# EMPLOYMENT FLASH

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## INSIDE



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## OFCCP Releases VEVRAA and Rehabilitation Act Section 503 Final Rules

On August 27, 2013, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced final rules revising regulations that implement provisions of the Vietnam Era Veterans' Readjustment Assistance Act, as amended (VEVRAA) and Section 503 of the Rehabilitation Act of 1973, as amended (Section 503) (collectively, the Final Rules). VEVRAA and Section 503 require federal government contractors and subcontractors to take affirmative action with respect to, and prohibit employment discrimination against, protected veterans and individuals with disabilities, respectively. As the OFCCP has stated, the VEVRAA and Section 503 rules had not been updated since the 1970s, and the Final Rules are intended to update and strengthen contractors' obligations. In general, the Final Rules enable the OFCCP to gauge contractors' progress toward achieving equal opportunities for veterans and disabled individuals by establishing "hiring benchmarks" and improving data collection, job listings and access to contractors' employment records.

The Final Rules were published in the Federal Register on September 24, 2013, and will become effective on March 24, 2014. However, contractors that have written affirmative action programs (AAP) in place on that date

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## US Supreme Court to Decide Whether Severance Payments Are Subject to FICA

On October 1, 2013, the U.S. Supreme Court granted the government's petition for *certiorari* in *United States v. Quality Stores, Inc.*, 693 F.3d 605 (6th Cir. 2012), an appellate decision holding that severance payments made to employees whose employment was involuntarily terminated are not taxable under the Federal Insurance Contributions Act (FICA). The Court is expected to resolve the split between the Sixth Circuit's *Quality Stores* decision and the 2008 Federal Circuit decision in *CSX Corp. v. United States*, 518 F.3d 1328 (Fed. Cir. 2008), which held that severance payments to terminated employees are taxable under FICA.

The government's petition observed that resolution of this issue was "of exceptional importance." As of its May 31, 2013 filing for *certiorari*, the IRS reported that the question was pending in 11 cases and more than 2,400 administrative claims, with more than $1 billion at stake. FICA taxes, which fund Social Security and Medicare, are paid by both employers and employees and account for approximately 15 percent

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## SDNY Rules That NYC Human Rights Law Does Not Protect Unpaid Interns

In *Wang v. Phoenix Satellite Television US, Inc.*, No. 13 Civ. 218(PKC), 2013 WL 5502803 (S.D.N.Y. Oct. 3, 2013), the federal district court for the Southern District of New York ruled, in a case of first impression, that the New York City Human Rights Law (NYCHRL) does not protect unpaid workers.

Lihuan Wang brought suit against defendant Phoenix Satellite Television US, Inc. (Phoenix) alleging that Phoenix's bureau chief, Zhengzhu Liu, subjected her to a hostile work environment, *quid pro quo* sexual harassment and retaliation. Ms. Wang also alleged that Phoenix failed to hire her for full-time employment because of Mr. Liu's discriminatory animus. In particular, Ms. Wang claimed that during the first two weeks of her unpaid internship at Phoenix, Mr. Liu told her she could obtain employment following the expiration of her student visa. Ms. Wang further alleged that Mr. Liu invited her to his hotel where he made sexual advances towards her. She further claimed that after she rejected Mr. Liu, he no longer expressed interest in hiring her permanently and instead began emphasizing that Phoenix could not sponsor her visa. When Ms. Wang allegedly later contacted Mr. Liu about working at Phoenix following her graduation, Mr. Liu asked her to accompany him on a trip to Atlantic City to discuss "job opportunities." Fearful that Mr. Liu would sexually harass her again, Ms. Wang declined to meet with Mr. Liu and stopped seeking employment with Phoenix.

The district court granted Phoenix's motion to dismiss Ms. Wang's hostile work environment claim because she failed to raise a plausible claim that she qualified as an employee under the NYCHRL. In doing so, the court rejected Ms. Wang's attempt to analyze her claim under a framework that considers several indicia of an employment relationship — the power to hire and fire a worker and supervise and control her tasks — and balances those factors along with whether the worker was compensated. The court emphasized that "remuneration is a threshold inquiry in establishing the existence of an employment relationship" and that the application of a balancing test "is only appropriate once a plaintiff has, in the first instance, demonstrated the existence of the 'essential condition' of remuneration." In addition, the court explained that analogous interpretations of Title VII and the New York State Human Rights Law (NYSHRL) also support the conclusion that unpaid interns are not employees within the ambit of the NYCHRL.

Although the court granted Phoenix's motion to dismiss Ms. Wang's hostile work environment claim, it denied Phoenix's motion to dismiss her remaining failure to hire claims under the NYSHRL and NYCHRL. Such motion was premised on an argument that Ms. Wang failed to allege a specific position was available and she applied for such position. However, the court found that Ms. Wang could sustain her failure to hire claim given that unposted job opportunities may have been available and she attempted to apply for those opportunities through informal procedures.

## New York City Passes the Pregnant Workers Fairness Act

On September 24, 2013, the New York City Council unanimously passed the Pregnant Workers Fairness Act, a bill that expands current protections against employment discrimination based on pregnancy, childbirth or a related medical condition. The Act is particularly aimed at protecting employees who need temporary modifications to continue to work safely during pregnancy. It is expected that the law will go into effect in early 2014.

The Act requires that employers provide "reasonable accommodations" for the needs of their workers related to pregnancy, childbirth or a related medical condition. Reasonable accommodations can include "bathroom breaks, leave for a period of disability arising from childbirth, breaks to facilitate increased water intake, periodic rest for those who stand for long periods of time, and assistance with manual labor." Notably, the new law extends beyond federal law which prohibits firing, demoting or otherwise discriminating against women because they are pregnant, but does not require accommodations that would cause "undue hardship" to an employer's business. Aggrieved employees can commence an action against their employer in court or file a complaint with the New York City Commission on Human Rights. An employer can plead as an affirmative defense that the employee aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, perform the essential duties of the job.

## New York Department of Labor Issues Final Regulations Regarding Payroll Deductions

On October 9, 2013, the New York Department of Labor (NYSDOL) published final regulations addressing employer deductions from employee wages. Such regulations are effective immediately and codified at 12 NYCRR Part 195. By way of background, effective November 2012, New York Labor Law Section 193 was amended to expand the scope of permissible deductions. (*See Employment Flash*, September 2012). Most notably, Section 193 now permits employers to make wage deductions to recoup overpayments and salary advances, subject to the employee's authorization and NYSDOL regulations. The final regulations set forth specific

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### New York Department of Labor Issues Final Regulations Regarding Payroll Deductions

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rules regarding the timing, duration, frequency and amount of such permissible wage deductions and impose notice and dispute resolution requirements on employers.

Moreover, Section 193 specifies permissible deductions for the benefit of the employee, and permits deductions for "similar payments for the benefit of the employee." Similar payments are limited to health and welfare benefits, pension and savings benefits, charitable contributions, child care and educational benefits, union dues, as well as transportation and food and lodging benefits. The final regulations provide examples of benefits which fall into these categories. The regulations further confirm that among the wage deductions that are expressly prohibited are deductions for employee purchase of tools, unauthorized expenses, contributions to PACs, fines for employee misconduct, tardiness or resigning without notice.

Employers should consider revising their current pay practices and amending their employee policies to reflect these new regulations. However, it should be noted that the Section 193 amendments and the new regulations will be automatically repealed on November 6, 2015, unless the law is extended by further legislative action.

## Ninth Circuit Rulings on Arbitration Agreements

In *Richards v. Ernst & Young, LLP*, No. 11-17530 (9th Cir. Aug. 21, 2013), the Ninth Circuit, joining the Second and Eighth Circuits, rejected the National Labor Relations Board's (NLRB) ruling in *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012), and found that an employee's arbitration agreement containing a class action waiver was enforceable. In *D.R. Horton*, the NLRB held that a mandatory class action waiver in an arbitration agreement was unenforceable because it violates employees' rights to engage in concerted activity under Section 7 of the National Labor Relations Act (NLRA), which, according to the NLRB, includes the right to lead or be part of a class. In upholding the arbitration agreement in *Richards*, the Ninth Circuit emphasized that the Eighth Circuit and the overwhelming majority of district courts have declined to followed *D.R. Horton* because it conflicts with the U.S. Supreme Court's explicit pronouncements about the policies underlying the Federal Arbitration Act (FAA). The Ninth Circuit echoed the U.S. Supreme Court's recent ruling in *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013), that courts must enforce arbitration agreements for claims alleging violation of a federal statute, "'unless the FAA's mandate has been overridden by a contrary congressional command.'" *Id.* at 2306.

On the other hand, the Ninth Circuit in *Chavarria v. Ralphs Grocery Co.*, 9th Cir., No. 11-56673, October 28, 2013), recently held that an employee's arbitration agreement in her employment application was unconscionable and therefore unenforceable under California state law. The court's finding of substantive unconscionability was based on the fact that the arbitration agreement required employees to bear half of the arbitration fees and included an arbitrator selection provision which would almost always produce an arbitrator selected by the employer in employee-initiated proceedings. The arbitration agreement was deemed to be procedurally unconscionable because it was presented to the employee on a "take it or leave it" basis and the employee did not receive the actual terms until after she submitted her application and agreed to be bound by the policy.

## California Implements an Employment Law "Hat-Trick"

*Increase to California's Minimum Wage Has Greater Wage/Hour Implications*

On September 25, 2013, California Governor Jerry Brown signed A.B. 10, which increases the state's minimum wage to $9 per hour as of July 1, 2014, and to $10 per hour as of January 1, 2016.

Because California's labor code requires that salaried exempt employees be paid at least twice the minimum wage for full-time employment, the minimum wage increase means that, as of July 1, a salaried exempt employee in California must earn at least $37,440 (on an annualized basis) to qualify for those exemptions. Other California laws that reference the minimum wage also will be affected, such as the split-shift premium and the minimum compensation of an employee who is required to provide and maintain his own hand tools and equipment.

California's minimum wage has been $8 per hour since 2008. However, some cities within California have their own minimum wage ordinances — notably, San Francisco's minimum wage is $10.55 per hour and San Jose's minimum wage is $10 per hour. Both of those cities' minimum wage ordinances are indexed to inflation. A.B. 10 (the state-wide bill), as originally introduced, would have eventually required the state's minimum wage to be increased in conjunction with the California Consumer Price Index. However, this provision was removed from the final legislation.

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**California Implements an Employment Law "Hat-Trick"** *(continued from page 3)*

*California Implements Domestic Worker Bill of Rights*

In September, Governor Brown also signed Assembly Bill 241, known as the Domestic Worker Bill of Rights. The law provides overtime premium pay for certain domestic employees at a rate of one and one-half times the employee's regular rate of pay for all hours worked over nine in a workday and all hours worked over 45 in any workweek. The class of employees to whom this law applies includes numerous definitions and exceptions, but generally, applies to employees who provide caregiving services (such as supervising, feeding and dressing children, or supervising elders) to private households, whether they are employed directly by the householder or by a third-party employer. Previously, such employees were only covered by the overtime requirements of federal law (which requires overtime pay for hours worked over 40 in a workweek), so there was no "daily overtime" requirement. This law takes effect on January 1, 2014, and will expire on January 1, 2017, unless renewed.

*California's Paid Family Leave Program Expands List of Family Relationships That Qualify for Caregiving*

California's Paid Family Leave program (commonly known as PFL) provides wage replacement for employees who take leave from work to bond with a new child or to care for a seriously ill family member. Currently, children, spouses, domestic partners and parents are covered family members under the PFL program. Senate Bill 770 expands the program to cover the family relationships of grandparent, grandchild, sibling and parent-in-law. S. 770, 2013-14 Reg. Sess. (Cal. 2013) (enacted). This change will take effect on July 1, 2014.

This change to the PFL program is not expected to impose a major hardship on employers. PFL is funded through a payroll tax paid entirely by employees. Also, S.B. 770 does not expand an employee's right to take time off to care for grandparents, grandchildren and in-laws under the California Family Rights Act (CFRA). The CFRA provides job-protected time off and continuing health insurance benefits to certain employees who take time off to bond with a new child or due to the serious health condition of the employee or the employee's child, parent or spouse.

## Fifth Circuit Reaffirms Application of Fluctuating Workweek Methodology to Calculating Overtime Damages

Utilization of the fluctuating workweek methodology to calculate overtime damages due to employees misclassified as "exempt" under the Fair Labor Standards Act (FLSA) continues to evolve in the courts. In *Ransom v. M. Patel Enter.*, No. 12–50534, 2013 WL 4402983 (5th Cir., Aug. 16, 2013), the Fifth Circuit reaffirmed the retroactive application of the fluctuating workweek methodology to determine overtime damages for misclassified workers. The case involved 16 executive managers of Party City stores who were paid a flat weekly salary for a varying schedule of approximately 50 to 55 hours per week.

The Fifth Circuit found that the district court applied an "unorthodox" methodology in calculating damages. Because the record showed that the managers did not work a fixed 55-hour work week, but instead had agreed to a schedule of fluctuating hours, the Fifth Circuit held that the fluctuating workweek methodology should have been applied in calculating damages and remanded the case for recalculation. Under this methodology, employees' overtime is calculated on a weekly basis by dividing each employee's salary by the number of hours actually worked to determine the employee's regular rate of pay and then paying a 50 percent overtime premium for all hours exceeding 40 in that workweek.

By contrast, on September 10, 2013, a decision in the Southern District of New York addressing claims for unpaid overtime premiums by Lady Gaga's personal assistant noted that neither the Second Circuit nor any other court in the district had addressed whether the fluctuating workweek methodology could be applied retroactively to determine overtime damages for misclassified employees. *O'Neill v. Mermaid Touring, Inc.*, No. 11 Civ. 9128, 2013 WL 4829266 (S.D.N.Y., Sept. 10, 2013). As the decision also noted, courts continue to be divided as to whether the fluctuating workweek methodology should be applied retroactively in a misclassification case, and while the First, Fourth, Fifth, Seventh and Tenth Circuits have adopted the methodology, district courts in Arizona, California, Connecticut and the District of Columbia have not. It is anticipated that case law will continue to evolve regarding this issue.

## Fourth Circuit Finds that Facebook "Like" Constitutes Protected Speech

On September 18, 2013, in *Bland v. Roberts*, No. 12-1671 (4th Cir. Sept. 18, 2013), the Fourth Circuit held that the act of clicking the "like" button on Facebook qualifies as protected speech under the First Amendment. According to the court, "liking" a political candidate's campaign page was "the Internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech."

In 2011, six former employees of Hampton, Virginia brought First Amendment retaliation claims against Sheriff B.J. Roberts in his individual and official capacities, alleging that he failed to reappoint them after expressing support for a rival candidate during his re-election campaign. One particular plaintiff, Daniel Carter Jr., alleged that Roberts fired him because he conveyed support for Roberts' rival on his Facebook

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### Fourth Circuit Finds that Facebook "Like" Constitutes Protected Speech *(continued from page 4)*

campaign page, either by "liking" or posting a message on the page. The district court granted summary judgment against Carter, finding that "merely 'liking' a Facebook page was insufficient speech to merit constitutional protection." However, the Fourth Circuit disagreed, stating that using a "single mouse click to produce a message" rather than "typing the same message with several individual key strokes is of no constitutional significance." In the court's view, pressing the like button "literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement."

Though the facts of this decision relate to the public sector and may not have direct implications for private employers, the ruling is a noteworthy development with respect to legal challenges involving social media communications.

## House Democrats Propose a Comprehensive Immigration Reform Bill

On October 2, 2013, House Democrats unveiled a comprehensive immigration reform bill, H.R. 15, which generally mirrors the bipartisan legislation that passed in the Senate in June of this year. H.R. 15, 113th Cong. (2013). The House's version of the Border Security, Economic Opportunity and Immigration Modernization Act includes many of the employment-related provisions contained in the Senate bill (as generally discussed in the July 2013 edition of the *Flash*), but excludes a Senate amendment dealing with border security, in particular. The bipartisan group which was working on unveiling a comprehensive immigration bill has yet to introduce a proposal, and three of the Republican lawmakers have left the group.

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## *Flash* From Across the Pond

As a new addition to the *Employment Flash*, we will be including a discussion of recent noteworthy employment law decisions and legal developments emanating from the European Union.

## LinkedIn and Social Media Contacts: The UK and US Approaches to Protecting an Employer's Contacts

Many employers encourage their staff to promote their personal profiles on LinkedIn and other professional networking sites. In doing so, the employer hopes that the employee will enhance its reputation and develop contacts for the employer's benefit. However, when an employee leaves employment, can the employee simply update his profile and take his LinkedIn contacts to a competitor? Employers in the United Kingdom and the United States are starting to take action to claim property in the social media contacts and accounts created by employees in the course of their duties.

In September 2013, the English High Court granted an interim injunction in the case of *Whitmar Publications Ltd v Gamage*, [2013] EWHC 1881 (Ch), to prevent a former employee's use of the LinkedIn contacts that were created in the course of the employees' duties for Whitmar. The determining factors were that (a) the employee, in concert with two other former employees, took active steps to engage in starting a competitive business, (b) her duties had included responsibility for maintaining the LinkedIn groups which had been created for her employer's benefit and (c) she had used her employer's computer to do this. The court not only prevented the departing employees from using the groups in their new business, but also ordered the employee (who had asserted that the groups administered through her LinkedIn account were personal to her) to assist her former employer by ensuring that it had "exclusive access, management and control" of the groups. While this case involved particularly strong evidence of employee misconduct, it nevertheless suggests that U.K. courts may be more inclined to rule in favor of the employer with respect to ownership of LinkedIn contacts created during employment.

Notably, a 2007 decision of the English High Court in *PennWell Publishing (UK) Limited v Ornstein*, [2007] EWHC 1570, held that an employee's personal contacts became the employer's property if kept on the employee's Outlook account at work. However, unlike an Outlook account, a LinkedIn account is provided directly to the employee by LinkedIn and is hosted on its servers. Therefore, a U.K. employer would be well-advised to include a clause in the employee's contract that assigns property in LinkedIn contacts made in the scope of employment to the employer and requires such contacts to be copied onto the employer's own database. (It is a requirement in the U.K. that all employees have a written contract). The employer also could include a requirement that a LinkedIn account accessed on the employer's system is used only for the benefit of the employer's business.

Like in the U.K., there has been a steady increase in cases within the United States which examine the issue of ownership of social media account content created during the scope of employment. For example, in *Eagle v. Morgan*, 2013 U.S. Dist. LEXIS 34220 (E.D. Pa. Mar. 12, 2013), Linda Eagle, a former executive at Edcomm, filed multiple claims against Edcomm for the company's unauthorized access and use of her LinkedIn account following her termination. Though Edcomm retained control over Eagle's LinkedIn account after she was terminated, Eagle apparently regained access shortly thereafter. Because of Eagle's post-employment

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**LinkedIn and Social Media Contacts: The UK and US Approaches to Protecting An Employer's Contacts** *(continued from page 5)*

access, Edcomm filed counterclaims against her for common law misappropriation and unfair competition, alleging that she failed to return Edcomm proprietary information and misappropriated the company's contacts on the LinkedIn account. In support of such claims, Edcomm alleged that it was the owner of Eagle's LinkedIn account connections given that the company's personnel developed and maintained such contacts on the account.

In dismissing Edcomm's misappropriation claim, the court concluded that there was a lack of evidence establishing the company's ownership of the LinkedIn account. As the court confirmed, a misappropriation claim requires proof that the plaintiff "has made a substantial investment of time, effort, and money into creating the thing misappropriated such that the court can characterize the 'thing' as a kind of property right." According to the court, even though Edcomm implemented a policy encouraging employees to create and become involved in the content of LinkedIn accounts, "Edcomm never had a policy of requiring that its employees use LinkedIn, did not dictate the precise contents of an employee's LinkedIn account, and did not pay for its employees' LinkedIn accounts." The court also noted that the LinkedIn User Agreement stated that Eagle's account was between LinkedIn and the individual user, and that the company did not maintain its own separate account. Moreover, the court found that there was no evidence that Eagle's contact list was developed through an investment of Edcomm's time and money as opposed to her own time, money and past experience.

A few U.S. courts have expressed an inclination toward concluding that social media profiles and contacts deserve trade secret protection. For example, in *Christou v. Beatport, LLC*, 849 F.Supp. 2d 1055 (D. Colo. 2012), a Colorado federal district court addressed the issue of whether an employee's list of friends and contact information on the MySpace platform were trade secrets. The employer, a nightclub owner, alleged that its former club promoter misappropriated the club's MySpace list of "friends" and login information for profiles on MySpace to establish a competing business. The court found that the employer's trade secret misappropriation claim was viable and considered such factors as the limited access given to employees to the MySpace profiles, the fact that the potential customer contact information could not be readily obtained from public directories or outside sources, the employer's degree of effort and cost expended in compiling the information, and the difficulty involved in replacing such data.

Similarly, in *PhoneDog v. Kravitz*, 2011 U.S. Dist. LEXIS 129229 (N.D. Cal. Nov. 8, 2011), a California federal district court declined to dismiss a trade secret misappropriation claim, among other claims, filed against a former employee of PhoneDog, who was hired to promote the company's services on social media. The employee established a Twitter account for the company and garnered approximately 17,000 followers. The court left open the possibility that a Twitter password and account could be protectable as trade secrets, as it declined to dismiss the employer's claim and concluded that whether Kravitz's actions constitute misappropriation needed to be developed in an evidentiary record.

Notably, the *Christou* and *PhoneDog* cases did not involve circumstances where the employer had implemented a policy addressing who owned and controlled the social media account. Though the case law in this area is in its infancy, it appears clear that employers in the U.S. and the U.K. should consider drafting policies or agreements which delineate the property interests in social media accounts developed in the scope of an employee's employment and possibly require the relinquishment and non-use of such accounts following termination of employment.

## UK Government's Revisions to TUPE on the Horizon

The U.K. government has in the last month responded to comments from interested parties on its proposals to revise the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), the U.K. law that implements a European Union directive to preserve employment and protect employees from dismissal or changes to their terms and conditions following a change of their employer, typically on an asset sale. Now that the required consultation is complete, new legislation is imminent and expected to be in force in January 2014. The changes will include provisions to clarify when a service provision change transfer occurs (the original proposal was to remove this aspect of TUPE, which is unique to the U.K.), enable employers to combine dismissal about collective redundancies with consultation about the transfer, make it possible to change terms and conditions in limited circumstances, and clarify that a relocation can be a fair reason for a dismissal in connection with the transfer. In our next edition of the *Employment Flash*, we will summarize the key changes and what they mean for businesses with employees in the United Kingdom.

## OFCCP Releases VEVRAA and Rehabilitation Act Section 503 Final Rules *(continued from page 1)*

may maintain their respective AAPs for the duration of their AAP year, but must update their plans to come into compliance with the Final Rules at the beginning of the following 12-month AAP review and updating cycle.

### *Numerical Goals*

While the Final Rules for VEVRAA and Section 503 were issued separately and differ in important ways, they share many common provisions. Perhaps most controversial is that both rules, for the first time, establish numerical goals for the hiring of protected veterans and individuals with disabilities. The VEVRAA Final Rule establishes a "hiring benchmark" for protected veterans, and the Section 503 Final Rule establishes a "utilization goal." More specifically, under the VEVRAA Final Rule, contractors can either (i) establish a benchmark equal to the national percentage of veterans in the civilian labor force (currently, 8 percent) or (ii) establish their own benchmarks using certain available data. The Section 503 Final Rule sets a national utilization goal of 7 percent to be applied to each job group (for contractors with more than 100 employees), or to the entire workforce (for contractors with 100 or fewer employees). The OFCCP has confirmed that the benchmark and utilization goals are not quotas and that contractors will not be cited simply for failing to meet such goals.

### *Enhanced Data Collection and Analysis*

Additionally, the Final Rules mandate enhanced data collection efforts in connection with contractors' employment of veterans and individuals with disabilities. In particular, such rules require contractors to maintain quantitative measurements regarding applicant flow and hiring with respect to such individuals.

### *Self-Identification Requirements*

The Final Rules require contractors to invite applicants to self-identify as protected veterans or individuals with disabilities at the pre-offer and post-offer stages of the employment application process. In response to concerns from contractors that asking applicants about disabilities at the pre-offer stage could constitute a violation of the Americans with Disabilities Act (ADA), the OFCCP has posted an opinion letter from the EEOC stating that compliance with the pre-offer requirement is not an ADA violation. Moreover, the preface to the Final Rules states that contractors may ask applicants to voluntarily identify as a protected veteran or individual with a disability at the same time they solicit applicants to self-identify their race, gender and ethnicity. Under the Section 503 Final Rule, contractors must also invite current employees to self-identify as individuals with disabilities every five years.

### *Additional Obligations and Changes*

The Final Rules provide for incorporation by reference of equal opportunity clauses into subcontracts, but require that contractors provide specific language. Other notable provisions include enhanced obligations regarding recordkeeping and clarification of the OFCCP's ability to access records. The Final Rules for Rule 503 also include revised definitions to bring the rule into compliance with amendments to the ADA.

## US Supreme Court to Decide Whether Severance Payments Are Subject to FICA

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of an employee's earned income. The circuit split centers over whether, as the Sixth Circuit held, severance payments made to employees are (i) supplemental unemployment compensation benefits (SUB payments), excluded from the definition of wages under FICA or (ii) as the Federal Circuit held, wages taxable under FICA. Neither the FICA statute nor the Treasury regulations promulgated under FICA squarely address the question.

Employers that have not already done so should consider filing protective refund claims for severance payments made to involuntarily terminated employees. The deadline to file claims for the 2013 tax year is April 15, 2014.

*Attorney contacts appear on the next page.*

***Employment Flash*** **provides information on recent developments in the law affecting the corporate workspace and employees. If you have any questions regarding the matters discussed in this newsletter, please call one of the following attorneys or your regular Skadden, Arps contact:**

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