

## Cut and Paste Post: November, 2012

### 2013 Workplace Issues Outlook

*Excerpted from an 11/8/12 article by Bill Leonard found on the SHRM website*

Bill Leonard, a senior writer for SHRM, provides the following 'now that the election dust has settled' 2013 federal workplace issues outlook:



- **Health Care Reform:** It is now fairly certain that the health care reform law will take effect. Companies that were waiting for the election outcome need to prepare for 2014, when most of the law's provisions go into effect.
- **Immigration Reform:** President Obama will likely push harder to pass a comprehensive reform package. And, since nearly 70 percent of Latino voters supported Obama in the 2012 election, Republican leaders may be more likely to work with the president and Democrats on enacting reform legislation.
- **Discrimination:** President Obama and the Democrats in Congress will push equal pay for equal work for women. The president also supports passage of the Employment Non-Discrimination Act, which would prohibit discrimination against workers based on their sexual orientation. Because the House remains in Republican hands, these issues may struggle to advance.
- **Workplace Leave:** Since 2009, President Obama and Democrats have been strong supporters of measures to create more leave options for employees. The Obama administration has explored expanding the Family and Medical Leave Act. Employers should expect to see more attempts to expand and extend leave options for workers.
- **Labor Relations:** Organized labor was a strong supporter of President Obama and was key to his success in some swing states. Obama supports the long-stalled Employee Free Choice Act, which would reform the election process for union representation. Again, in a divided Congress, the act may not advance. The presidential appointments to the National Labor Relations Board (NLRB) strongly support workers' rights to organize. After several controversial rule revisions and new regulations, the Republican-controlled House passed several measures intended to block the changes and limit the authority of the NLRB. Employers and labor organizers should expect to see similar struggles in 2013.

### Montana Legislative Outlook

The members of the 2013 Montana Legislature are turning in their requests for bill drafts with legislative services. The last two pages of this *Cut N Paste Post* include a link to the legislature's webpage and an overview of the types of laws that may affect the practice of human resources in Montana.

## NLRB Decision Challenges Privacy in Investigations

*During the certification study group, Tori Atkins and Teri Nightingale told me about an NLRB decision that was affecting confidentiality in workplace investigations. (I learned more from them than they learned from me!) The NLRB decision in 'Navarro v. Banner Health Systems' may have created a no win situation for human resources professionals; one that deserves to be highlighted in a Cut n Paste Post.*

**The case in a nutshell:** James Navarro worked as a medical equipment technician at an Arizona Hospital operated by *Banner*. One day, Navarro's supervisor directed him to do something Navarro believed was not safe for patients. He refused to do the work, and told his coworkers about the problems. His supervisor reported Navarro to human resources; he was deemed insubordinate and was subjected to non-disciplinary coaching. Shortly later, he received a subpar performance review.

Navarro filed an unfair labor charge with the National Labor Relations Board (NLRB) alleging that the coaching and poor performance review were in retaliation for his engaging in a protected activity: complaining about job conditions.

An administrative law judge determined that *Banner's* actions against Navarro did not violate labor laws. Navarro appealed and, on appeal, the NLRB affirmed the judge's decision. However, in its decision, the NLRB found that, **by imposing a confidentiality policy while it investigated Navarro's claims, Banner had violated Section 7 of the National Labor Relations Act (NLRA)**. Section 7 protects the rights of union and non-union employees to engage in "concerted activities" for their mutual aid and protection, and includes discussions among employees concerning their terms and conditions of employment.



In this case, the NLRB said that, rather than having blanket confidentiality rules, there must be a case-by-case analysis as to whether confidentiality is necessary in investigations. It also said that **employers must be able to demonstrate a specific legitimate business justification for confidentiality, tied to the individual investigation, and that a generalized concern to protect the integrity of an investigation does not justify an overall policy of secrecy.**

### The EEOC Weighs In

Shortly after this decision, the Equal Employment Opportunity Commission's (EEOC) Buffalo District Office issued a predetermination letter saying that blanket confidentiality rules violate the anti-retaliation provision of Title VII. The letter called a violation of this type "flagrant, not trivial."

It's important to understand that the NLRB's decision is not binding in non-union environments, and an EEOC pre-determination letter from a District Office is not binding authority. But there does seem to be momentum toward applying the NLRB's logic outside of the unionized workforce context.

### Competing Concerns

The NLRB ruling may compete with employer's obligations under the Montana Constitution and the EEOC's *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (the "[Enforcement Guidance](#)"):

- Article II, Section 10 of the Montana Constitution reads as follows:

**Section 10. Right of privacy.** *The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.*

In the most general terms, the only time there is a “compelling state interest” in the release of employment information is when a public employee is involved. And, to protect public employee privacy rights, there is judicial process used to review requests for releases of public employee information. Given this, any release of information (by any person) regarding the investigation of a private employee may violate that employee’s Section 10 Rights.

The challenge here will be for employers to identify a procedure that ensures their employee’s Section 10 Right to Privacy without violating the NLRB direction.

- **The Enforcement Guidance** describes an “affirmative defense” to liability or damages in cases of harassment. The affirmative defense consists of two prongs, the first of which requires an employer to establish and enforce an anti-harassment policy which contains “assurance that the employer will protect the confidentiality of harassment complaints to the extent possible...” Complying with the *Guidance* by assuring “confidentiality to the extent possible” may be contrary to the NLRB’s prohibition of “blanket” confidentiality rules. The problem may be documenting a “specific legitimate business reason” to ensure an employee’s information is kept confidential.

In addition, like the Montana Constitution, the *Guidance* requires that information about harassment is only shared with those who need to know about it. If blanket confidentiality rules are not allowed, it significantly limits the employer’s ability to direct others involved in the investigation to not share information with those who have no need to know about it.

**Professional Pointers:** Because it appears that, in Washington DC, “the left hand doesn’t know what the right hand is doing”, it is likely that the Courts are going to have to sort through this conflict. In the meantime, maybe a couple lessons can be learned from this:

- **There is an increasing impact on non-union employers by the NLRB** - Until recently, non-union organizations rarely paid attention to what the NLRB was doing. However, because the NLRB seems to be expanding its focus, it will be important for all employers subject to the NLRA (and chances are that if you are an employer, you are subject to the NLRA) to pay attention to NLRB activities.
- **The Banner case seems to identify certain steps that union and non-union employers should take to avoid liability.** First, you should review your handbooks and policies and eliminate blanket confidentiality rules not requiring the case-by-case analysis. Second, you should retrain employees who conduct investigations that this analysis is required and must be documented. Third, when conducting investigations, you should document how the facts and circumstances of the specific investigation required confidentiality. Finally, talk to an employment attorney about the best way to balance the competing requirements of the Banner ruling, Article II, Section 10 of the Montana Constitution, and EEOC guidance.

Read the case: [http://www.aboud.com/html/Downloads/Banner%20Health%20System\\_NLRB.pdf](http://www.aboud.com/html/Downloads/Banner%20Health%20System_NLRB.pdf)

## IRS Announces New Dollar Limits For Retirement Plans

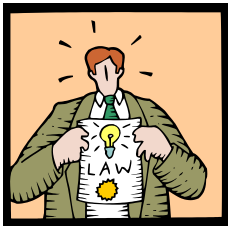
On October 18, the U.S. Internal Revenue Service (IRS) announced the tax year 2013 cost of living adjustments for defined contribution and defined benefit retirement plans and other retirement-related plans. Many limits on contributions and benefits will rise because increases in the cost-of-living index met the statutory thresholds that trigger their adjustment. To see the IRS’ announcement, go to <http://www.irs.gov/pub/irs-news/IR-12-077.pdf>



## New Montana Minimum Wage

On January 1, 2013, the Montana Minimum Wage increases to \$7.80 per hour. This is in response to Montana Code, which requires annual adjustments in the minimum wage based on changes in the consumer price index. To get a new poster, contact your local Job Service Office, or download one at: [http://erd.dli.mt.gov/images/stories/pdf/labor\\_standards/minwageposter\\_10-2012.pdf](http://erd.dli.mt.gov/images/stories/pdf/labor_standards/minwageposter_10-2012.pdf)

## Montana Legislative Forecast



Here is *sample* of bills that have been requested by members of the Montana Legislature. Based on their titles, these bills may have HR implications. This list may be a good indicator of the types of bills yet to come. (To date, there have been 21 bills introduced and 962 bills requested but not yet introduced. In normal sessions, there will be over 2000 bill requests so we're probably not even halfway there.)

To follow the legislative process, or to set up an individual preference account to track bills important to you, go to <http://leg.mt.gov>

Bill Draft No. (LC No.)	Request Date	Requestor	Status (An "*" after Status indicates the bill is <i>probably</i> dead <sup>1</sup> )	Status Date	Short Title
<a href="#">LC0010</a>	04/28/2011	Edward Buttrey	(C) Draft On Hold	10/09/2012	Generally revise employment laws
<a href="#">LC0020</a>	06/22/2011	Art Wittich	(C) Draft Taken Off Hold	11/10/2012	Generally revise collective bargaining laws with public employees
<a href="#">LC0023</a>	06/22/2011	Art Wittich	(C) Draft On Hold	10/04/2012	Establish education savings accounts
<a href="#">LC0055</a>	03/28/2012	David E Wanzenried	(C) Draft Request Received	03/28/2012	Unemployment benefits for certain classified employees
<a href="#">LC0063</a>	04/18/2012	Jason Priest	(C) Draft Canceled *	11/13/2012	Require public employees to use the federal healthcare exchange to buy insurance
<a href="#">LC0073</a>	04/18/2012	Jason Priest	(C) Draft On Hold	10/29/2012	Require annual disclosure of public employee compensation
<a href="#">LC0074</a>	04/18/2012	Jason Priest	(C) Draft Canceled *	11/13/2012	Authorize state and local public employees to direct union dues
<a href="#">LC0093</a>	05/01/2012	Anders Blewett	(C) Draft On Hold	10/30/2012	Revise laws protecting job applicant/ employee privacy related to social media
<a href="#">LC0115</a>	05/08/2012	Edward Walker	(C) Draft to Requester for Review	11/15/2012	Generally revise education laws for tenure
<a href="#">LC0116</a>	05/08/2012	Edward Walker	(C) Draft On Hold	10/25/2012	Generally revise workers' compensation laws
<a href="#">LC0149</a>	06/04/2012	Tom Facey	(C) Draft On Hold	09/25/2012	Revise school employment law
<a href="#">LC0174</a>	06/18/2012	For Office of Public Instruction by Education and Local Government Interim Committee	(C) Pre-Introduction Letter Sent	11/09/2012	Clarify retention of student records and school district personnel files
<a href="#">LC0203</a>	06/26/2012	For Department of Military Affairs by State Administration and Veterans' Affairs Interim Committee	(C) Draft Request Received	06/26/2012	Generally revise applicability of federally related laws and regulations

Bill Draft No. (LC No.)	Request Date	Requestor	Status (An "*" after Status indicates the bill is <i>probably</i> dead <sup>1</sup> )	Status Date	Short Title
<a href="#">LC0229</a>	07/06/2012	Art Wittich	(C) Draft Request Received	07/06/2012	Allow right to work
<a href="#">LC0250</a>	07/11/2012	David E Wanzenried	(C) Draft On Hold	11/14/2012	Revise medical marijuana laws to authorize coverage for PTSD
<a href="#">LC0257</a>	07/11/2012	Edward Walker	(C) Draft Request Received	07/11/2012	Revise laws related to dental insurance plans and services
<a href="#">LC0388</a>	09/14/2012	For Department of Labor and Industry by Economic Affairs Interim Committee	(C) Draft in Input/Proofing	11/23/2012	Clarify wage payment laws related to timing for employee wages recovery
<a href="#">LC0391</a>	09/14/2012	For Department of Labor and Industry by Economic Affairs Interim Committee	(C) Pre-Introduction Letter Sent	11/20/2012	Require occupation safety documentation on public works construction contracts
<a href="#">LC0393</a>	09/14/2012	For Department of Labor and Industry by Economic Affairs Interim Committee	(C) Pre-Introduction Letter Sent	11/20/2012	Revise unemployment laws related to definition of total employment
<a href="#">LC0396</a>	09/14/2012	Llew Jones	(C) Draft Request Received	09/14/2012	Provide for at-will employment
<a href="#">LC0463</a>	10/09/2012	Mary Caferro	(C) Draft Request Received	10/09/2012	Revise paid leave laws
<a href="#">LC0464</a>	10/09/2012	Mary Caferro	(C) Draft On Hold	10/29/2012	Revise minimum wage laws
<a href="#">LC0478</a>	10/15/2012	Llew Jones	(C) Draft Request Received	10/15/2012	Revise laws related to state and federal minimum wage
<a href="#">LC0551</a>	10/31/2012	Jason Priest	(C) Draft Request Received	10/31/2012	Generally revise unemployment insurance laws
<a href="#">LC0581</a>	11/02/2012	Austin Knudsen	(C) Draft Request Received	11/02/2012	Generally review employment laws
<a href="#">LC0635</a>	11/08/2012	Dee Brown	(C) Draft Request Received	11/08/2012	Establish a workers' compensation holiday for employers for new hires
<a href="#">LC0674</a>	11/08/2012	Cary Smith	(C) Draft in Input/Proofing	11/21/2012	Authorize healthcare tax credits for individuals and out-of-pocket expenses
<a href="#">LC0694</a>	11/08/2012	Nicholas Schwaderer	(C) Draft On Hold	11/16/2012	Generally revise mandated health insurance coverage laws
<a href="#">LC0704</a>	11/09/2012	Ellie Boldman Hill	(C) Draft Request Received	11/09/2012	Protect gender identity or expression and sexual orientation from discrimination
<a href="#">LC0797</a>	11/16/2012	Elsie Arntzen	(C) Draft Request Received	11/16/2012	Revise state human resource laws regarding military service experience ratings
<a href="#">LC0813</a>	11/17/2012	David Howard	(C) Draft Request Received	11/17/2012	Provide that employment of an unauthorized alien is unlawful
<a href="#">LC0881</a>	11/17/2012	Gerald (Jerry) Bennett	(C) Draft Request Received	11/17/2012	Generally revise laws related to health and safety
<a href="#">LC0887</a>	11/17/2012	Randy Brodehl	(C) Draft to Requester for Review	11/24/2012	Revise union membership requirements for employees
<a href="#">LC0902</a>	11/17/2012	Wendy Warburton	(C) Draft Request Received	11/17/2012	Establish the employee safe travel to work act
<a href="#">LC0925</a>	11/20/2012	Steve Gibson	(C) Draft Request Received	11/20/2012	Provide income tax credit to employers who hire veterans

<sup>1</sup> "**Probably Dead**" is a Bill Progress Category assigned to those bills that have been voted down or missed a transmittal deadline, and to those bill drafts that have been canceled. To revive a bill that is "probably dead" typically requires a supermajority vote (usually a 2/3 vote) by the House or Senate.