Newsletter

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U.S. Employer Update

2015 Year in Review and 2016 Challenges

2015 was another whirlwind year for U.S. employers. In this newsletter we identify and provide proactive tips to address the top developments that impact how employers will operate in the U.S. in 2016, and preview pending legislation and case developments for which employers should “stay tuned." Finally, we summarize the top 2016 developments in international employment for global employers.

Accommodations / Discrimination

Accommodations Provided for "Similarly Limiting Conditions" Must Also Be Extended to Pregnant Employees

The Supreme Court held in *Young v. UPS* that claims under the Pregnancy Discrimination Act (PDA) are evaluated by comparing the treatment of pregnant workers to the treatment of "similarly limited" workers. UPS had a policy of granting light duty to employees with certain limitations, such as those injured on the job or those seeking accommodation under the ADA, but the policy did not extend to pregnant employees. UPS argued that its policy complied with the PDA because it was treating pregnant women just as it treated workers without physical limitations, but the Court said that wasn't what the PDA required. Rather, the PDA requires employers to provide pregnant workers with the same accommodations it would provide similarly limited workers.

Action Item: Employers should analyze their accommodation and light duty processes and procedures. If a pregnant woman requires an accommodation that is provided to some other similarly situated workers, she should also have the benefit of that accommodation.

EEOC to Treat Sexual Orientation Discrimination as Title VII Sex Discrimination

A growing number of cities and states have passed laws specifically prohibiting discrimination on the basis of sexual orientation. In July 2015, consistent with its enforcement agenda on LGBT issues, the EEOC issued a decision that such discrimination is prohibited at the federal level by Title VII of the Civil Rights Act. In *David Baldwin v. Dep’t of Transportation*, the Commission reasoned that because sexual orientation cannot be understood, or even discussed, without reference to a person’s sex, it is necessarily sex discrimination. Further, behaviors permitted for men (*i.e.*, dating a woman) must be permitted for women, and vice versa.

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Action Item: Companies can avoid potential liability and expensive litigation by implementing policies against sexual orientation discrimination.

Telecommuting as an Accommodation Not Reasonable for “Most Jobs”

According to the Sixth Circuit, most jobs would be “fundamentally altered” if on-site attendance was not a regular and predictable feature. This means that while telecommuting may be a reasonable accommodation on an occasional, infrequent basis, it is not reasonable as a frequent occurrence for most jobs. In *EEOC v. Ford Motor Co.*, a steel resale buyer with irritable bowel syndrome requested to telecommute “as needed,” up to four days per week. Ford offered other accommodations but rejected such frequent telecommunication, saying that face-to-face interaction was a necessary function of the job. The Sixth Circuit agreed, and did not limit its holding to the particularly interactive type of job duties in this case. Instead, it said that telecommuting would not be a reasonable accommodation on such a regular basis for “most jobs.”

Planning Tip: Employers should attempt to work with their employees in good faith to agree to reasonable accommodations when necessary, but they have some protection where they ultimately determine that frequent telecommuting is simply not feasible.

Wage and Hour

Department of Labor Publishes Proposed Amendments to Overtime Rules

In July, the Department of Labor published proposals to amend the “white collar” exemptions for the executive, administrative, and professional exemptions, as well as the exemption for highly-compensated employees. The proposed new overtime rules are designed to extend the FLSA's overtime protections to millions of workers and, if adopted, will have a significant impact on employers' operations.

The DOL’s proposed amendments contain three key changes to the current FLSA regulations:

1. Set the minimum salary required to qualify for the white collar exemptions (the administrative, executive, and professional exemptions) at the 40th percentile of weekly earnings for full-time salaried workers. Based on 2013 data, this would amount to a minimum salary of $921 per week or $47,892 annually, almost double the current level;

2. Increase the total annual compensation requirement needed to exempt highly compensated employees to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers. In 2013, this was $122,148 annually. This too is a large increase over the current salary basis of at least $100,000 annually; and

3. Establish a mechanism for automatically updating the minimum salary and compensation levels for these exemptions going forward.

The proposal does not contain any specific changes to these exempt classifications' duties requirements "at this time." Instead, the DOL only "seek[s] to determine whether, in light of our salary level proposal, changes to the duties tests are also warranted" and "invites comments on whether adjustments to the

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duties tests are necessary, particularly in light of the proposed change in the salary level test."

These changes could impact as many as five million workers. The final rules are expected to be published by late 2016.

Action Item: Employers should consider the following actions:

1. Identify the employee populations in your workforce currently classified as exempt under the white collar exemptions who will not meet the DOL's proposed increases in the salary basis tests, if and when the proposed rule becomes final.

2. Create an action plan to be ready to raise the salary for certain employees to meet the proposed minimum salary threshold, or reclassify employees from exempt to non-exempt.

3. If employees are reclassified from exempt to non-exempt, determine an appropriate hourly rate, work schedule, and timekeeping policy and practice for those employees, including an appropriate communication and training strategy and budgeting for salary increases and increased overtime costs.

Department of Labor Publishes Memorandum on Misclassification of Independent Contractors

In July, the Department of Labor issued a guiding memorandum, Administrator's Interpretation No. 2015-1, on how to determine whether a worker is an independent contractor or an employee under the Fair Labor Standards Act. The memorandum adopts the "economic realities test," which courts commonly use to determine employee versus independent contractor status. The economic realities test weighs six factors, which analyze whether the worker is truly in business for himself or herself, or economically dependent on the employer. Specifically, the factors include:

1) The extent to which the work performed is an integral part of the employer's business;

2) The worker's opportunities for profit or loss depending on his or her managerial skill;

3) The extent of the relative investments of the employer and the worker;

4) Whether the work performed requires special skills and initiative;

5) The permanency of the relationship; and

6) The degree of control exercised or retained by the employer.

The memorandum concludes by noting that most workers will likely qualify as employees under the FLSA's broad definitions. The DOL's prediction-that most contractors are actually employees under the FLSA-will likely increase the number of disputes with workers claiming to be misclassified. As those misclassified workers come under the purview of the FLSA as employees (as well as other employment laws), they will be entitled to additional benefits and protections, such as minimum wage, overtime compensation, family and medical leave, and unemployment insurance, which may result in significant liability for employers.

Action Item: Since it appears that demonstrating a worker is a true independent contractor will become more difficult, employers should conduct a privileged audit of their relationships with independent contractors to ensure proper classification.

Sixth Circuit Rules on Radio Monitoring During Lunch Breaks

In *Ruffin v. MotorCity Casino*, 775 F.3d 807 (6th Cir. 2015), the Sixth Circuit held that a worker's required monitoring of his or her radio during lunch breaks did not qualify as compensable work under the Fair Labor Standards Act. In *Ruffin*, security guards at MotorCity Casino were entitled under their collective agreement to a 30-minute meal period, during which they were free to "eat, drink, socialize with other…employees, use their cell phones, utilize the internet…," etc. MotorCity did, however, restrict how the guards could spend their meal periods, including by requiring the guards to remain on company premises, to monitor their two-way radios, and to respond to any emergencies. A guard who did not respond to an emergency during his or her break was subject to discipline.

The security guards sued under the FLSA's overtime provision, alleging their 30-minute meal period was compensable work time, since requiring them to monitor their radio resulted in the time being spent predominantly for MotorCity's benefit. The Sixth Circuit disagreed; in examining the "totality of the circumstances," the court reasoned monitoring a radio and being available to respond if called was a *de minimis*, peripheral activity, which the guards could perform while spending their meal breaks however they liked.

Planning Tip: Although the Sixth Circuit ruled in the employer's favor, employers should still be careful when placing restrictions on employees during their meal breaks. In *Ruffin*, the guards' meal breaks were rarely interrupted. In fact, one guard testified that his meal period had only been interrupted once in 10 years of employment. If the interruptions had been more frequent, the court may have determined that the breaks were compensable, in which case the employees would be entitled to overtime. Employers should review any restrictions that they place on meal periods and determine how frequently employees' breaks are interrupted by work. Companies should also be mindful of State laws, which may require different compensability or on-call policies for meal breaks.

ERISA Updates

The Day ERISA's Presumption Of Vesting For Retiree Medical Plan Benefits Died

This year, the Supreme Court killed off ERISA's "presumption of vesting" in *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 935 (2015). Historically, whether an employer can change medical benefits for retired employees depends on what promises the employer has made to those retirees.

To help employers navigate the changing landscape of employment challenges here in the U.S. and around the globe, we also offer a monthly webinar series that offers practical advice on cutting edge issues for domestic and global employers. In 2015, we offered the following webinars:

- Annual Employer Update: 2014 Developments and 2015 Challenges
- Do You Know Where Your Data Is? BYOD, Social Media, and Other Tech Developments Impacting Global Employers
- Food & Agribusiness Labor Issues in 2015
- Global Reductions in Force: Understanding Employment Laws in the Wake of Declining Oil Prices
- Top 5 Employment Developments Federal Contractors and Subcontractors Should Know About in 2015
- The Proposed FLSA Amendments: What They Mean and How to Respond
- Recruiting the Right Talent: The Top 5 Legal Issues Employers Need to Know in 2015

To request a playback of any of these 2015 webinars, or any other webinar in this series, click here.

Join us for our special 2-part webinar series, "**How to Be Your Company's Super Hero: The Top Employment Developments and Trends You Need to Know**."

January 13, 2016: **Global Update**: Focus on Asia Pacific, Canada, Europe and Latin America

January 27, 2016: **U.S. Update**: Wage & Hour, Corporate Compliance, Arbitration, Discrimination and Harassment

Register for our upcoming webinar series here.

In 2000, M&G Polymers entered into a collective bargaining agreement ("CBA") wherein it agreed to provide its employees at its plant in Apple Grove, West Virginia with pension and retiree medical benefits. Employees who retired after a certain date and who were eligible for a pension based on number of years of service would receive, for themselves and their dependents, "a full Company contribution towards the cost of [health care] benefits." When the CBA expired, M&G Polymers informed retirees that they must contribute toward the cost of their medical plan coverage. The retirees sued alleging that the 2000 agreement provided lifetime, contribution-free medical plan benefits to them and their dependents.

The Court unanimously ruled that the "inference of vesting" was impermissible because it failed to apply ordinary principles of contract interpretation to a contractual dispute. The Supreme Court emphasized the importance of effectuating the terms of a contract as written, especially when the contract constitutes an ERISA-regulated plan:

> "[T]he rule that contractual provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA [welfare benefits] plan. That is because the focus on the written terms of the plan is the linchpin of a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [welfare benefits] plans in the first place."

135 S. Ct. at 933 (internal citations & quotations omitted). The Supreme Court also held that "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest." 135 S. Ct. at 937.

Planning Tip: ERISA plan sponsors should review their CBAs and Plans to ensure that the language relating to vesting is clear and unambiguous. Even though *Tackett* signals that ordinary principles of contract law require a clear and express statement of the intent to vest retiree benefits, the best practice is to ensure that vesting rules are clear to everyone involved.

ERISA's Statute of Limitations And Claims of Breach of Fiduciary Duty

In 2015, the Supreme Court confirmed that the statute of limitations is different for claims of a breach of fiduciary duty. The Supreme Court considered two questions: (1) does the duty to exercise prudence in selecting investments end once they are selected, and (2) does the fiduciary have a continuing duty to monitor, and to remove imprudent plan investments? A unanimous Court ruled "no" as to the first question and "yes" as to the second.

In *Tibble v. Edison Intl.*, 135 S. Ct. 1823 (2015), plaintiff filed a putative class action on behalf of beneficiaries in the Edison 401(k) Savings Plan. He alleged that plan fiduciaries had breached their fiduciary duties by improperly selecting investments, failing to prudently monitor the investments, and neglecting to remove imprudent investment options from the Plan.

In 1999, three mutual funds were added to the Plan and three more were added in 2002. Plaintiffs alleged that Plan fiduciaries acted imprudently by selecting and continuing to invest in higher priced "retail-class" mutual funds when materially identical lower priced "institutional-class" mutual funds were available.

The fiduciaries argued that the suit was time-barred as to funds for which the decision to invest had been made more than six years before the Complaint was filed. Plaintiffs claimed that the fiduciaries had a continuing duty to monitor investments which continued past the limitations period.

The District Court held that the plaintiffs' claims were untimely with respect to the 1999 funds. On appeal, the Ninth Circuit held that plaintiffs' claims regarding the 1999 funds were untimely because plaintiffs had not established a change in circumstances that might trigger on obligation to review and to change investments within the six-year statutory period. The Court of Appeals also did not find any continuing violation of ERISA.

The Supreme Court ruled that under trust law, a fiduciary is required to conduct a "regular review of its investment with the nature and timing of the review contingent on the circumstances." *Tibble v. Edison Intl.*, 135 S. Ct. 1823 (2015). The case was remanded for the Ninth Circuit to consider "trust-law principles," at which time "it is possible that it will conclude that the fiduciaries did indeed conduct the sort of review that a reasonable fiduciary would have conducted absent a significant change in circumstances."

Planning Tip: Routinely (every 90 days or so) review plan investments and monitor the reasonableness of fees and other terms of service provider contracts. Retain documents showing how investments were monitored, how the plan's investments were compared to relevant benchmarks, and any other documents that demonstrate fiduciaries were otherwise "procedurally prudent" in following the plan's investment policy statements.

Conduct periodic reviews and, when "materially changed circumstances" occur, conduct a "full due-diligence review."

Review and amend investment policy statements to provide guidance or benchmarks for a review of each investment alternative on a predetermined schedule.

Arbitration

Mandatory Arbitration Agreements With Class and Collective Action Waivers Remain a Viable Option For Most U.S. Employers, but the NLRB and California Courts Continues to Find Such Agreements Unenforceable

The end of 2015 finds employers in much the same position with mandatory arbitration agreements as they were at the beginning of 2015.

Following a wave of favorable Supreme Court precedent over the last few years, most federal courts continue to enforce properly drafted employee arbitration agreements which include class and collective action waivers. This is demonstrated by an October 2015 decision of the United States Court of Appeals for the Fifth Circuit in *Murphy Oil USA, Incorporated v. National Labor Relations Board*. In *Murphy Oil USA*, the Fifth Circuit considered a decision by the NLRB holding the employer violated the NLRA by requiring its employees to sign an arbitration agreement waiving their right to pursue class and collective actions. The Fifth Circuit had previously rejected this same analysis in *D.R. Horton*, and it adhered to its prior ruling in again in *Murphy Oil*. Accordingly, the Fifth Circuit held that the employer did not commit an unfair labor practice by requiring its employees to sign an arbitration agreement in which they waived their right to pursue a class or collective action.

Nevertheless, the NLRB continues to adhere to its 2012 decision in D.R. Horton, which held that class or collective action waivers violate Section 8(a)(1) of the NLRA. In the *Murphy Oil* decision, the Fifth Circuit noted that, because the employer can seek review in federal circuits apart from the NLRB's rulings, it did not "celebrate the Board's failure to follow [the Fifth Circuit's] *D.R. Horton* reasoning, but neither [did it] condemn its non-acquiescence."

In line with the NLRB's distaste of collective waivers in arbitration agreements, the California courts continue to strike down arbitration agreements with waivers of representative Private Attorneys General Act ("PAGA") claims. California's PAGA provides California employees with a private right of action to bring claims against an employer for certain Labor Code violations, either personally or in a representative action on behalf of other "aggrieved employees." In 2014, the California Supreme Court held in *Iskanian v. CLS Transportation Los Angeles*, LLC, that although arbitration agreements with class action waivers are enforceable as a general rule, a waiver of a representative PAGA claim in an arbitration agreement is unenforceable. On September 28, 2015, a divided Ninth Circuit panel agreed, holding that the Federal Arbitration Act ("FAA") does not preempt the Iskanian rule, and therefore a PAGA waiver in an arbitration clause or agreement with employees remains unenforceable.

Further, in *Williams v. Superior Court (Pinkerton Governmental Services, Inc.*), a California appellate court considered whether an employee who asserts a representative PAGA claim can be forced to arbitrate the individual claim first. The Court held that employees cannot be required to submit the "underlying controversy" to arbitration to determine whether there is standing to pursue the representative PAGA claim, as doing so would split a single case between litigation and arbitration.

California employers should use caution in relying on the choice of law in arbitration agreements. In *Pinela v. Neiman Marcus Group Inc.*, a California employee of the Texas-based company Neiman Marcus brought individual and class claims for alleged wage and hour violations, despite an arbitration agreement between the parties. In holding that the entire arbitration agreement was unenforceable, the California appeals court emphasized two clauses in particular: (1) a delegation clause that required the arbitrator to decide issues of enforceability, and (2) a detailed governing law clause that required the agreement to be governed by, interpreted, and enforced according to Texas law, and requiring the arbitrator to apply Fifth Circuit law. The Court concluded that these, along with several other provisions, made the arbitration agreement as a whole unconscionable, and therefore unenforceable.

Planning Tip: Developments in 2015 leave employers in much the same position as they were in 2014 with regards to mandatory employee arbitration agreements. While employers may include enforceable class, collective, and representative action waivers in arbitration agreements, employers should understand the risk that the NLRB or California courts may find such waivers to be unenforceable. Moreover, companies headquartered outside of California may want to review their arbitration agreements and any governing law clauses in light of Pinela.

Labor and Employee Relations

NLRB Drastically Expands "Joint Employer" Definition

In August 2015, the NLRB issued a ruling in *Browning-Ferris* that drastically expanded the NLRB's "joint employer" definition. Under the decision, third party employees may be treated as the contracting company's employees for the purposes of the NLRA when the entities share or codetermine those matters governing the essential terms and conditions of employment. *Browning-Ferrris* has far reaching implications for any business that contracts, subcontracts, or outsources work (e.g., janitorial work, trucking/long-haul shipping, office/secretarial support services, etc.), that uses staffing agencies to provide temporary assistance; that maintains franchise agreements with other entities, and/or that maintains some control over a subsidiary entity. The NLRB's ruling may also provide a template for other government agencies to follow, such as the U.S. Department of Labor's Wage and Hour Division, Equal Employment Opportunity Commission, or other government entities.

Click here to read more.

Action Item: Employers should carefully review subcontracts, service contracts, outsourcing agreements, staffing agency contracts, franchise agreements, corporate subsidiary relationships, and/or any other relationship through which control may be exercised over another entities "employees." Although a "joint employer" finding may be unavoidable in certain circumstances, employers should prepare for such a contingency. In such situations, a broad indemnification agreement should be considered.

NLRB General Counsel Issues Report on Employer Rules and Policies that Violate NLRA

In March 2015, the NLRB's General Counsel issued a report applicable to both union and non-union employers alike, providing guidance on the General Counsel's view of what rules and policies are impermissible under the NLRA. The report describes overbroad rules and policies that, in the General Counsel's view, interfere with, restrain, or coerce employees in their exercise of rights protected by the NLRA's Section 7. Generally, these are overly broad policies which might have a "chilling effect" on protected employee conduct if an employee could reasonably read the rule to prohibit protected activities. The report specifically details several categories of rules, and examples of those rules, that may be impermissible:

1) Rules regarding confidentiality (e.g. "[d]o not discuss 'customer or employee information' outside of work, including 'phone numbers [and] addresses'");

2) Rules regarding employee conduct towards employer and supervisors (e.g. "be respectful to the company, other employees, customers, partners, and competitors");

3) Rules regarding conduct towards fellow employees (e.g. "don't pick fights online");

4) Rules regarding employee interactions with third parties (e.g. "if you are contacted by any government agency you should contact the Law Department immediately for assistance");

5) Rules regarding use of company logos, copyrights and trademarks (e.g. "do not use any Company logos, trademarks, graphics, or advertising materials" in social media);

6) Rules regarding photography and recording (e.g. "taking unauthorized pictures or video on company property is prohibited");

7) Rules regarding employees leaving work (e.g. "walking off the job is prohibited"); and

8) Employer rules regarding conflicts of interest (e.g. "employees may not engage in any action that is not in the best interest of the employer").

The NLRB seems to agree with the General Counsel's approach. Later in March 2015, in *Lily Transportation Corporation*, the NLRB determined that an employer policy that barred "disclosure of confidential information, including company, customer information and employee information maintained in confidential personnel files," violated the NLRA. The Board found that this rule impermissibly barred employees from discussing information about wages and other terms and conditions of employment.

Warning: An employer that maintains an overbroad rule or policy may be required to retract the rule or policy and inform all employees that were covered by the rule or policy that it was overbroad, that it will be removed/replaced, and that the employees have rights under the NLRA. Employers may be required to inform employees in a variety of ways, including posting physical and electronic notices and personally notifying employees either electronically or by other means.

Action Item: Employers should review all rules and policies to ensure that there are no restrictions that may be reasonably interpreted by employees to prohibit protected activities. The General Counsel seems principally concerned with vague rules that may have sweeping effects if read liberally.

NLRB's New Election Rules Take Effect

In April 2015, the NLRB's new election rules took effect. These new rules eliminated a 25 day minimum period between petition and election required by the old rules, and the new rules established streamlined union election procedures. The tight deadlines imposed by the new rules can be challenging to meet.

In addition to the tighter deadlines, the new rules also impose an obligation on employers to file a position statement, identify disputed issues, and provide a preliminary list of voters in the proposed unit (including names, work locations, shifts, and job classifications). The new rules further alter the NLRB's "*Excelsior* List" requirements, and now, in addition to the list of eligible voters' full names and residential addresses required to be provided under the old rules, an employer must provide, in electronic form (in most cases), employees' personal email addresses where available, telephone numbers available, job classifications, and shifts.

In a related development, in September 2015, the General Counsel indicated that electronic signatures would be accepted in support of the showing of interest necessary for a union to seek an election. In October 2015, the General Counsel issued a revised memorandum that provides some details on the procedures that will be followed in relation to electronic signatures. Previously, signed, physical authorization cards were necessary for a union to demonstrate employee interest in union representation.

Action Item: Because employers will now have less time to campaign against union representation by ensuring employees understand the pros and cons of unionization, employers should increase efforts to monitor employee satisfaction and take steps to periodically remind employees of the pros and cons of unionization. Employers should also prepare themselves for increased union organizational activity already seen and expected to continue as unions attempt to take advantage of the NLRB's new election rules.

Worker Retention Statutes Force Purchasers to Become "Successors"

In August 2015, the NLRB held that a business purchasing another entity's assets can become a successor if that business is obligated to retain the prior entity's workers for a "trial period" under a local worker retention law. Certain jurisdictions-New York City, Los Angeles, San Francisco, and Washington, D.C. to name a few-maintain such worker retention laws, which require employees in certain industries to be employed for a trial period following the sale of a business. As a successor, an employer has an obligation to recognize and bargain with the employees' representative (a union) that represented the employees at the time the successor purchased the other entity's assets. In a 2011 decision, the NLRB deemed that a successor employer is obligated to bargain with the employees' representative for at least six months (this doctrine, known as the "successor bar," was reaffirmed by the NLRB in August 2015).

Successor employers also run the risk of becoming a "perfectly clear" successor. A perfectly clear successor is obligated to maintain all of its predecessor's existing terms and conditions of employment until it bargains to impasse or it reaches an agreement with the union representing the employees. To avoid the "perfectly clear" label, a "successor" employer must set initial terms and conditions of employment that are different from its predecessor.

Action Item: Businesses considering the purchase of another entity's assets should be wary of doing so in jurisdictions that maintain worker retention laws if some of the selling entity's employees are covered by the worker retention laws. If such a purchase is made, then the purchasing business should take care to immediately set its own terms and conditions of employment to avoid becoming a perfectly clear successor.

NLRB Developments to Watch For

- **NLRB's Decision Opens Potential Constitutional Challenges to Local Worker Retention Statutes** - In a 2011 decision, the First Circuit Court of Appeals refused to find that a local worker retention statute was preempted by the NLRA in part because a potential successor employer would not be required to recognize and bargain with the union during the mandatory retention period. Because the NLRB held in 2015 that a successor employer is required to recognize and bargain with a union during the mandatory retention period, it is possible that courts will begin finding that local worker retention statutes are preempted by the NLRA.

- **"Successor Bar" Opens Potential Challenge to the Successor Doctrine -** In a seminal successorship case decided by the United States Supreme Court that approved the concept of successorship, *Fall River Dyeing*, the Court stressed the importance of allowing employees to choose the entity that represents them (i.e. a union continuing to serve as employees' bargaining representative even where the employees are no longer employed by the same entity). Because the NLRB's "successor bar" now ties employees to a particular union for at least six months (and up to twelve months), a critical underpinning of *Fall River Dyeing* no longer holds weight. As such, the NLRB's current stance on successorship may be ripe for challenge before the Supreme Court.

- **Department of Labor's "Persuader" Rule Could Pose Challenges to Attorney-Client Confidentiality -** The DOL is targeting March 2016 for publication of its final "persuader" rule. The current rule requires employers to disclose to the DOL consultants who are engaged to persuade employees (either directly or indirectly) in relation to organization and collective bargaining. Historically, attorneys who did not address employees were not required to report, called the "advice exception." Based on an earlier proposed version of the rule, it is anticipated that the final rule will drastically narrow the "advice exception" to the current persuader rule. Because of the anticipated narrowing of the advice exception, employers could be required to publicly disclose attorneys who are engaged to advise and assist with union organizing campaigns. The final rule is also anticipated to substantially increase the persuader rule's general reporting requirements. Attorneys are expected to have substantial disclosure requirements, as their reporting obligation is expected to extend to all labor clients, not just those for whom persuasive work is performed. The proposed version of the rule was first released in 2011, but the final version's release has been postponed on several occasions.

Federal Contractor Updates

Proposed "Blacklisting" Rule

A controversial proposed rule implementing the Fair Pay and Safe Workplaces Executive Order, which employer groups have dubbed the "blacklisting" rule, could see a Final Rule published in 2016. The Executive Order requires prospective and existing federal contractors to disclose violations of any employment or labor laws in the past three years, and update the information every six months. The Federal Acquisition Regulatory Council's ("FAR") proposed rule instructs that "before a Federal contract is awarded, a contracting officer must determine that the contractor is a responsible source to do business with the Federal Government." FAR published the proposed rule in May 2015, and the Department of Labor has issued separate guidance for the Executive Order. Currently, FAR lists April 2016 as the anticipated date for the Final Rule, although it is unclear when the rule will go into effect. The reporting and updating requirements will likely be highly burdensome, particularly for large employers.

Final Rule on Pay Transparency for Federal Contractors

In 2014, President Obama issued Executive Order 13665, which aims to promote pay transparency among employees and applicants of federal contractors. The Final Rule was published on September 11, 2015 and will take effect January 11, 2016.

Action Item: Under the Final Rule, covered federal contractors and subcontractors must refrain from discharging, or otherwise discriminating against, employees or applicants who ask about, discuss, or disclose their compensation or the compensation of other employees or applicants, with limited exceptions. Contractors also must include this language in the equal opportunity clause of all covered federal contracts and subcontractors. In addition, contractors must incorporate a prescribed nondiscrimination provision into existing employee handbooks and make sure all employees and applicants are aware of the provision.

No Discrimination on Basis of Gender Identity or Sexual Orientation

Under the Obama Administration, the Office of Federal Contract Compliance Programs (“OFCCP”) has achieved greater protections for employees on the basis of sexual orientation and gender identity. In 2014, President Obama signed Executive Order 13672, which amends Executive Order 11246 and its corresponding regulations to prohibit federal contractors and subcontractors from discriminating on the basis of sexual orientation or gender identity. The amended regulations took effect on April 8, 2015.

Planning Tip: Under the revised regulations, federal contractors and subcontractors must treat applicants and employees without regard to their sexual orientation or gender identity. The non-discrimination provision covers every type of new and modified federal contractor but does not require employers to undertake new recordkeeping, data analysis, goal setting or other types of affirmative action.

Pending Federal Legislation

Federal Ban the Box Laws - The Fair Chance Act was introduced into the Senate in September, which would prohibit federal agencies and government contractors from asking about a job applicant's criminal history until after making a conditional offer of employment. This "ban-the-box" law-referring to a "yes/no" check box on employment applications-comes on the heels of numerous states that have enacted their own ban-the-box law. These laws have seen an increase in support across the United States, particularly in the last two years. No ban-the-box law, including the proposed Fair Chance Act, completely prohibits inquiry into criminal history; rather, the laws limit when an employer can ask. Notably, the proposed federal ban-the-box law does not currently seek to prevent private employers from inquiring into criminal history, as several states have done. However, it will affect employers that contract with the federal government. As such, these employers should be on the lookout for updates on the Fair Chance Act. Similarly, President Obama announced in November his intention to sign an Executive Order banning inquiry into criminal history for federal government employees. But the Order is not expected to apply to federal contractors, and thus should not impact federal contractors.

Pending Cases

U.S. Supreme Court Cases

- *Campbell-Ewald Co. v. Gomez* - The U.S. Supreme Court will consider whether employers can moot potential class actions, reviewing the following questions: (1) Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim; (2) whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified; and (3) whether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co.*, for government contractors is restricted to claims arising out of property damage caused by public works projects.

Corporate Compliance

The Dodd-Frank Whistleblower Program Continues to Expand

In the fiscal year 2015, the SEC paid more than $37 million in awards to eight whistleblowers, who provided new information to the agency which led to successful enforcement actions. Among them, was a former hedge fund manager who received more than $600,000 in connection with a whistleblower retaliation case against his former employer Paradigm Capital Management, Inc. The majority of the award recipients under the program continue to be current or former employees of companies. This year the SEC Office of the Whistleblower received nearly 4,000 whistleblower tips. For the first time in 2015, the SEC awarded bounties to a Compliance Officer and to a former Company Officer. The most common categories reported by whistleblowers included Corporate Disclosures and Financials (17.5%), Offering Fraud (15.6%) and Manipulation (12.3%). The Commission received tips from individuals in 50 states, as well as from District of Columbia and U.S. territories of Puerto Rico and U.S. Virgin Islands, and 61 foreign countries. The highest number of tips came from California, New York, Texas, Florida and New Jersey.

Directors May Be Personally Liable under SOX and Dodd-Frank

On October 23, 2015, the Northern District of California ruled that the anti-retaliation provisions under SOX and Dodd-Frank could result in personal liability for board members.

The Courts Remain Split On Protection Of Whistleblowers Who Report Internally

On September 10, 2015, in *Berman v. Neo Ogilvy*, the Second Circuit, in reversing summary judgment for the company, deferred to the SEC's interpretation of the definition of "whistleblower" under the Dodd-Frank and held that a whistleblower who reports internally may pursue a retaliation claim under Dodd-Frank. The plaintiff in the case worked as a finance director for Neo@Oglivy LLC and was terminated after complaining to his superiors that certain accounting procedures allegedly amounted to fraud. About six months following his termination, plaintiff also reported the questionable accounting practices to the SEC and sued his former employer for retaliation. The decision puts the Second Circuit at odds with the Fifth Circuit's decision in *Assadi v. G.E. Energy (USA)* which extended whistleblower protection only if the report was made to the SEC, and may prompt review of the issue by the U.S. Supreme Court.

U.S. Deputy Attorney General Sally Yates Issues Memorandum Outlining Department's Approach For Internal Investigations

On September 9, 2015, Sally Q. Yates, the Deputy Attorney General, issued an memo titled "Individual Accountability for Corporate Wrongdoing" outlining the Department's approach to corporate investigations and the six steps that should be taken in any investigation of corporate misconduct. The memo makes it clear that the Department's approach with respect to investigations has changed and creates new practical issues for companies that are subject to the investigation.

SEC Slaps KBR with a Fine for Its Confidentiality Agreement

On April 1, 2015, the SEC instituted a cease-and desist proceeding against KBR, Inc. alleging that its form confidentiality statement undermines the purposes of Section 21F of the Dodd-Frank and Rule 21F-17(a) which prohibits "any action to impede an individual from communicating directly with the commission staff about a possible securities law violation…". In the course of conducting internal investigations, KBR had witnesses sign a form confidentiality statement which prohibited interviewees from "discussing any particulars regarding the interview and the subject matter discussed without prior authorization" from KBR's legal department and admonished that unauthorized disclosures may be grounds for disciplinary action up to and including termination of employment. The SEC held that KBR's confidentiality agreement runs afoul of Rule 21F-17(a). KBR agreed to pay $130,000 in penalties to settle the case.

Action Item: Companies should confirm that their confidentiality agreements and other employment documents contain an explicit disclaimer indicating that nothing prohibits the individual from reporting possible violations of federal law or regulations to any government agency or entity, including but not limited to the Department of Justice and the Securities and Exchange Commission or from making other disclosures that are protected under the whistleblower provisions of federal law or regulation.

Self-Help Discovery Can Result in Criminal Prosecution

Employers have struggled with former whistleblowers who walk off with company documents in support of their legal claims. In the latest decision siding with employers, the New Jersey Supreme Court held on June 23, 2015 , that former employees cannot engage in "self-help" discovery. In *State v. Saavedra*, an employee filed a discrimination and retaliation suit under New Jersey's discrimination statute against her school board employer. During discovery, the employer learned that the plaintiff had taken hundreds of documents containing confidential medical and education information of children in purported support of her claim. A grand jury indicted her, charging her with theft and official misconduct, sending a strong message that "self-help" is not permitted and that even whistleblowers must use proper discovery process.

California Department Of Justices Begins Enforcement Activity Under The California Transparency In Supply Chain Act

On April 1, 2015 and again on October 1, 2015, the California Department of Justice began enforcement activity of the California Transparency in Supply Chain Act ("CTSCA"), which went into effect in 2010, and issued warning letters to companies not in compliance with its requirements. The law requires retail sellers and manufacturers doing business in California with over $100 million in worldwide gross receipts to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods they offer for sale. CTSCA sets forth specific guidance on the items that must be disclosed. For retail sellers and manufacturers with Internet websites disclosures must be posted "with a conspicuous and easily understood link to the required information placed on the business' homepage." Cal Civ. Code §1714.43, subd. (b). For those covered retail sellers or manufacturers without a website, written disclosure must be provided within 30 days of receiving a written request for the disclosure from a consumer. The remedy for the violation is an action brought by the State Attorney General for injunctive relief, but the CTSCA does not limit remedies available for violations of any other state or federal laws. Potentially, consumers can bring claims under the California Business and Professions Code Section 17200 for unfair business practices and Section 17500 for false advertising.

Action Item: Companies with manufacturing or retail sales listed as their principal business activity on California tax filings should ensure that they are compliant with the CTSCA requirements and take steps to diligence their supply chain.

U.K. Follows California's Lead and Requires Companies to Publish a Human Trafficking Statement

In October 2015, the U.K. Modern Slavery Act 2015 ("MSA") came into effect. The MSA is modelled on the California Transparency in Supply Chain Act and applies to all businesses who carry on business (or a part of their business) in the U.K. and have turnover of more than £36 million (approximately $55 million). At a minimum, the MSA requires companies to publish a statement on their website and include a link to the statement in a prominent place on the website's homepage detailing the steps they took to combat slavery in all parts of their supply chain during the past financial year. If a company does not have a website, it must be prepared to provide a copy of the statement within 30 days of receiving a written request.

The company's board of directors (or equivalent management body) must approve the statement before it is published. The MSA does not specifically prescribe the contents of the statement; however, the statement may include information regarding the following:

- Organization's structure, business, and its supply chains;
- Its policies in relation to slavery and human trafficking;
- Its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
- The part of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps the business has taken to assess and manage the risk;

- Its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and

- Training about slavery and human trafficking available to staff.

According to the guidance published by the Home Secretary on October 29, 2015, although the government has not been prescriptive in setting forth the specific contents of the statement, the statement must include all steps that the company has taken to combat slavery. The level of detail will depend on a variety of factors, including the complexity of the company's structure and supply chains and it business sector. The MSA gives the Secretary of State the power to bring a civil proceeding for injunctive relief ordering the company to publish a statement in accordance with MSA.

Action Item: Companies who carry on business in the U.K. and meet the requisite revenue threshold should ensure that they are compliant with the MSA requirements and take steps to diligence their supply chain and take steps to eliminate human trafficking.

International Trends

As 2015 draws to a close, we reflect on the global employment trends that U.S. multinationals faced, and the continuing challenges likely to carry over into what is shaping up to be a busy 2016 for global employers. While companies seems to face everything from continued global expansion, to divestitures and separations aimed at unlocking value, to managing highly mobile (and sometimes expensive) workforces, four key trends seemed to repeatedly rise to the top of in house legal and HR's "to do" list. Let's see if these trends are on your list too!

Trend 1: Workforce Management

After a surge in transactions and hiring outside the U.S. over the past few years-which does not seem to be slowing down-multinationals have increasingly been seeking guidance on how to best consolidate and integrate their workforce, and successfully grow and manage talent outside the U.S. What are the key actions coming out of this Trend?

- **Background Checks** - Background checks form an integral part of the U.S. hiring process and are a useful tool to hiring talent. Outside the U.S., background checks are not always common practice or culturally acceptable. When they are permissible, the candidate's express consent to each check is often required. There may also be data privacy considerations that will need to be taken into account if data is transferred to the U.S. Further, the employment relationship can usually not be conditional on the outcome of the background check. Click here to read more about legal requirements around background checks outside the U.S.

  Planning Tip: Employers should ensure background checks are conducted in compliance with current local laws prior to extending offers of employment and understand the limitation of including background check language in employment agreements outside the U.S.

- **Performance Improvement Plans** - U.S. multinationals often believe in giving its carefully selected employees a "second chance" despite poor performance. Especially outside of the U.S., where there is no concept of "at will" employment, the old adage that "no good deed goes unpunished" holds true. At the first signs of inadequate performance, it is highly recommended, and in some cases required, to put in place a performance improvement plan (or local equivalent) if the employee is to be disciplined or potentially ultimately terminated for poor performance. Even in countries where inadequate performance, even when supported by a performance improvement plan (or local equivalent) is not an established "cause" for termination, a properly documented inadequate performance can nonetheless help the employers negotiate a mutual termination. Further, in the event of an unfair dismissal claim, the local employer is able to rely on a well-documented performance improvement plan.

  Action Item: Although the general concept of a performance improvement plan is shared amongst jurisdictions, there are some important distinctions (such as length, process, etc.) that vary per country. Employers are encouraged to recognize the commonalities and train managers accordingly, but develop locally compliant performance management mechanisms outside the U.S.

- **Workplace Training Requirements** - Although California law requires employers to conduct regular anti-harassment and anti-discrimination training, many jurisdictions do not have such training requirements. However, conducting trainings on matters such as health/ safety, anti-harassment and/or anti-bribery are required in some jurisdictions and highly recommended as a matter of best practice in others. Such trainings will serve as key defenses that the company took all practical steps to prevent workplace-related injuries, harassment, bribery, etc. It is also recommended to put in place accompanying healthy and safety, anti-harassment and anti-bribery policies and request individual employee acknowledgement to such policies.

  Planning Tip: Employers should review their training practices and accompanying policies and confirm they are compliant with local requirements and cultural norms. Employers should also be mindful that all employees are required to participate in such trainings (including managers!) and keep records of attendance.

- **Policies and Handbooks** - Policies and handbooks can be an invaluable tool to protect the company against claims, respond to employee questions, guide local HR teams and globalize the company's values and mission. Multinationals are often overwhelmed by the varying local requirements around policies and handbooks, and may try to adopt a single global handbook on company policies. Although understandable, such approach is often problematic, since employee handbooks and policies are almost always governed by local (and potentially conflicting) law. For example, while handbooks are recommended in China to discipline / control employees, handbooks are generally not recommended in Germany where only certain locally required postings should be communicated to employees. By contrast, locally compliant policies can be made to be fully enforceable against local employees especially if the employee is to be terminated for poor performance. Hybrid employment policies can also be used where the company has certain global codes of conduct (which should also be vetted for local compliance) that can be matched with local benefits and disciplinary policies. Such policies should also be adopted and implemented in accordance with local law, which may involve consultations and/or input from the employees and/or collective body.

Planning Tip: Companies should consider the costs and benefits of preparing and adopting various policies / handbooks, and engage in advanced planning and discuss the various approaches with counsel to determine what is compatible with the company's philosophy and needs.

Trend 2: Compensation Design

In the current competitive talent market, multinationals have been busy this year revisiting their compensation design with a focus on equality and fairness across the workforce. What are the key "hot" compensation design elements?

- **Stock Options for All?** - Some employers have been moving towards providing stock options, restricted stock or other equity grants to all employees in good standing, on a yearly basis. Although this approach may be considered "fair" and help to encourage performance, it raises concerns outside the U.S. First, tying eligibility to a U.S. stock option grant to employee performance will not only be deemed to be local employment compensation (thus included in termination calculations), but could increase permanent establishment risks and joint employer exposure. Second, local employers may expose themselves to potential discrimination claims (e.g., What is the cut-off date to exclude employees from the scheme? Can part-time employees be excluded from the scheme?). Third, although equity should be treated as separate from local employment-related compensation, the local employer may be asked to inform or consult with works councils, employee representatives or unions.

  Planning Tip: While some of the above risks can be manageable, depending on the country, employers are encouraged to think through all equity and employment issues that can arise under "equity for all" schemes and ensure that they are prepared to manage accordingly.

- **Global Commission Plans:** - Employers often associate global commission plans with administrative ease and fairness across the global workforce. Global commission plans can, in theory, generally be rolled out (subject to translation requirements in some countries) by a local employer. However, multinationals should be aware of the stringent employee-friendly local implementation requirements that vary per jurisdiction and that often will make employers wish they had implemented a locally compliant commission plan, which often provide greater flexibility. For example, in France, if a locally-compliant commission plan is not adopted, employees may be able to claim that all / some provisions are unenforceable, which could entitle the employee to claim 100% of the commission despite meeting targets under the commission plan.

Planning Tip: When rolling out commission plans outside the U.S., employers should be cognizant of the various local requirements and the need to fully localize commission plans.

Trend 3: Gender Equality in the Workplace

In keeping with the underlying trend behind California's newly enacted Equal Pay Act, see above article "California expands Equal Pay Act to make it easier for employees to establish successful gender-based disparity claims." Many countries outside the U.S. are working to reduce the pay gap between men and women and to promote gender equality in the workplace. In particular, there has been a rise in "equal pay" legislation across the globe. The equal pay issues generally materialize in two different forms: (a) labor claims filed by an employee with the lower compensation seeking equal pay; and/or (b) an audit, inspection, investigation or claim by the relevant labor authorities.

True "equal pay for equal work" laws goes beyond simply prohibiting discrimination of men/women when it comes to pay. Rather, these laws require that employees who perform the same job receive the same pay. For example, in the UK, the government plans to introduce mandatory reporting for employers with 250 or more employees that will require the employer to publish the difference between the average pay of their male and female employees. An Equal Pay Act is also being considered in Thailand. In Japan, starting April 1, 2016, new legislation will encourage female participation in the workplace, by requiring large employers (with 300 or more employees) to establish a kind of affirmative action plan for female workforce participation.

Similarly, we have seen a rise in "shared parental leave" and "paternity leave" legislation designed to encourage young mothers to return to work. The U.K. government has even just announced that by 2018, working grandparents will be able to take shared parental leave and pay. This announcement is in response to a study finding than more than half of mothers rely on grandparents for childcare when they first go back to work, and over 60% of working grandparents with grandchildren under the age of 16 provide some sort of childcare. Paternity leave legislation is also being adopted in APAC jurisdictions. By way of example, Singapore is increasing the amount of government-paid paternity leave from 1 to 2 weeks, retroactive as of the beginning of this year. In Hong Kong, men are for the first time ever entitled to 3 days of paternity leave, which appears to be a modest movement to encourage female workforce participation by providing paternity benefits to fathers.

<u>Take Away</u>

Employers should ensure that leave policies adequately reflect recent legislative updates. This is also an opportunity to be legally compliant, get ahead of the law and potentially differentiate your company in the market when it comes to recruiting talent.

Trend 4: Global Spin-Offs

2015 was another banner year for corporate M&A activity, with the spinoff / sale of various operating entities around the world being the name of the game. Though these types of decisions are often driven by overall business strategy and corporate and tax considerations, the impact on the employees of both the existing company and the "SpinCo" can be significant and require equal amounts of careful planning as other substantive areas. There are a number of high-level employment issues that all companies should consider with the spin off of a global workforce, including, among others, notice and consultations obligations, how employees transfer, employee communications, all of which can materially impact the overall success of the transaction. You can read more about top 10 human resources considerations we have identified in our recently published *Law360* article.

Employee Data Privacy Update

Is the EU/US safe harbor scheme for data transfers "Invalid"?

It's been just over 2 months since the European Court of Justice handed down the now infamous "Schrems judgment", sending ripples of panic across the Atlantic which left some U.S. multinational with European operations questioning-if only for a split second- whether it would be necessary to pull the plug on all transatlantic personal data transfers. The Court took a bold position, standing up to what many Europeans consider the U.S. government's flagrant disregard for the European fundamental right to privacy (brought into the spotlight by the Snowden revelations of NSA surveillance practices). The decision has been widely reported as "invalidating" Safe Harbor, but the Court, in fact, ruled that the national DPAs have authority to evaluate the safeguards guaranteed under Safe Harbor to determine adequacy (rather than defer to the European Commission's decision on the adequacy of the Safe Harbor scheme- a decision the Court ruled was no longer valid in light of the U.S. government's pervasive surveillance).

The DPAs rose to the challenge, with pronouncements on the topic seemingly on a weekly basis: The Spanish and French DPAs have told data controllers they have until the end of January to safeguard transfers to the U.S. by other means (for instance, via model contracts), but even the model contracts the French DPA has said may need to be revisited after January 2016. The German DPAs were divided but at least one went so far as to say there is no mechanism to adequately safeguard employee data transferred to the US, leaving data controllers with no clear alternative short of ceasing transfers of employee data altogether. The Italian DPA has also pronounced that transfers may not rely on Safe Harbor but may use alternative measures, such as model contracts, until at least the end of January. In contrast, the U.K. DPA has taken a more relaxed approach, blogging that although there is no longer carte blanche for transfers under Safe Harbor-they are not automatically unlawful.

What is a U.S. multinational to do?

Remember that for European employees, with the exception of a few countries which accept that employees may consent to transfers without safeguards, all transfers outside the employee's home jurisdiction must be adequately safeguarded. All U.S. multinationals with employees in Europe should take stock:

1. **Do you certify or recertify your U.S. company?** If you were considering Safe Harbor certification as the primary means of safeguarding transfers of employee data to the U.S. parent company, it may not make sense to begin the due diligence process right this minute-at least until after January (that is the earliest we can hope to have further guidance from the European authorities as to "Safe Harbor 2.0" (a revamped and renegotiated version of the same scheme). If you really need something in place right now, the model contracts are your best bet because currently most DPAs continue to recognize this mechanism and it can be implemented much faster than the other alternative, binding corporate rules. If you were to start now on the approval process for your binding corporate rules, it is likely that Safe Harbor

2.0 will be in place before your new binding corporate rules get approved (the process takes at least 18 months and several DPAs are not currently reviewing applications). However, if you are already certified and due for recertification-these developments do not necessarily mean you should let it lapse-you have done a lot of groundwork and Safe Harbor certification is better than nothing as it at the very least shows a good faith effort.

2. **How are you safeguarding the data you share with vendors and other third parties?** Regardless of your company's Safe Harbor status and chosen method of securing internal transfers, you should be thinking about the arrangements your company has in place with third party vendors. This includes benefits providers, learning and communication tool providers, other cloud service providers, ethics hotline administrators and anyone else with whom your company shares European employee data (including by merely granting incidental access to that data). Are you relying on your vendors' Safe Harbor certifications? Given that this has been deemed unlawful in several jurisdictions, it may be time to inventory Safe Harbor certified vendors and initiate discussions on putting in place model contracts-with any luck, you won't be the first customer to raise the concern and the vendor will have a pre-packaged solution (i.e., completed model contract ready for execution).
3. **Is it time for employee communications and revising privacy notices?** Chances are all this publicity has not gone unnoticed by at least one of your European employees. It is important to remember they have the right to ask about the data held on them and about what happens to that data. Any such request must be addressed as a matter of European law. Being clear and upfront with employees as to how their data is safeguarded in the U.S. will also help keep them from seeking recourse with their local DPA. Depending on what current employee privacy notices are rolled out to European employees and what they currently say about Safe Harbor, it may be worthwhile to consider whether to disseminate an update as to Safe Harbor status and the company's current compliance plan. It may also suit your company better to "not rock the boat" until at least there is more guidance in the new year.

Don't forget your privacy compliance basics

Even while we await a new Safe Harbor, there are steps you could take to be a better, more compliant data custodian:

- Only transfer personal data that is absolutely required for legitimate business reasons (not the entire HR file) -this may be difficult if your HRIS system is administered in/hosted in the U.S. (because that is where the contract with the vendor is held or that is where the server physically sits). Consider whether any HR functions, IT functions such as helpdesks, etc. may be administered locally or at least in a European hub, to the extent possible so as to minimize data processing in the US.
- Limit distribution and access in the U.S. only to those who have a legitimate business need to know (HR, legal, IT and direct managers of the given European employees).
- Don't transfer social security/national ID numbers or other more "sensitive data" - use a randomized employee ID instead.
- Remember that data not stored or transmitted electronically (data in hardcopy) is sometimes subject to less stringent rules. In some countries, if it is not organized (alphabetically or otherwise) it may not even be considered "personal data" as long as it does not become electronic. The principle behind this is that hardcopy data is more controlled in how it is

disseminated, etc. To the extent you have very sensitive data (i.e., investigation notes) consider whether this could be kept in hardcopy only, and whether it should be in a "relevant filing system."

- The current upheaval relates only to U.S. transfers. Therefore it is still possible to remove some data processing to another third country outside of Europe (for instance in APAC) for processing, as long as data transfer agreements are put in place. Some countries are even considered "safe" so that no additional measures are required.

Given that thousands of U.S. companies are all wondering what to do next, we hope that Safe Harbor will be renegotiated at the governmental level by January, but this is looking less likely by the day. If not, there should be some more definitive guidance on alternatives as pulling the plug on all data transfers to the U.S. is clearly not an option.

That's it. We look forward to working with you in 2016!