

Legislative and Regulatory Issues of Note

Prepared by the CUPA-HR Public Policy Committee
November/December 2011

Key CUPA-HR actions since July 2011

OFCCP Proposed Update on Affirmative Action Rule for Veterans: On April 26, the Office of Federal Contract Compliance Programs (OFCCP) at the Department of Labor published in the *Federal Register* its proposed rule to overhaul the federal contractor affirmative action program requirements for covered veterans, including a provision that would require contractors to establish numerical hiring benchmarks for protected veterans. The committee discussed the issues with the proposal and approved comments expressing concerns about the proposed rule, which CUPA-HR submitted with SHRM on July 11.

Informational Reporting on Group Health Coverage Costs: The University of Missouri had submitted detailed comments in response to the IRS on its Interim Guidance on W-2 Informational Reporting to Employees of the Cost of Their Group Health Insurance Coverage. The committee reviewed the University of Missouri's comments, felt the concerns raised would impact all of higher education, and recommended CUPA-HR draw attention to their comments by resubmitting them with a cover letter expressing CUPA-HR's support. With approval of the individual who drafted the comments, CUPA-HR submitted on July 15, 2011.

Prevailing Wage Determination Suspensions for PERM and H-1B: The Department of Labor's Office of Foreign Labor Certification (OFLC), announced that it was temporarily suspending processing of Prevailing Wage requests for most case types, including PERM and H-1B Labor Certifications. The delay was justified by DOL as necessary so that it could redirect resources to comply with a June court order related to the reissuance of prevailing wage determinations (PWDs) for H-2B temporary labor certification applications that created a backlog of PWDs. The committee approved of CUPA-HR signing onto American Council on International Personnel (ACIP) letter with SHRM on August 26 that proposed some interim solutions.

NLRB Election Time Frames: On June 21, the NLRB released a Notice of Proposed Rulemaking (NPRM) to change procedures for elections that are held to determine if employees wish to organize for collective bargaining. The changes would significantly limit the ability of employers to challenge bargaining unit composition, election misconduct, and voter eligibility. The rule also would shorten election time frames from the 38 day median to somewhere in the 10-21 day time frame. The committee discussed the possible impact of the proposals and endorsed signing onto two sets of comments expressing concerns about the proposed procedures, one with the American Council on Education (ACE) and other higher education associations, and one with the Coalition for a Democratic Workplace. They were both submitted on August 22.

Public Policy Survey of CHROs: In August and September, the Public Policy committee developed and issued a survey to chief HR officers to assist in determining member needs and interests in the area of public policy/governmental affairs. The survey asked CHROs about (a) their current and desired roles in advising their organization's leaders on public policy issues, (b) their relationships with their campus governmental affairs officers, (c) their awareness and use of CUPA-HR resources (e.g., *Washington Update*, *Quarterly Legislative Update*, public policy section of the CUPA-HR website). About 125 CHROs responded. It was evident that they

appreciate the information and tools they currently receive from CUPA-HR and would like more – and more targeted – resources to support their campus efforts.

DOL Proposal to Change Reporting Requirements for Employers Facing Union Organizing: On June 20, the Labor Department’s Office of Labor-Management Standards (OLMS) released a proposed rule that would increase reporting requirements for employers facing union organizing campaign, requiring employers to report substantially more information, including correspondence with, and information about, legal counsel with whom they might consult. The committee discussed the possible impact of the proposal and endorsed signing onto two sets of comments expressing concerns about the proposed rule, one with the American Council on Education (ACE) and other higher education association, and one with the Coalition for a Democratic Workplace. They were both submitted on September 21.

OFCCP Advanced Notice of Proposed Rulemaking on Compensation Data Collection Tool: As part of its effort to address potential sex and race discrimination in pay among federal contractors, the Labor Department's Office of Federal Contract Compliance Programs issued an advance notice of proposed rulemaking soliciting public comment on development of a compensation data collection tool. The committee approved CUPA-HR filing joint comments with SHRM, which were submitted on September 28.

Public Policy “Needs & Interests” Discussions at National Conference: At the national CUPAHR conference in late September, the committee facilitated two discussions with members about their public policy needs and interests – one discussion with general membership who attended Josh Ulman’s legislative update presentation, and the other with a small group of CHROs. Based on both the survey results and the feedback from the conference sessions, it was clear that they would --

- Like to be more engaged in emerging public policy debate and position formulation
- Like to be asked by CUPA-HR for their opinions and feedback on formulation of the association’s public policy positions
- Like to engage and cooperate more with their governmental affairs officers on workforce issues
- Like CUPA-HR to provide them with additional skill-building and leadership development opportunities in this realm (including possible reinvention of “Public Policy Forums” – with somewhat modified goals than its previous incarnation)
- Like CUPA-HR to facilitate new dialogues with government affairs professionals in higher ed institutions
- Like to receive targeted information from CUPA-HR in ways that are efficient and effective, including time-sensitive “hot topics,” and topics applicable to their specific type of institution
- Like to receive tools and ‘business intelligence’ through CUPA-HR, such as template position papers, environmental scans, and bullet-points that they can use to inform and influence their institution’s senior leadership on important workforce issues

The committee will be working with the national office staff to determine ways to be responsive to members’ interests in this critical public policy realm.

FY 2012 Funding Levels for Minority Serving Institutions: On October 14, the committee endorsed CUPA-HR’s signing on to American Council on Education (ACE) letters to the House and Senate regarding Fiscal Year 2012 funding levels for the Department of Education. The letter, signed by many higher education associations, asked Congress to reject the significant

cuts to minority serving institutions suggested in the House Labor, Health and Human Services, Education, and Related Agencies Appropriations draft bill.

Summary of Benefits and Coverage and the Uniform Glossary for the Healthcare Law: The committee approved comments that CUPA-HR and a number of other associations submitted on October 21, 2011. The Healthcare Law calls for a summary of benefits to be issued by health plans no later than March 23, 2012. The comments submitted to the Secretaries of Treasury, Labor and Health and Human Services calls for an extension of the implementation date, as well as the establishment of a safe harbor and the creation of a simplified program for the coverage facts label

Detailed Issue Summaries

LEGISLATION

- ***Legal Workforce Act***

On September 21, 2011, the House Judiciary Committee held a markup of the Legal Workforce Act (H.R. 2885). The bill was amended and approved by the committee on a part-line vote of 22 to 13. The Legal Workforce Act, introduced by the Chairman of the committee, Lamar Smith (RTX), would streamline the current I-9 process and require every employer to use E-Verify for new hires and many employers (including public employers and government contractors) to use e-verify for existing employees (the later within 6 months of enactment). The employer community has largely embraced the bill as it has a safe harbor for good faith compliance (both for hiring or not hiring based on response from E-Verify) and provides for preemption of state and local law (though it does allow state and localities to revoke business licenses from employers that fail to comply with the federal law). The mandate would be phased in over two years, with large employers (10,000+ employees) complying within six months and employers with 500-9,999 employees given twelve months, those with under 500 employees eighteen months and employers with less than 20 employees two years.

Two other committees also have jurisdiction of the bill, the House committees on Education and Workforce and Ways and Means. It is expected that the Ways and Means Committee will assert their jurisdiction next, as they have some concerns with the bill as it was passed by the Judiciary Committee.

CUPA-HR continues to work with all of the committee staffs on minimizing the burdens of verification of *current* employees within six months of enactment of the bill (including additional time). As a result of our discussions with the Judiciary Committee, one of our major concerns with the bill was solved. They fixed the language to add a rule for an alien who is authorized for employment who provides evidence from the Social Security Administration that they have applied for a social security number (SSN), in which case the verification period ends three business days after such alien receives the SSN. This was an issue since many of our visa holders may not get social security numbers soon enough to be run through the system during the traditional time frame.

Both of the remaining committees would need to approve the bill or waive their jurisdiction before the bill could move to a vote before the whole House. However, should that occur, it is still unclear as to whether the bill would move to the floor this year.

- ***Employment Non-Discrimination Act***

The Employment Non-Discrimination Act (ENDA, H.R. 1397/S. 811) was reintroduced in the House by Rep. Barney Frank (D-MA) and in the Senate by Sen. Jeff Merkley (D-OR) on April 6 and 13, respectively. ENDA would prohibit discrimination on the basis of an individual's actual or perceived sexual orientation or gender identity in decisions regarding hiring, firing, compensation and other terms, conditions or privileges of employment. ENDA would apply to employers with 15 or more employees, but includes an exemption for religious employers and armed forces. CUPA-HR supported the bill in the previous Congress, without the gender identity provision, but did not publicly support the bill last Congress as there was no activity. Many employer groups expressed concern with the EEOC's rulemaking authority under the bill, after the agency issued over expansive proposed regulations under the Genetics Information Nondiscrimination Act and the ADA Amendments Act. CUPA-HR members would be particularly impacted if the EEOC used the regulatory process to make substantive changes to the bill's religious institution exemption. The committee is prepared to re-evaluate CUPA-HR's public position, if asked by Congressional staff should the legislation be considered. However, congressional action on the bill seems unlikely in the near future. The Senate may hold a hearing or a vote on the bill next year, but there is virtually no chance of passage this congress.

- ***Paycheck Fairness Act***

The Paycheck Fairness Act (PFA, H.R. 1519/S.797) was reintroduced this Congress by Rep. Rosa DeLauro (D-CT) and Sen. Barbara Mikulski (D-MD) on April 12. PFA would essentially require businesses to prove any gender-based pay disparity is "job related and consistent with business necessity." The bill would also make it easier to file class action suits based on gender pay disparities and provide for unlimited liability for violations. CUPA-HR has actively opposed the bill in previous Congresses. If Senate Majority Leader Harry Reid (D-NV) does bring the bill up for consideration this Congress, it likely will not occur until closer to the 2012 elections. The bill is not expected to pass this congress.

- ***Public Safety Employer-Employee Cooperation Act***

The Public Safety Employer-Employee Cooperation Act (PSEECA) remains a priority for organized labor and Senate Democratic Leadership so it remains on the committee's radar screen. PSEECA would require states to provide collective bargaining rights for state and local firefighters, police and EMTs. The legislation would require the Federal Labor Relations Authority, which is now responsible for overseeing labor relations for federal employees, to establish criteria based on principles in the bill and require each state to meet these criteria. This would not only require states that do not have collective bargaining laws for firefighters, police and EMTs to enact such laws, but would force most, if not all, others states to amend their existing laws to meet the new criteria. Public universities that employ police and EMTs would be affected. CUPA-HR opposes the bill, believing this issue should be addressed at the state level without a new federal mandate. The Republican controlled House is not expected to support or consider the bill, so if it does move this Congress, it would likely be inserted by the Senate into a larger bill, like an appropriations bill.

- ***Tax Parity for Health Plan Beneficiaries Act***

Senator Chuck Schumer (D-NY) and Congressman Jim McDermott (D-WA) have re-introduced the "Tax Parity for Health Plan Beneficiaries Act" (S. 1171/H.R. 2088), that would remove some federal tax inequities that exist for employer-sponsored health coverage provided to non-spouse, non-dependent beneficiaries. Federal Tax law has not kept up with the increase in

employers offering health benefits to domestic partners of employees, requiring nearly a 50% increase in payroll tax obligations for these employees compared to similarly situated co-workers with spousal coverage. The discrepancy in taxation between spousal coverage and domestic partner health coverage forces employers to create and maintain separate systems for income tax withholding and payroll tax obligations, placing a significant administrative burden on employers. This legislation would remove these federal tax inequities and will permit a Voluntary Employees' Beneficiary Association (or a VEBA) to provide full benefits to domestic partners or other non-spouse, non-dependent beneficiaries without endangering an employer's tax-exempt status.

This year's legislation is largely unchanged from last year's bill, and the House and Senate bills will once again track one another. The only modifications that have been made are (1) a slight change in the title (to the Tax Parity (as opposed to Equity) for Health Plan Beneficiaries Act), (2) some non-substantive redrafting necessitated by passage of the health reform act last year, and (3) the addition of a new provision requested by several employers to make clear that 401(h) accounts, which are accounts attached to defined benefit pension plans that can be funded to finance retiree medical benefits, can be used to finance health benefits for the domestic partners (and other non-spouse, non-dependent beneficiaries) of retirees. CUPA-HR is a member of the Business Coalition for Benefits Tax Equity, a group of employers and business trade associations, supporting the proposed legislation.

- ***Public Employee Pension Transparency Act***

Rep. Devin Nunes (R-CA) and Sen. Richard Burr (R-NC) have introduced legislation called the "Public Employee Pension Transparency Act" (H.R. 567 and S. 347) that would establish federal accounting and disclosure standards for state and local public pension plans and ban any federal bailouts. It would also prohibit state and local government from issuing tax-exempt bonds if they fail to comply with the new standards.

Proponents of the bill, like the U.S. Chamber of Commerce and anti-tax groups, believe it will allow citizens to "accurately judge the performance of the state and local authorities in managing the public trust." However, others feel it would create a worrisome precedent regarding federal regulation of state and local governments and taxation of their bonds. Nunes originally introduced the bill at the end of last Congress, drawing opposition from the National Association of Counties, the National Leagues of Cities, the National Association of State Retirement Administrators and the National Council on Teacher Retirement, as well as the American Federation of State, County, and Municipal Employees (AFSCME). A hearing was held on the bill on May 5 in the House Ways and Means Subcommittee on Oversight.

- ***FY 2012 Funding Levels for Minority Serving Institutions***

On October 14, CUPA-HR sent letters with the American Council on Education and more than 30 other higher education groups to the House and the Senate on Fiscal Year 2012 funding levels for the U.S. Department of Education. The Labor, Health and Human Services, Education, and Related Agencies Appropriations draft bill put together by the House suggests significant cuts to historically black colleges and universities, predominantly black institutions, Hispanic-serving institutions, tribal colleges and universities and other minority-serving institutions.

The House Appropriations Subcommittee that drafted the bill does not have the votes to pass the bill out of committee so it is not moving forward with this bill, but instead released it for conversation purposes with the Senate as it looks to address funding levels for these

departments. The higher ed letters to the House and Senate highlight concerns with these cuts and request Congress maintain current funding levels for these programs in any FY 2012 omnibus appropriations bill.

- ***Workforce Democracy and Fairness Act***

On October 26, 2011, the House Education and Workforce Committee held a markup on committee Chairman John Kline's (R-MN) bill, the "Workforce Democracy and Fairness Act" (H.R. 3094). The legislation is aimed at preventing the National Labor Relations Board (NLRB) from implementing its recent proposed rule on changes to union election procedures and recent decision in *Specialty Healthcare*. The bill was voted out of committee by a vote of 23–16.

The NLRB's proposed rule would limit employers' ability to challenge bargaining unit composition, election misconduct, voter eligibility and shorten election time frames from the 38 day median to somewhere in the 10-21 day time frame. In the *Specialty Healthcare* case, the NLRB adopted a new approach for determining what constitutes an appropriate bargaining unit. Though the Board's press release claims the case only applies to non-acute health care facilities, many believe this decision will actually set a new standard for all industries and will encourage smaller bargaining units.

The committee held a hearing on the bill on October 12 and marked it up October 26. The bill is expected to be voted on by the House this fall. CUPA-HR joined other employer groups in the Coalition for a Democratic Workplace by signing on to a letter in support of the bill sent to the committee they day of mark up.

- ***Preservation of Independent Contractor Safe Harbor***

The Joint Select Committee on Deficit Reduction, or the "Super Committee," is reportedly looking at proposals to repeal Section 530 of the Revenue Act of 1978, a "safe harbor" for federal employment-tax purposes for employers who hire independent contractors, or otherwise increase administrative burdens, regulatory risks and uncertainty for employers that do business with independent contractors. CUPA-HR joined a letter to the Super Committee on October 29 with the Coalition to Preserve Independent Contractor Status requesting the committee reject these proposals.

REGULATIONS

Treasury and IRS

- *Summary of Benefits and Coverage and the Uniform Glossary for the Healthcare Law*
On August 22, the Departments of Treasury, Labor (DOL) and Health and Human Services (HHS) issued a proposed rule in the *Federal Register* increasing disclosure requirements on the Summary of Benefit and Coverage (SBC) for all group and individual health plans. They also issued a solicitation of comment on the proposed template, instructions and related materials. These items will satisfy the SBC requirements that the Patient Protection and Affordable Care Act added to the Public Health Service Act. Under the statute, beginning no later than March 23, 2012, group health plans and health insurers (including grandfathered plans) must provide plan participants with a short SBC prior to enrollment and upon request and notify participants at least 60 days in advance of any material modifications to the term of plan coverage. The SBC is intended to provide easy-to-understand information about insurance plans to make it easier for individuals to compare the benefits and costs for

different plans. Some of the requirements for the SBC include uniform definitions of standard medical and insurance terms (using the Uniform Glossary provided by the Departments); a description of coverage; exceptions, reductions and limitations on coverage; coverage examples, like having a baby, treating breast cancer and managing diabetes; and a total cost of coverage. The proposed rule states that the SBC must be a stand-alone document presented in a uniform format with no more than four double-sided pages and no smaller than 12-point font. CUPA-HR filed comments with a number of other associations on October 21, 2011. The comments submitted call for an extension of the implementation date, as well as, the establishment of a safe harbor and the creation of a simplified program for the coverage facts label.

- *Informational Reporting on Group Health Coverage Costs*
The University of Missouri submitted detailed comments in response to the IRS on their Interim Guidance on W-2 Informational Reporting to Employees of the Cost of Their Group Health Insurance Coverage. The committee reviewed their comments and felt the concerns raised by the University of Missouri would impact all of higher education and recommended CUPA-HR draw attention to their comments by resubmitting them to the IRS with a cover letter expressing CUPA-HR's support. With approval of the person that drafted the comments, CUPA-HR did so on July 15, 2011.

Department of Health and Human Services

- *Proposed Regulations of Student Health Insurance Coverage*
On April 12 CUPA-HR joined other higher education associations in filing a community comment letter on the Department of Health and Human Services (HHS) proposed regulations on student health insurance coverage under the Patient Protection and Affordable Care Act (PPACA) and the Public Health Service Act. The proposed rule would define "student health insurance coverage" as a type of individual health insurance coverage and, pursuant to section 1560(c) of the PPACA, specify certain PPACA and Public Health Service Act requirements as inapplicable to this type of individual health insurance coverage.

The rule would apply the same consumer rights and protections to student health insurance coverage as other plans that fall under the PPACA, including the Patient's Bill of Rights. Insurers would no longer be able to impose lifetime limits on coverage, drop coverage due to unintentional mistakes on an application or deny or exclude coverage for students under age 19 because of a pre-existing condition. Under the rule, student health plans would be allowed to have annual dollar limits on essential health benefits of no less than \$100,000 for policy years beginning before September 23, 2012. Plans beginning after that date would need to comply with the PPACA's annual limit restrictions of no less than \$2 million.

Student health plans affected by the rule are: plans that are provided by a college or university through a health insurance company; only available to enrolled students and their dependents; and available regardless of the students' health status. The higher education community had worked closely with the White House on this issue since the webinar CUPA-HR organized with the White House on healthcare reform last summer. The final rule is expected out before the end of the year.

Department of Labor

- **OFCCP**

- *Section 503 Proposal*

Based on the committee's feedback, on September 21 CUPA-HR filed comments with SHRM on the Department of Labor's Office of Federal Contract Compliance Programs' (OFCCP) efforts to strengthen the affirmative action obligations for individuals with disabilities under the regulations implementing Section 503 of the Rehabilitation Act of 1973. OFCCP published an Advanced Notice of Proposed Rulemaking (ANPRM) on possible changes to government contractor obligations under Section 503 of the Rehabilitation Act on July 23. The Rehab Act predates the ADA and imposes duties on federal contractors to ensure equal opportunities for individuals with disabilities. OFCCP is considering adopting measures that would make the data collection and affirmative action requirements for applicants and employees with disabilities similar to those currently required for women and minority applicants and employees. The CUPA-HR and SHRM comments expressed concern about this requirement as there are significant obstacles to collecting accurate data on individuals with disabilities. The OFCCP has not taken any further action on the ANPRM and it remains unclear as to when they will move forward with this proposal.

- *Rescission of Compensation Standards Proposal*

On January 3, the Office of Federal Contract Compliance Programs (OFCCP) published a Notice of Proposed Rescission (NPR) proposing to rescind its current systemic compensation discrimination standards and self-audit guidelines for evaluating pay practices for federal contractors and subcontractors under Executive Order 11246. The compensation standards and the voluntary self-audit guidelines were both adopted in 2006. In the NPR, the OFCCP asserts that the standards have limited the agency's ability to effectively investigate, analyze and identify compensation discrimination and that the guidelines are rarely used by federal contractors. The agency's view is controversial, as many in the employer community welcomed the 2006 changes. The OFCCP did not specify an alternative to the current standards, other than that it intends to adhere generally to "Title VII principles" in investigations of contractors' compensation practices. The committee approved comments that were filed with SHRM on March 4. It is unclear when OFCCP will take further action on their rescission proposal.

- *OFCCP Proposed Update on Affirmative Action Rule for Veterans*

On April 26 the Office of Federal Contract Compliance Programs (OFCCP) within the Department of Labor published in the *Federal Register* its proposed rule to overhaul the federal contractor affirmative action program requirements for covered veterans. The rule would clarify and provide greater detail in the steps that a federal contractor must take to comply with the Veterans' Readjustment Assistance Act and its amendments. The proposed rule would also increase collection obligations and require contractors to establish numerical hiring benchmarks for protected veterans.

The Obama administration has put a priority on increasing affirmative action efforts for federal contractors and we expect to see other proposed rules from OFCCP in this area for the construction industry, as well as one dealing with requirements for persons with disabilities. The committee discussed the issues with the proposal and approved comments CUPA-HR submitted with SHRM on July 11.

- *OFCCP Advanced Notice of Proposed Rulemaking on Compensation Data Collection Tool*
As part of its effort to address potential sex and race discrimination in pay among federal contractors, the Labor Department's Office of Federal Contract Compliance Programs issued an advance notice of proposed rulemaking soliciting public comment on development of a compensation data collection tool. OFCCP asked federal contractors and other OFCCP stakeholders for their input on the “scope, content, and format of the data collection tool, as well as suggestions for ensuring that the tool will be an effective and efficient means of identifying contractors” for OFCCP compliance reviews under Executive Order 11246. OFCCP poses 15 specific questions for those submitting comments, including what compensation data should be collected, how it should be organized, whether OFCCP should consider extending any compensation data tool beyond supply and service contractors to construction industry contractors, and how to manage the potential burdens on small businesses that are federal contractors.

OFCCP emphasized that its current notice is the beginning of the rulemaking process and that covered contractors will have additional opportunities for comment as the agency develops the rule. The committee approved CUPA-HR filing joint comments with SHRM, which were submitted on September 28.

- *Request for Information on Scheduling Letter*
In May of 2011, OFCCP Requested Information regarding proposed changes to its scheduling letter, which is used by the OFCCP to initiate a compliance evaluation of federal contractors covered by Executive Order 11246, Section 503 and VEVRAA. The proposed changes would require contractors provide new information on leave policies and collective bargaining agreements, report data in 5-7 rather than 2 categories and report compensation information by individual employee rather than in an aggregated format. The committee approved CUPA-HR move forward with filing comments with SHRM to the Office of Management and Budget about the costs and benefits of this proposal, which were filed on October 28.
- ***Wage and Hour Division***
 - *“Right to Know” Proposal*
A “Right to Know” proposed rule was expected to be issued this fall. The rule would require employers to provide workers with details about why they have been classified as an independent contractor or employee. It would require employers provide employees with details on how their pay is computed (hourly or exempt) and why. The proposal has not yet been issued, but other agency activities have indicated that they still intend to release it – though the timing is unclear.
 - *FMLA Changes*
DOL has been conducting a survey of employers over the past six months gathering information to measure the impact of the FMLA. The information obtained through the survey will supplement the normal time-use information also provided by employers to the Bureau of Labor Statistics. The results of the survey are expected in January 2012. Employer groups have suspected for some time that this survey may be used as grounds to reverse the FMLA regulatory changes made by the Bush administration. DOL reportedly already has the regulations drafted to reverse the Bush changes drafted, but will likely wait until the first quarter of next year to release them.

- **Occupational Safety and Health Administration**
 - *MSD (Ergonomic Injury) Proposal*
The Occupational Safety and Health Administration (OSHA) is now revisiting a rule that would require employers to record Musculoskeletal Disorders (MSDs or Ergonomic injuries) injuries in a separate column on "the form 300" injury and illness logs. In January, OSHA had said that they were "temporarily" withdrawing the proposal from OMB review. The proposal had been languishing at OMB since mid July. In early summer, OSHA solicited more input on the proposal from small businesses. It is unclear how or when they will proceed, but OSHA has indicated that they hope to move forward.
 - *I2P2 Proposal*
OSHA plans to propose a rule that would require that all employers create a workplace Injury and Illness Prevention Program (I2P2). OSHA has said it will convene a Small Business Regulatory Flexibility Act review panel (the first step to a proposed regulation) in June 2011, but they have not done so. California, which is one of the state's that has opted out of OSHA by creating its own state plan, already has a similar requirement. Businesses have had few complaints about the California rule, but business groups are concerned that the OSHA regulation will be more onerous.
- **Office of Labor-Management Standards**
 - *Proposal to Change Reporting Requirements for Employers Facing Union Organizing*
On June 20, the Office of Labor-Management Standards (OLMS) released a proposed rule that would increase reporting requirements for employers facing union organizing campaign. Under the Labor-Management Reporting and Disclosure Act (LMRDA), an employer must report any agreement or arrangement with a third party consultant to persuade employees about union organizing. However, attorneys and other consultants hired to provide advice to employers facing organizing campaigns generally do not trigger the reporting requirement unless they speak directly to employees. DOL's proposal would significantly narrow this "advice exemption," requiring employers to report substantially more information, including correspondence with attorneys. The committee discussed the possible impact of the proposal and endorsed signing onto two sets of comments, one with the American Council on Education (ACE) and other higher education associations, and one with the Coalition for a Democratic Workplace. They were both submitted on September 21.

Equal Employment Opportunity Commission

- *Guidance on the Use of Credit and Criminal Background Checks in the Hiring Process*
On August 10, 2011, CUPA-HR signed onto a letter with more than fifty other associations to the EEOC detailing how employers use criminal histories to mitigate risk and promote safety. We expect the EEOC will revise its guidance on criminal and credit background checks in the next six months. We are working with other employer groups and legislators to urge the EEOC to provide stakeholders with an opportunity to comment on the guidance before it becomes final.

National Labor Relations Board

- *Election Time Frames*
On June 21, the NLRB released a Notice of Proposed Rulemaking (NPRM) changes procedures for elections held to determine if employees wish a union. The changes would

limit employers' ability to challenge bargaining unit composition, election misconduct and voter eligibility. The rule also would shorten election time frames from the 38 day median to somewhere in the 10-21 day time frame. The effect would be to greatly limit and employers' ability to communicate with employees about the union prior to the election. The committee discussed the possible impact of the proposals and endorsed signing onto two sets of comments, one with the American Council on Education (ACE) and other higher education association, and one with the Coalition for a Democratic Workplace. They were both submitted on August 22.

- *Posting Proposal*

On October 5, 2011, the National Labor Relations Board (NLRB) announced that it would delay the effective date of its final rule that requires almost all private sector employers to post a notice of labor rights. The final rule was published in the *Federal Register* on August 30 and was originally set to take effect on November 14, 2011, but now will not take effect until January 31, 2012. The NLRB said the delay was to "allow for enhanced education and outreach to employers, particularly those who operate small and medium sized businesses." Many speculate, the NLRB delayed the requirement in response to suits challenging the rule filed by the US Chamber of Commerce, National Association of Manufacturers, the Coalition for a Democratic Workplace, National Federation of Independent Business, and others.

The NLRB poster uses similar language as the Department of Labor (DOL) poster that government contractors are required to display explaining worker's labor rights, which resulted from a 2009 executive order. The final rule goes farther than the DOL requirement or other posting requirements, however, in that it would impose additional obligations on employers that regularly communicate with employees by posting information on an intranet or internet site. Those employers would be required to provide the notice electronically on those sites. Most private sector employers will be required to post the 11-by-17-inch notice, which is available at no cost from the NLRB through its website, either by downloading and printing or ordering a print by mail.

- *Move to Reconsider Graduate Student Collective Bargaining*

On October 25, the National Labor Relations Board (NLRB) issued a 2-to-1 decision allowing graduate students at New York University a full hearing to look at the merits of their organizing drive with the United Auto Workers. Members Becker and Pearce ruled to reverse a regional director's decision that the 2004 NLRB case, *Brown University*, prohibited NYU graduate students from organizing.

Under the Bush administration, *Brown* found that graduate students are primarily students, not employees, and are not entitled to collectively bargain under the National Labor Relations Act. *Brown* reversed a decision under the Clinton administration that ruled that graduate students were employees and could organize. The case was returned to the regional director for a full hearing. On June 16, NLRB regional office in Manhattan issued its decision. The acting director dismissed the petition to form a union because of the 2004 *Brown University* precedent, but also declared that teaching and research assistants at NYU might be formally considered its employees. The case will now go to the full NLRB for a hearing. According to ACE's legal counsel, the UAW has 20 days to appeal and the community will likely be invited to submit an amicus in the proceeding sometime after the 20 days. ACE plans to provide a draft brief for sign on by associations and interested institutions. The committee continues to closely watch this issue.

Legislative Issues Committee Members

Barbara Carroll, Chair

Linda Lulli, National Board Representative

Dave Trainor, National Board Representative

Susan Norton, Georgia Health Sciences University

Carl Sorensen, University of Richmond

Kevin Fowler, Tyler Junior College

Andy Brantley, President and CEO

Josh Ulman, Chief Government Relations Officer

Christi Layman, Government Relations Manager

Committee Charge

The Legislative Issues Committee works with CUPA-HR staff to determine the association's position on emerging federal legislative, regulatory and public policy issues and to recommend strategies for advocacy and timely dissemination of information to our members. The committee also works with national office staff to ensure that CUPA-HR is the voice for higher education workforce issues.