permanent or of long duration or chronic in nature would not automatically make it a disability if it otherwise does not substantially limit a major life activity.

The ADAAA states that an individual is not "regarded" as disabled if the impairment is transitory and minor. (Transitory impairment has an expected duration of six months or less.) An impairment that is episodic or in remission is a disability if it substantially limits a major life activity when active.

- ***Mitigating Measures***

A significant change in the application of the disability laws is the virtual elimination of the mitigating measures in determining the absence of a disability. With the ADAAA, the ameliorative effects of mitigating measures, with the exception of glasses and contact lenses, may not be considered in the disability determination. The ADAAA directs that the positive effects from an individual's use of one or more mitigating measures be ignored in determining if an impairment substantially limits a major life activity. In other words, if a mitigating measure eliminates or reduces the symptoms or impact of an impairment, that fact cannot be used in determining if a person meets the definition of disability. Instead, the determination of disability must focus on whether the individual would be substantially limited in performing a major life activity without the mitigating measure.

However, the ADAAA allows consideration of the negative effects from use of a mitigating measure in determining if a disability exists. For example, the side effects that an individual experiences from use of medication for hypertension may be considered in determining whether the individual is substantially limited in a major life activity.

The ADAAA's prohibition on assessing the positive effects of mitigating measures applies only to the determination of whether an individual meets the definition of disability. All other determinations, including the need for a reasonable accommodation and whether an individual poses a direct threat, can take into account the positive and negative effects of a mitigating measure. For example, if an individual with a disability uses a mitigating measure which eliminates the need for a reasonable accommodation, then an employer will have no obligation to provide one.

- ***Additional Information***

As stated above, the Proposed Regulations are not final, although the ADAAA and its mandates to interpret the disability laws broadly are in effect.

Section D contains recommendations for employers to consider as part of their program to comply with these expanded protections under the disability laws.

Title II of the Genetic Information Nondiscrimination Act

In May of 2008, the Genetic Information Nondiscrimination Act of 2008 ("GINA") was enacted. Title I of GINA addresses health insurance discrimination and Title II addresses employment discrimination. Title II GINA became effective in November of 2009. The requirements of Title II are administered by the Equal Employment Opportunity Commission (EEOC). The EEOC issued proposed regulations for GINA in March of 2009 (the "Proposed GINA Regulations"). A final set of Proposed GINA Regulations is under review by the White House Office of Management and Budget as of the submission of this paper.⁴

⁴ The Genetic Information Nondiscrimination Act of 2008 ("GINA") (Pub. L. 110-233, 122 Stat. 881) is codified at 42 U.S.C. §2000ff et seq. References in this paper to the Proposed GINA Regulations are found at 74 Fed. Reg. 9056. For the purposes of this paper, citations to specific provisions within the statutes and regulations are omitted.

Title I prevents all health insurers, including employer-sponsored group health plans and individual health insurance issuers, from basing eligibility or premium determinations on genetic information. The requirements of Title I are administered by the Departments of Health and Human Services, Labor and the Treasury.⁵

Title II of GINA applies to employers (with fifteen or more employees), labor unions and employment agencies. It broadly prohibits those covered entities from discriminating against an individual on the basis of the genetic information of the individual in regard to hiring, firing, compensation, or other terms, conditions or privileges of employment. GINA also prohibits the deliberate acquisition of genetic information by covered entities. Covered entities which obtain genetic information about their employees inadvertently, or through compliance with the Family and Medical Leave Act, the ADAAA, or other laws, or through employee wellness programs or monitoring of the effects of toxic substances in the workplace, will not be penalized under GINA unless they use such information to discriminate against employees.

GINA requires covered entities to maintain genetic information as a confidential medical record and places strict limits on disclosure of genetic information. Specifically, GINA requires that covered entities maintain genetic information on separate forms and in separate medical files. The information must be treated confidentially. Employers may not disclose genetic information regarding an employee except to that employee, health researchers, or in compliance with federal or state law. For example, an employer can disclose genetic information in connection with its compliance efforts under the Family and Medical Leave Act.

- ***The Meaning of Genetic Information under GINA***

Under the EEOC's Proposed GINA Regulations, genetic information is defined broadly. It includes information about genetic tests of the individual or his/her family members, the manifestation of a disease or disorder in family members of an individual (family medical history), an individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or his/her family member, and the genetic information of a fetus carried (or an embryo held by or for) the individual or his/her family member. Genetic information excludes information about the sex or age of the individual or his/her family members. Under GINA, a genetic test is defined as an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations or chromosomal changes.

- ***Enforcement Provisions Under Title II of GINA***

The enforcement provisions of Title II of GINA are borrowed from Title VII of the Civil Rights Act of 1964, as amended. The EEOC has jurisdiction over enforcement.

Interested readers should refer to the statutes and regulations for specific cite references. **NOTE:** At the time this paper was written, the Proposed GINA Regulations have not become final.

⁵ This paper focuses on Title II of GINA. The reader is advised to review the statute directly for specific information regarding Title I of GINA and its enforcement and penalty structure.

Employees who believe they have been discriminated against in violation of the GINA may file a charge with the EEOC or the appropriate state agency. The EEOC will investigate the charge and may bring suit on behalf of the employee if it finds evidence of a violation. In cases where the EEOC chooses not to bring suit, the employee may file suit individually in the court system. For the most part, the same remedies available under Title VII (such as, reinstatement, back pay, injunctive relief, equitable relief, and attorneys' fees and costs) are available under Title II of GINA.

Section D sets forth action items for employers to take in regard to its compliance program as to GINA.

C. The Family Medical Leave Act Amendments and Military Related Employee Leaves

The Family and Medical Leave Act ("FMLA") was enacted in 1993. For the many years following its enactment, varying interpretations of the FMLA regulations resulted in inconsistencies among the courts' application of the FMLA, leaving employers with confusion and increased vulnerability to lawsuits. In an effort to clarify some (but not all) of these inconsistencies, Congress enacted new FMLA regulations, effective January 16, 2009.⁶

The FMLA was further enhanced in conjunction with the enactment of the National Defense Authorization Act in January of 2008. With that legislation, the FMLA was expanded to include military related leaves. Regulations addressing the implementation of the FMLA military leaves became effective in January of 2009, and, as recently as the fall of 2009, the FMLA military leave was expanded again.

- ***The January 2009 FMLA Regulations***

The primary changes to the FMLA regulations, effective January 16, 2009, are discussed in the PowerPoint attached at Appendix A, entitled "*Are You Prepared to Comply With the Changes to the Regulations to the Family and Medical Leave Act – January 2009.*" These new regulations place new administrative requirements on employers and maximize many aspects of the FMLA protections afforded to employees. In addition to Appendix A, readers are referred to the Department of Labor's website at <http://www.dol.gov/whd/fmla/index.htm> for further information regarding these FMLA regulations.

- ***October 2009 Expansions of Military Related Leaves under the FMLA***

There are now two types of FMLA military leaves. The first type of FMLA military leave, effective January 16, 2009, is referred to as the qualifying exigency leave. The second type of FMLA military leave, effective January 28, 2008, is known as the military caregiver leave. Most recently, on October 28, 2009, President Obama signed into law the Fiscal Year 2010 National Defense Authorization Act. This new law expands both the qualifying exigency leave and the military caregiver leave provisions, as discussed below.

⁶ The Family and Medical Leave Act ("FMLA") appears at 29 U.S.C. §2601 et seq. and its regulations appear at 29 C.F.R. Part 825. For the purposes of this paper, citations to specific provisions within the statutes and regulations are omitted. Interested readers should refer to the statutes and regulations for specific cite references.

Prior to the October 28, 2009 law, eligible employees who are family members (spouse, son, daughter, or parent) of those Reserves or National Guard members who are called to active duty service in support of a contingency operation are granted up to 12 weeks of FMLA leave for qualifying exigencies related to the reservist's call to active service. With the October 2009 new law, qualifying exigency leave is extended to include covered family members of any active duty service members (and not only reservists) who are deployed to a foreign country (and not called only in support of a contingency operations). (Under the revised FMLA regulations, effective January 16, 2009, "qualifying exigency" includes: (1) short-notice deployment, (2) military events and related activities, (3) urgent childcare and school activities, (4) financial and legal tasks, (5) counseling, (6) rest and recuperation, (7) post-deployment activities, and (8) additional purposes arising out of the military member's active duty or call to active duty status, provided the employer and employee agree.)

Prior to the October 28, 2009 law, the FMLA provides for up to 26 weeks of leave for an employee to care for a covered family member (spouse, son, daughter, parent, or next of kin) injured while serving on active military duty. With the October 2009 new law, this military caregiver leave provision is extended to include caring for a covered family member who is injured while serving on active military duty or who is undergoing medical treatment, recuperation or therapy for serious injury or illness that occurred any time during the five years preceding the date of treatment. Thus, this caregiver leave is available to covered family members of veterans (and not just active service members) who are recovering from injury or illness incurred in the line of duty within the five year period prior to the date of treatment. In addition, illness and injury encompasses pre-existing conditions which may have been aggravated in the line of duty.

Regulations have not yet been issued to address further the implementation of these military leaves under the FMLA.

D. The Impact of the ADAAA, GINA and the FMLA Changes: The Employer's Action Plan

The primary impact of the ADAAA is to reduce substantially (and some would say eliminate entirely) an employer's challenge that the employee (or job applicant) has a disability as that term is now defined and interpreted. The de-emphasis on whether or not an individual meets the statutory definition of disabled will result in an emphasis on the availability of reasonable accommodations and the attendant interactive process. The emphasis on the reasonable accommodation process will, in turn, place further focus on whether the disabled individual is otherwise qualified to perform the essential functions of a job.

As a result of the changes to the ADAAA, employers are wise to refocus and update their approaches to compliance with the disability laws by doing the following:

- Update disability and reasonable accommodation policies to make certain these policies include prohibitions against disability discrimination and an explanation of the reasonable accommodation process, including how an individual can make a request for a reasonable accommodation.

- Centralize the reasonable accommodation review, determination and approval process to the extent practicable to maximize expertise and consistency of response.
- Comply with Section 504 regulations of the Rehabilitation Act requiring compliance coordinators and a grievance process, if the institution is covered under Section 504. (A coordinator and simple (but meaningful) grievance process can be useful even if the school is not covered by Section 504.)
- Identify and articulate the essential qualifications for and the essential duties of the job at issue.
- Update job descriptions to include a clear, accurate and reasonable articulation of the essential duties of the job.
- Train management personnel on the changes in the definition of disability, the employer's obligation for the interactive process, and the employer's disability policy and specific procedures for addressing requests for accommodations.
- Direct management personnel who are likely to receive reasonable accommodation requests to refer individuals to the employer's established processes and/or include appropriate human resources personnel in the discussion.
- Obtain medical verification from individual's health care provider based on criteria directly related to the essential job duties.
- Document the employer's acceptance and reliance on information and certification provided by the individual's health provider as to the individual's ability to perform the essential duties of the job, with the agreed accommodations (or without the need for accommodations).

Employers should not interpret the ADAAA as a prohibition to take employment actions based upon legitimate, non-discriminatory business reasons. However, as any employer faced with a discrimination lawsuit knows, justifying the legitimate basis of an employment action requires adherence to established policies and accurate documentation. Employers are prudent to view the challenges presented by the broadening of the ADAAA as an opportunity to refocus on, and reestablish, effective employment management practices, such as the following:

- Train management personnel on the importance of conducting (and how to conduct) meaningful performance reviews, including evaluating job performance in the context of the essential duties of the job.
- Establish and articulate the job requirements and performance expectations to the employee.
- Have employee review and acknowledge the job position description.
- Adhere to any policies regarding job training and mentoring.

For those employers which understand the “regarded as disabled” provisions of the ADAAA and the rationale underlying the prohibitions of disability discrimination, and respect the confidentiality of medical information they receive in connection with the FMLA, workers compensation or similar leaves, compliance with Title II of GINA should not be overwhelming. At a minimum, however, employers must take the following immediate actions to be in compliance with GINA:

- Update employment policies prohibiting discrimination to include prohibitions against genetic information discrimination.
- Post updated EEOC poster that includes information about GINA. See <http://www.dol.gov/ofccp/regs/compliance/posters/pdf/eeopost.pdf>.
- Develop procedures to comply with GINA requirements regarding maintaining documentation with genetic information confidentially and separately. (Generally, employers have such procedures in place by virtue of keeping other medical information they receive pursuant to requests for medical leaves or accommodations for disabilities, in separate and confidential files.)
- Train management personnel on the requirements under GINA. (This training is incorporated easily with training on disability laws.)

The changes to the FMLA require immediate attention by employers to ensure compliance. Employers must make certain to take these steps toward compliance:

- Update employer’s FMLA policies to reflect the military leaves, including the most recent October 28, 2009 expansions, in addition to the January 16, 2009 amendments to the FMLA regulations.
- Be prepared to implement any further requirements of any future (but not yet proposed) regulations regarding the FMLA military leaves.
- Post updated poster that includes information about FMLA and how to file a complaint. See <http://www.dol.gov/whd/regs/compliance/posters/fmla.htm>.
- Update employer’s FMLA request forms, by utilizing the forms developed by the Department of Labor. See <http://www.dol.gov/whd/fmla/finalrule.htm> for links to the following forms:
 - WH-380-E Certification of Health Care Provider for Employee’s Serious Health Condition
 - WH-380-F Certification of Health Care Provider for Family Member’s Serious Health Condition
 - WH-381 Notice of Eligibility and Rights & Responsibilities
 - WH-382 Designation Notice

- WH-384 Certification of Qualifying Exigency For Military Family Leave
- WH-385 Certification for Serious Injury or Illness of Covered Servicemember - for Military Family Leave
- Centralize the FMLA request and review/approval process to the extent practicable to maximize expertise and consistency of response.
- Document to the employee the employers' actions on requests for FMLA, including the start and end date.
- Train management personnel on the changes in the FMLA laws and the employer's policy and procedures.
- Train management personnel on the prohibitions or retaliating against an employee for exercising his or rights to take an FMLA leave.
- Remember that the fact that an employee has exhausted all available FMLA leave time does not eliminate the employer's need to assess whether the employee may be eligible for reasonable accommodations for a disability (for example, additional leave as reasonable accommodation for a disability after the conclusion of the FMLA).

In conclusion, employers can achieve compliance with the ADAAA changes, GINA, and the FMLA regulations by being vigilant in updating their policies, procedures and postings, conducting supervisory training programs, and reinforcing effective employment management practices, in particular having meaningful employee performance evaluation programs.

Section II. The Impact of Recent Compliance and Enforcement Initiatives on Colleges and Universities

Various legislation enacted in the last year has given rise to new or enhanced compliance and enforcement initiatives. This includes the American Recovery and Reinvestment Act of 2009, the Fraud Enforcement and Recovery Act of 2009, and amendments to the Civil False Claims Act and the Federal Acquisition Regulation ("FAR").

Embedded throughout this legislation are oversight mechanisms to impose accountability on the recipients of these government dollars. Included among these oversight mechanisms are enhanced provisions for whistleblower claims. Comprehensive discussion of this legislation is beyond the scope of this paper. However, effective management of employees in this new era requires a basic understanding of the whistleblower protections contained in the American Recovery and Reinvestment Act of and the Civil False Claims Act, as discussed below.

The use of whistleblowers as part of legislative weaponry for accountability is not new.⁷ Most notably, whistleblower protection in the form of *qui tam*⁸ actions under the False Claims

⁷ Moreover, bills have been introduced recently in the House and Senate for the purpose of further fortifying whistleblower protection. See, e.g., *Press Release, House Committee on Oversight and Government Reform*,

Act has been in effect for some time. Recent amendments to the False Claims Act will serve to enhance those whistleblower protections. In addition, specific whistleblower provisions in the American Recovery and Reinvestment Act provide expanded avenues for whistleblower claims. These two statutes are discussed in the next two sections.⁹ Following those two sections are recommended action items for educational institutions to implement in this era of accountability and transparency.

A. The American Recovery and Reinvestment Act

The American Recovery and Reinvestment Act of 2009 (the “Recovery Act”) provides for hundreds of billions of dollars in government spending on a vast array of projects. The Recovery Act creates a multitude of new federally funded programs in areas such as transportation and infrastructure development, housing, healthcare, education, energy efficiency programs, environmental protection, and defense. The money may come directly from federal agencies, but it may also come from state and local agencies, as well as private companies which contract with, or receive grants from, the federal government.

Under the Recovery Act, recipients of grants or contracts that are funded in whole or in part by Recovery Act money must report quarterly on their use of the Recovery Act funds including: (1) an accounting of funds received and expended, (2) a project information narrative description, which must include the project name, objective and status of completion, (3) employment information on the estimated number of jobs created or retained as a result of the project, and (4) compensation information for the five most highly compensated officers. Similar information must be obtained from sub-contractors/grantees, and the burden is upon the recipient to collect and report the sub-grantee information.

To properly report upon Recovery Act activities, award recipients must also separately track and account for the Recovery Act funding. Comingling Recovery Act funds with other funding sources is not permitted. This accounting requirement imposes separate tracking requirements on contractors/grantees and subcontractors, which requires that procedures be in place to allow government auditors to determine with specificity what has been done with each federal dollar provided.

The Recovery Act contains several provisions for enhanced oversight to ensure compliance with its requirements. The information submitted by recipients, including the compensation information, is released to the public by the granting agency. Also, the Recovery Act authorizes GAO to audit recipients’ records and Inspectors General or the newly-formed Recovery Accountability and Transparency Board may subpoena records and interview employees of Recovery Act fund recipients. Failure to report or comply with investigative

Chairman Towns’ Statement on the Whistleblower Protection Enhancement Act of 2009 (March 12, 2009), oversight.house.gov/story.asp?ID-2340.

⁸ The phrase “*qui tam*” refers to the longer phrase: “*qui tam pro domino rege quam re ipso in hac parte sequitor*”. Translation: “who brings the action for the king as well as for himself.”

⁹ These two sections are based substantially on materials prepared by Holland & Knight attorneys Christopher Myers and Mark Baker.

requests could result in termination of the grant or contract. The Recovery Act also places mandatory self reporting obligations on the grantees or sub-grantees awarded Recovery Act funds. Such recipients must report to an appropriate inspector general any credible evidence that a principal, employee, agent, contractor, sub-grantee, subcontractor, or other person has submitted a false claim under the civil False Claims Act or has committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving those funds. Failure to make timely reports of such information may result in civil or criminal penalties under the applicable statutes or regulations, and may also provide a basis for the government to suspend or debar the recipient from participation in any future federal contracts or grants.

In a further effort to assure that these funds are not squandered, section 1553 of the Recovery Act extends whistleblower protections to employees of state and local governments, as well as employees of contractors, subcontractors and grantees who receive Recovery Act funds. Although the U.S. Department of Labor (DOL) already administers numerous whistleblower laws through the Occupational Safety and Health Act and a variety of other environmental, transportation and nuclear regulatory laws, the whistleblower provisions under the Recovery Act are unprecedented in their scope of coverage, employee protections and procedural advantages for the whistleblower-employee.

The Recovery Act whistleblower provisions define covered “employees” to include any “individual performing services on behalf of an employer.” This broad definition could encompass independent contractors and consultants. (Employees of the federal government, however, are expressly excluded.) “Non-federal employers” who employ such “employees” and are subject to whistleblower claims include contractors, subcontractors, grantees, professional membership organizations, professional bodies, federal agents or licensees, and other recipients operating with any funds made available through the Recovery Act, as well as anyone “acting directly or indirectly in the interest of an employer receiving covered funds.” Because substantial stimulus bill funds are funneled through state and local governments, those governments that receive funding and their contractors and subcontractors also are considered to be covered non-federal employers.

The Recovery Act whistleblower provision prohibits discharge, demotion or other discrimination against any employee of a non-federal employer receiving the Recovery Act funds in retaliation for the employee’s disclosure of “information that the employee reasonably believes is evidence of” any of the following:

- gross mismanagement of an agency contract or grant related to covered funds;
- gross waste of covered funds;
- substantial and specific danger to public health or safety related to the implementation or use of covered funds;
- abuse of authority related to the implementation or use of covered funds; or

- any other violation of law (including laws governing competition for or negotiation of a contract) related to a contract, grant or award involving covered funds.

Covered disclosures include those made to the federal Recovery Accountability and Transparency Board, an inspector general, the U.S. Comptroller General, Congress, any state or federal regulatory or law enforcement agency, any other federal agency, a court or grand jury, a person with supervisory authority over the employee or a person working for the employer who has authority to investigate, discover, or terminate misconduct. The Recovery Act explicitly provides that a disclosure made in the ordinary course of an employee's duties is protected. This provision has the potential to enable employees who address compliance and reporting as a part of their job to claim that they have engaged in protected activity.

Unlike most existing federal whistleblower provisions, which vest investigative and enforcement authority with DOL, the Recovery Act specifies that complaints of alleged retaliation are to be submitted to the Inspector General (IG) of the agency involved in providing Recovery Act funding. The IG must investigate the complaint and submit a report of findings to the complainant, the complainant's employer, and the head of the agency. Based on the IG report, the agency head must determine whether prohibited retaliation occurred and, if a violation is found, may order the employer to (1) take affirmative action to abate the retaliation; (2) reinstate a terminated employee with compensation for back pay and benefits, compensatory damages and other "make whole" relief; and (3) pay the affected employees' attorneys' fees and related costs. Currently, these remedies can be imposed without an evidentiary hearing or opportunity for administrative appeal. The burdens of proof that govern the Recovery Act whistleblower claims favor the complainant. A whistleblower alleging retaliation is deemed "to have affirmatively established the occurrence" of the violation if he or she demonstrates that a protected disclosure was "a contributing factor" in the alleged retaliation. Further, a disclosure may be demonstrated as a contributing factor by circumstantial evidence that the person taking the retaliatory act knew of the disclosure, or that the timing between the disclosure and the alleged retaliatory act permits a reasonable conclusion of causation. The covered employer may overcome these presumptions if the employer convinces the agency head by clear and convincing evidence that the action would have been taken absent the disclosure.

If the agency head orders relief for the whistleblower complainant and the employer fails to comply with the order, s/he must file an action in federal district court seeking enforcement of the order. The court may grant injunctive relief, compensatory and exemplary damages, and attorney's fees and costs. If the agency head denies relief to the whistleblower or does not issue a final decision within 210 days after the filing of a complaint, or if the IG investigation is administratively discontinued, the whistleblower may bring a *de novo* action in a federal district court against his or her employer seeking the same type of remedies specified above. A jury trial is available in such actions.

Both whistleblower complainants and employers who are adversely affected by an agency order may seek review of the order in a United States Court of Appeals. Appellate review is subject to the review standards of the Administrative Procedure Act, which gives relatively broad deference to agency decision making.

Employee rights under the Recovery Act whistleblower provisions may not be subject to mandatory arbitration agreements, nor may they be waived by any agreement, policy or other condition of employment. The only exception to these limitations is that arbitration provisions in a collective bargaining agreement may apply to disputes arising under the agreement.

Any employer receiving the Recovery Act funds must post notices informing employees of section 1553 rights and remedies for whistleblowers.

B. The False Claims Act and Qui Tam Actions

Educational institutions which receive or administer federal funding should be aware of the civil False Claims Act. The False Claims Act, first passed in the wake of the Civil War and substantially amended in 1986 and again in 2009, creates liability for the “knowing” submission of false or fraudulent claims to the United States government. “Knowing” can include both actual knowledge and “reckless disregard” or “deliberate ignorance” of compliance obligations. Violators can be required to pay treble damages plus civil penalties of up to \$11,000 for each false claim submitted. The False Claims Act also permits private citizens with information about the submission of false claims to file a civil False Claims Act action on behalf of, and in the name of, the United States. These actions are referred to as *qui tam*, or “whistleblower” lawsuits, and the person who brings them is permitted by statute to share in any recovery that is obtained for the government. The *qui tam* provisions supply unhappy or disgruntled employees, vendors and others with a very profitable means of seeking revenge against the institution. Another potential consequence of violating the False Claims Act is the possibility of being suspended, debarred, or excluded from future participation in government funded programs.

Since the 1986 amendments to the False Claims Act, the government, as well as whistleblowers and their attorney have pursued False Claims Act cases aggressively against government contractors, health care providers, and others. In recent years, universities with medical schools, hospitals, or clinics, or which conduct research that is partially or fully-funded with federal money, are increasingly becoming targets for enforcement. In many instances, the government’s theory of False Claims Act liability rests upon alleged violations of contractual or regulatory provisions. Examples of cases where educational institutions have settled the False Claims Act allegations include:

- ***University of Phoenix.*** In December of 2009, the Department of Justice announced that the University of Phoenix (a for-profit university) reportedly agreed to pay \$67.5 million to settle allegations that its student recruitment policies violated the False Claims Act. The *qui tam* suit was brought by former recruiters who alleged that the university violated the Higher Education Act (which prohibits paying enrollment counselors based on how many students they enroll) and certified that it was in compliance with the 1992 law when it was not.
- ***New Jersey University Hospital.*** In June of 2009, the Department of Justice announced that the University of Medicine and Dentistry of New Jersey agreed to a \$2 million settlement to resolve civil False Claims Act allegations that its hospital defrauded Medicaid. The University allegedly submitted duplicate claims for payment under the government’s Medicaid program when it submitted claims for outpatient physician services that doctors working in the Hospital’s outpatient centers also billed.

- ***Alta College.*** In April of 2009, the Department of Justice announced that Alta College had agreed to a \$7 million settlement to resolve allegations under the False Claims Act. The claim alleged that Alta College made false representations in order to receive federal financial student aid, in that it misrepresented that it met Texas state licensing requirements related to: (a) state job-placement reporting and (b) program compliance with professional license requirements.
- ***Cornell University, Weill Medical College.*** In March of 2009, the Department of Justice announced that Weill Medical College of Cornell (“Weill”) entered into a \$2.6 million settlement to resolve allegations of false statements made to the National Institute of Health and the Department of Defense in connection with Weill’s federal grant applications. An investigator with Weill allegedly failed to disclose the full extent of her various active research projects, depriving the government of its ability to assess the investigator’s ability to perform the projects in the grant application. Weill allegedly knew, or should have known, that this investigator failed to fully disclose her active research projects in the grant applications, because the totality of her research commitments exceeded 100% of her available time.
- ***Yale University.*** In December of 2008, the Department of Justice announced that Yale University entered into a \$7.6 million settlement to resolve two types of allegations that it violated the False Claims Act and related common law requirements in the management of more than 6,000 federally funded research grants. The first allegation concerned some researchers improperly transferring costs to a federal grant account to which the costs were not related. Researchers were allegedly motivated to carry out these transfers when the federal grant was near its expiration date, and the remaining funding had to be expended or returned to the government. The second allegation concerned researchers submitting time and effort reports for summer salaries paid from federal grants. They allegedly falsely charged 100 percent of their summer effort to federal grants when, in fact, they expended significant effort on other unrelated work.
- ***St. Louis University.*** In July of 2008, the Department of Justice announced that St. Louis University agreed to a \$1 million settlement of a lawsuit brought against it, alleging its School of Public Health had engaged in a scheme to defraud the government by overstating the time certain faculty members were spending on grants received from the Centers for Disease Control and Prevention. The University allegedly failed to comply with federal requirements to maintain a system that accurately tracked hours worked on federal grants.

The potential for liability under the False Claims Act is growing. In May of 2009, amendments to the False Claims Act were included in the Fraud Enforcement and Recovery Act of 2009, (“FERA”). Under FERA, the False Claims Act has been amended to, among other things:

- Revise the definition of “claim” to include demands for payments made by subcontractors and subgrantees to prime contractors, or grantees who receive federal

funds. For example, if an education institution receives a state contract or grant that is funded, at least in part by the federal Department of Education, then any request for payment may be subject to the federal Civil False Claims Act. Similarly, a college or university that receives federally funded research grants may subcontract with outside organizations or vendors to perform some portions of that research; claims submitted to the grantee by those subcontractors or vendors now fall within the ambit of the statute. Thus, if the subcontractor submits a false or inaccurate invoice, or certification of progress, and the university knows, or by the exercise of reasonable due diligence would discover the error, and nevertheless passes the claim on to the government, the university could be liable under the False Claims Act.

- Expand the reach of the “reverse false claim” provision to include the retention of overpayments. For example, if a federal research grant permits advances for costs, and the costs associated with the request turn out to be less than anticipated, then it may be a violation of the False Claims Act if the recipient does not refund the overpayment.
- Affirmatively allow the federal government to share information collected pursuant to its Civil Investigative Demand authority with False Claims Act whistleblowers as well as state agencies that are named as co-plaintiffs in a False Claims Act case. This sharing of information gives increased ammunition to whistleblowers.

It should also be noted that the United States Supreme Court heard oral arguments in November of 2009 on a *qui tam* action brought under the False Claims Act, in the case of *Graham County Soil & Water Conservation District v. United States ex rel Wilson*, 528 F.3d 292 (4th Cir. 2008), certiorari granted June 22, 2009. In that case a former employee sued her former employer and other entities, claiming that certain state government entities and employees submitted false claims for reimbursement. The question before the Supreme Court is whether information that is publically disclosed in the context of audits and investigations performed by a state is subject to the whistleblower provisions of the False Claims Act. If the Supreme Court answers the question “yes,” that result will expand further the universe of potential whistleblowers under the False Claims Act.

C. The Impact of these Compliance and Enforcement Initiatives on Colleges and Universities: Recommended Action Plans

The immediate impact of these various legislative requirements is that each college and university must review its operations and contracts on a detailed and comprehensive basis to determine if it is covered by these statutes. If it is, it must audit carefully its current policies, procedures and practices to make sure it is in compliance with the new requirements, and have programs in place to ensure on-going monitoring and compliance. In addition, before accepting Recovery Act funded contracts or other government projects that subject the institution to these statutory reporting and disclosure requirements, the institution should evaluate the benefit of the project as compared to the oversight obligations it will be taking on.

This culture of transparency and accountability impacts not only the institution’s business operations, it also impacts how it manages its employees. Employees can be the source of two separate types of liabilities for the institutions in this arena. At the front end, employees may

create the underlying non-compliant situations (either intentionally or inadvertently). This can result in liabilities imposed against the institution for non-compliance directly through government action. At the back end, employees may create additional liabilities for the institution by virtue of various legislative weaponry, such as whistleblower/*qui tam* actions, or claims under anti-retaliation provisions. Employers should take steps to ensure that their managers understand the ramifications of receiving this funding, the type of employee activity that is protected, and the care that must be taken in managing employees who engage in such activity.

Even if an educational institution is not a contractor covered by specific legislation, it is wise to consider the predicted impact of the principles of accountability and transparency inherent to these legislative requirements on its day to day operations. That is, these developments resound a culture of intolerance of conflicts of interests and misuse of government funding, and demand the implementation of comprehensive compliance and ethics programs.

The current environment teaches it is important that all employers establish compliance and ethics programs on at least a general basis (and on a more specific basis as required by applicable statutes for employers subject to covered government contracts) and other reporting requirements. Guidance for these programs can be drawn from the requirements established under these new legislative mandates. For example, the requirements under the Federal Acquisition Regulation (“FAR”),¹⁰ address effective components of business ethics awareness and compliance programs, and internal control systems necessary to support such programs.

Ethics awareness and compliance programs must include appropriate training, effective communication of the contractor’s standards and the employer’s own standards, and dissemination of information as appropriate to an individual’s roles and responsibilities. Internal control systems must be established and implemented to facilitate timely discovery of improper conduct. FAR instructs that such internal control systems must, at a minimum, address the following:

- Assigning responsibility for oversight of the program at a sufficiently high level and providing adequate resources to ensure the effectiveness of the program;
- Making reasonable efforts to exclude from contract work individuals who have engaged in conduct that violates the contractors’ requirements or who generate a perception of lack of appreciation of the requirements;
- Conducting periodic reviews of practices, policies, procedures and internal controls for compliance with the code and the requirements of government contracting and the company’s internal standards, including: monitoring and auditing to detect improper

¹⁰ On November 12, 2008, the Federal Acquisition Regulation (FAR) Councils issued a final rule that amends FAR to amplify existing compliance program provisions. 73 Fed. Reg. 67064, FAR Case 2007-006. The new rule took effect on December 12, 2008. It requires comprehensive compliance and ethics programs for most government contracts of \$5 million or more and with a performance period of 120 days or more. In addition to the affirmative obligation to implement compliance programs, these government contractors must also self-report violations of the civil False Claims Act and certain kinds of criminal violations.

conduct, periodic evaluation of the effectiveness of the program and internal control systems, and periodic assessment of the risks of improper conduct and implementation of appropriate steps to address the risks identified;

- Establishing an internal reporting system (or “hotline”) that provides for anonymous or confidential reporting of suspected improper conduct;
- Imposing a consistent system of disciplinary action for engaging in or failing to take reasonable steps to detect and prevent improper conduct, as well as incentives to encourage compliant behavior;
- Making timely disclosure of violations of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations, or violations of the civil False Claims Act, as required under applicable statute; and
- Establishing effective conflict of interest policies and monitor compliance with those policies.

Further guidance for the development of conflict of interest policies is found within the reporting and disclosure requirements made by a not-for profit institution when filing its Form 990. An institution may use those requirements, and the data that it generates to prepare its Form 990, as sources to identify areas where conflict of interest policies may be necessary, or where further compliance or training efforts may be appropriate.

In summary, today’s environment demands that colleges and universities promote an organizational culture that promotes ethical conduct and a commitment to compliance with the law. This requires the institution, as the employer generally (and, where applicable, as a federal contractor specifically), to exercise due diligence to understand and comply with its legal obligations, and to prevent, detect and address improper conduct. This all in turn requires the involvement of employees through the implementation of training and compliance programs and the establishment of mechanisms to report, investigate and act upon any instances of non-compliance.

D. E-Verify Obligations For Government Contractors

On September 8, 2009, a final rule regarding E-Verify (the “Final Rule”), which amends the Federal Acquisition Regulations (“FAR”) pursuant to Executive Order 12989 (the “Executive Order”), became effective.¹¹ Although the rule was due to be effective earlier in 2009, its implementation was postponed because of existing litigation and the change of administrations. The Final Rule requires certain government contracts to contain a clause requiring contractors to enroll in and use the E-Verify system (known as the “E-verify Clause”).

¹¹ Information in this section is based upon Executive Order 12989 (June 6, 2008), the final rule under the Executive Order, issued at 73 Fed. Reg. 67651 (November 14, 2008), and information that is publicly available at U.S. government websites.

The E-Verify system is a free, government-run, web-based system that electronically verifies the employment eligibility of employees. The system is a partnership between the Department of Homeland Security (DHS) and the Social Security Administration (SSA) and is administered by the United States Citizenship and Immigration Service (USCIS) within DHS. Participating employers can use the system to compare electronically information from an individual's I-9 Form against more than 425 million records in SSA's database and more than 60 million records in DHS databases. E-Verify establish employment eligibility only; it does not verify an individual's immigration status.

The Executive Order makes use of E-Verify mandatory under covered federal contracts entered into after September 8, 2009. More specifically, the Final Rule requires that all prime federal contracts with a period of performance greater than 120 days and valued over \$100,000 contain the E-Verify Clause. The Final Rule also covers subcontracts if the prime contract contains the E-Verify Clause. For those subcontracts that flow down from covered prime contracts, the Final Rule requires participation if the subcontract is for services or construction valued over \$3,000. The Final Rule exempts from its coverage contracts for less than a period of 120 days, contracts in which all of the work is performed outside of the United States, contracts for less than \$100,000, and contracts for only commercially available off-the-shelf items. In addition, most grants generally are not covered by the Final Rule. *See* Final Rule, 73 Fed. Reg. 67651-01, at 67669.

Federal contractors participating in E-Verify are required to use E-Verify for all new employees hired to work in the United States during the term of the covered contract term, and all existing employees classified as "employees assigned to the contract." Institutions of higher education may choose to verify only employees assigned to the contract. *See* FAR 52.222-54; 48 C.F.R. 22.1802.

The term "employee assigned to the contract" is defined in the Final Rule as: "an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract that is required to include the clause ... An employee is not considered to be directly performing work under a contract if the employee - (1) Normally performs support work, such as indirect or overhead functions; and (2) does not perform any substantial duties applicable to the contract." 48 C.F.R. 22.1801. Aside from this definition, the Final Rule provides little guidance on how to determine whether an employee is "assigned to the contract." Indeed, as stated in response to comments in the Final Rule, "The Councils do not believe it is appropriate to try to establish a mathematical definition of an assigned employee. Contractors will instead have to interpret the definition stated in the final rule as it applies to various individual situations." *See* Final Rule, 73 Fed. Reg. 67651-01, at 67669.

If an employer is not enrolled in E-Verify at the time of the contract award, the employer must enroll as a contractor in E-Verify within 30 calendar days of contract award. There are specific time periods within which the employer must then use E-Verify to verify employment. The time periods vary depending upon the enrollment dates and the dates of the employee's hire and/or assignment to a covered contract. Employers should refer carefully to its contract award dates and enrollment dates and http://www.dhs.gov/files/programs/gc_1185221678150.shtm to ensure it is meeting these timing requirements.

The Impact of E-Verify: Action Items for Covered Employers

- Examine contracts to determine if they require the employer to use E-Verify.¹²
- Register for E-Verify. Online registration is available at www.uscis.gov/e-verify. Employers must accept the terms of a Memorandum of Understanding included on the website.
- Post a notice provided by the DHS informing employees that it uses E-Verify.
- Comply with timing requirements to begin use of E-Verify for new and existing employees assigned to a covered contract.
- Do not use E-Verify on the basis of an individual's national origin or citizenship status. E-Verify may not be used selectively.
- Use E-Verify only after an individual's hire and completion of the I-9 Form. Do not use E-Verify to pre-screen applicants.
- If E-Verify generates an information mismatch, promptly provide the employee with a written notice generated by E-Verify concerning how to challenge the mismatch.
- If an employee challenges a mismatch, promptly provide the employee with a referral letter issued by E-Verify that contains specific instructions and contact information.
- Comply with the process: an employee faced with a mismatch must be given eight federal government workdays to contact the appropriate federal agency to contest the information mismatch.
- Comply with the process: an employee who receives an SSA tentative non-confirmation (TNC) may contact an SSA field office to update his/her record or, if the employee is a naturalized U.S. citizen, he/she may contact USCIS directly.
- Do not retaliate against employees who challenge a mismatch.

All employers are advised to approach E-Verify compliance in an informed, systematic and centralized manner. Employees who are responsible for this process must be trained about the legal requirements, as well as the employer's procedures. Readers are encouraged to refer to the website at http://www.dhs.gov/files/programs/gc_1185221678150.shtm, maintained by the Department of Homeland Security. In addition, educational institutions will find helpful the comprehensive paper recently published by NACUANOTES, January 20, 2010, Volume 8, number 5, entitled "*E-Verify: Compliance for College and University Federal Contractors.*"

¹² In addition to the federal E-Verify requirement, a number of states have enacted their own similar legislation. While some states require state contractor employers to use E-Verify, a minority of jurisdictions require all employers to use the system.

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