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New Stimulus Bill Imposes New COBRA Obligations – Checklist for Employers

The Stimulus Bill signed by President Obama known as the American Recovery and Reinvestment Tax Act of 2009 (ARRA) includes a temporary subsidy of COBRA premiums for certain employees. The following is an initial checklist employers may follow to comply with the premium subsidy provisions of ARRA.



✓ Develop a general understanding of the new provisions.

ARRA provides for a 65% subsidy of the COBRA premium charged to individuals who suffered (or will suffer) an *involuntary* termination between September 1, 2008 and December 31, 2009. The subsidy is available for any health coverage (including dental and vision coverage), other than health flexible spending account coverage. Under ARRA, individuals pay 35% of the COBRA premium they would otherwise pay. The remaining 65% of the premium is subsidized by the employer. The employer can claim a credit against wage withholdings and payroll taxes equal to the amount of the subsidy. The COBRA subsidy takes effect March 1, 2009. The maximum COBRA subsidy is for nine months.

✓ Identify several different classes of former employees.

Employers should review past terminations and identify the following groups for the reason noted:

- (A) All COBRA eligible individuals (not just those eligible for the subsidy) who experienced a COBRA qualifying event since September 1, 2008 (this group must be given a new notice about the subsidy and special enrollment availability);
- (B) Among those identified in group (A), those who were involuntarily terminated (this group will be eligible for the subsidy);
- (C) Among those identified in group (B), those who elected and currently have COBRA coverage (this group is eligible for the subsidy starting March 1, 2009); and
- (D) Among those identified in group (B), those who did not elect COBRA coverage or who elected COBRA coverage but terminated such coverage prior to February 17, 2009 (this group is eligible for the 60-day special enrollment opportunity discussed below).

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✓ **More specifically, determine which individuals are eligible for the subsidy.**

The COBRA premium subsidy is available to individuals who (i) are otherwise eligible for COBRA coverage, (ii) elect such coverage, and (iii) were involuntarily terminated from employment at any time during the period beginning September 1, 2008 and ending December 31, 2009 (referred to as Assistance Eligible Individuals or AEIs).

Note that it is not clear what constitutes an “involuntary termination” since the term is not defined in ARRA. One suggested approach for determining what constitutes an involuntary termination is by reference to state unemployment law. Employers should contact counsel immediately if it is unclear whether an individual has been involuntarily terminated.

✓ **Prepare to send a notice regarding the COBRA subsidy to all individuals who experienced a COBRA qualifying event between September 1, 2008 and February 16, 2009.**

ARRA requires employers to provide all COBRA-eligible individuals (not just AEIs) who have experienced a COBRA qualifying event since September 1, 2008 with a new notice containing details regarding the availability of the subsidy. Among those eligible for the subsidy are individuals who were involuntarily terminated from employment on or after September 1, 2008, but who had not elected COBRA coverage by the date of the enactment of the Act (February 17, 2009), or who had elected COBRA coverage since September 1, 2008, but lost coverage prior to the enactment of ARRA. Such individuals have a special 60-day enrollment period in which they can elect COBRA coverage; however, this 60-day enrollment period does not start running until the new notice is provided. (The new notice must be provided at the latest by April 18, 2009.)

Although the new 60-day special enrollment period does not begin running until notice is provided to affected individuals, the statute does not require the DOL to issue a model notice for such purposes until 30 days after the enactment of the Act. Therefore, if an employer wishes to start the 60-day period running immediately it will have to craft its own notice, in advance of any DOL model notice. Among other components, this notice should indicate that the subsidy is available, and that AEIs may elect coverage even if coverage was previously declined.

Note that if an election is made solely because of the special enrollment period (i.e., it is not made within the individual’s original election period), COBRA coverage will begin on March 1, 2009, but the maximum COBRA continuation coverage period will be applied as if coverage was elected during the individual’s original election period.

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✓ **Prepare a revised COBRA election notice for individuals who terminate on or after February 17, 2009, but before December 31, 2009.**

The Act does not suspend the current COBRA obligations of the employer. Therefore, employers should continue to provide qualified beneficiaries with a COBRA election notice going forward. However, the standard COBRA election notice distributed by the employer should be revised to include information regarding the subsidy. Alternatively, employers could prepare a separate supplement regarding the subsidy to be distributed with the standard COBRA election notice.

✓ **Prepare revised HIPAA certificates of creditable coverage.**

Employers should prepare revised HIPAA certificates of creditable coverage to account for individuals who are entitled to the special enrollment period. Pursuant to ARRA, such individuals will not be considered to have experienced a gap in coverage for purposes of HIPAA's pre-existing condition rules if coverage is properly elected during the new 60-day special enrollment period (even if COBRA coverage was previously declined).

✓ **Document all subsidy waivers.**

The subsidy phases out for individuals with modified adjusted gross income between \$125,000 and \$145,000 (\$250,000 and \$290,000 for joint filers). Individuals in this category who receive the subsidy will have their income tax increased by the amount of the subsidy that is phased out pursuant to ARRA. To avoid this additional income tax, individuals can waive their rights to the subsidy. Additional government guidance regarding the form and substance required in such a waiver will be forthcoming.

✓ **Establish procedures to accurately claim the credit in payroll filings.**

Under ARRA, individuals pay 35% of the COBRA premium while 65% of the premium is subsidized by the employer. The employer may subsequently claim a credit against its wage withholdings and payroll taxes for the portion of the premium the employer subsidizes. Employers will want to work with payroll administrators to ensure that subsidies are properly tracked for reporting purposes. In addition to reporting current offsets in each of the employer's reporting periods, employers will be required to report an estimate of payroll tax offsets for each subsequent reporting period.

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Note that employers cannot claim the credit against payroll taxes until after the AEI has paid his or her portion of the premium. Therefore, employers will need to update administrative procedures to ensure that they do not apply for the credit before the AEI's portion of the premium is actually received by the employer. In addition, employers should prepare attestations of involuntary termination for each AEI who received a subsidy and for whom the employer is seeking reimbursement. Additional government guidance regarding the employer's reporting obligations for this purpose will be forthcoming.

✓ **Determine if different coverage options will be available.**

An employer may, at its discretion, allow employees to apply the COBRA subsidy to a different health plan option offered by the employer to active employees. The coverage option must have the same or lower premiums than the option the employee would otherwise be offered. Offering this option will likely create additional burdens on the employer and its COBRA administrator (e.g., by requiring employers to furnish administrators with information regarding other benefit options available under the plan). Therefore, employers should discuss this option with counsel and their COBRA administrators before proceeding.

✓ **Recognize when the subsidy should end.**

Under ARRA, the COBRA subsidy period ends upon the earliest of the following events to occur: (i) the end of nine months of subsidy payments, (ii) the date the individual becomes eligible for other group health plan coverage or Medicare, or (iii) the date COBRA coverage would otherwise terminate (e.g., for failure to pay the applicable premium). The subsidy does not affect the normal length of COBRA coverage available under current law (normally 18 months). Therefore, if an individual remains on COBRA after the nine month subsidy period expires, he or she will be responsible for the entire COBRA premium.

Employers should prepare a notice explaining that the premium assistance is about to end to notify AEIs in advance of a premium increase. This notice could be incorporated into an employer's notice of termination of COBRA coverage for those employees who exhaust their COBRA period or become eligible for other coverage.

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✓ Update plan summaries.

Although not required by ARRA, employers should consider updating summary plan descriptions and other materials distributed to employees that may be impacted by the premium subsidy provisions of ARRA. Included in any updates should be information regarding the special appeals procedures available to individuals who are denied a subsidy by the plan. ARRA provides that any individuals who are denied a subsidy may appeal the denial to the Department of Labor (private plans) or the Department of Health and Human Services (governmental plans).

✓ Maintain a current list of employees receiving the premium subsidy.

Employers should maintain accurate records of all employees who receive the subsidy, the amount of the subsidy reimbursed to each employee, and the number of individuals covered by the subsidy (i.e., whether spouses or dependents are covered) to submit for reporting purposes. Additional government guidance regarding the employer's reporting obligations for this purpose will be forthcoming.

For more information related to this article, please contact [Tom Dowling](#) or [Tom Brous](#).

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Whistleblowers Receive Protection Under Stimulus Bill

The recently passed American Recovery and Reinvestment Act of 2009 (ARRA) also contains new, expansive whistleblower protection for certain employees. The protections were made possible by an amendment to the ARRA by Senator Claire McCaskill of Missouri (McCaskill Amendment).

The McCaskill Amendment protects any employee of a non-federal employer, who receives funds under the ARRA, from discharge, demotion or other discriminatory actions for disclosing information which the employee believes to be evidence of:

- gross mismanagement of an agency contract or grant relating to covered funds;
- a gross waste of covered funds;
- a substantial and specific danger to public health or safety related to the implementation or use of covered funds; or
- a violation of law, rule, or regulation related to an agency contract.

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A covered disclosure is one made to any person with supervisory authority over the employee, a state or federal regulatory or law enforcement agency, a member of Congress, a court or grand jury, or the head of a federal agency.

If an adverse employment action is taken against the employee, the burden of proving that the action was not based on the employee's protected disclosure falls heavily on the employer. Specifically, the McCaskill Amendment provides that an employee will establish discrimination if the disclosure was even a "contributing factor" in the action taken by the employer. Further, evidence of such "contributing factors" may be shown through knowledge of the employee's disclosure by the decisionmaker or by showing that the events occurred within such a short time period that it would give rise to an inference that the disclosure was a contributing factor.

A successful employee who brings an action under the McCaskill Amendment could be entitled to reinstatement, receive back pay, receive damages for pain and suffering, and receive attorney's fees and litigation costs. The protections under the McCaskill amendment may not be waived by the employee.

Bottom Line: The McCaskill Amendment provides a new avenue for certain employees to report potential abuses arising from the American Recovery and Reinvestment Act of 2009. Employers accepting funds from the ARRA should pay careful heed to the McCaskill Amendment's prohibition against any discriminatory actions taken against an employee who expresses concerns regarding the use or management of such funds.

For more information regarding this article, please contact [Eric Tiritilli](#).

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Temporary Waiver of Required Minimum Distributions for 2009

As part of the [Worker, Retiree, and Employer Recovery Act of 2008](#) (WRERA) passed by Congress late last year, individuals are allowed relief from having to take required minimum distributions (RMDs) from employer-sponsored tax-qualified retirement plans or IRAs. In particular, WRERA adds IRC § 401(a)(9)(H), which provides a temporary waiver of the RMD rules for the 2009 calendar year. As a result of this waiver, many participants who have suffered significant reductions in the value of his or her retirement account over the past year may avoid having to sell assets at a loss this year to generate RMDs for 2009. The limited relief, however, does not come without a price since compliance with the temporary waiver may be difficult for plan sponsors.

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- **General Overview of RMDs:** RMDs are minimum annual amounts required to be distributed to a plan participant that must begin by April 1 of the calendar year following the calendar year in which the participant attains age 70 ½. Once they begin, RMDs must be made following an IRS schedule over the life expectancy of the participant or over the joint life expectancy of the participant and the beneficiary. The purpose of RMDs is to force minimum annual distributions upon reaching age 70 ½ to prevent the accumulation of large amounts of wealth indefinitely on a tax-deferred basis. Failures by a qualified plan to comply with the RMD rules can result in plan disqualification. In addition, the participant is subject to an excise tax penalty of 50% of the missed RMD amount.
- **Effect of the Temporary Waiver:** Participants subject to RMDs may skip the RMD that would otherwise be required for calendar year 2009. However, these participants need to keep in mind that the new law does not waive a 2008 RMD that was deferred to April 1, 2009. For example, this new law does not impact an individual who turned 70 ½ in 2008 and chose to wait until April 1, 2009 to receive his or her first RMD.
- **Types of Plans Affected by the Temporary Waiver:** The temporary waiver applies to qualified defined contributions plans (such as 401(k) and profit sharing plans), governmental 457 plans, 403(b) plans, 403(a) plans, and IRAs.
- **How Plans Should Treat Distributions Affected by the Temporary Waiver:** WRERA is ambiguous as to whether the suspension of RMDs is mandatory. There is currently no IRS guidance to assist employers with this issue. If the suspension is optional, then plans can (1) make distributions in accordance with previous elections, notwithstanding the RMD waiver, (2) suspend all RMDs for 2009, or (3) let the participant choose whether to take a distribution equal to the 2009 RMD amount. In addition, employers should consider a review of their plan's RMD procedures to determine whether any revisions are necessary in light of how they choose to handle such distributions.
- **Rollovers of 2009 Distributions Possible:** Generally, an RMD is not an eligible rollover distribution (ERD). However, any distribution for 2009 that is not required because of the temporary waiver on 2009 RMDs, but is made anyway, may be an ERD. If the distribution is an ERD, then the participant can rollover the distribution by contributing it to an eligible retirement plan within 60 days. Employers need to keep in mind that certain general rules applicable to ERDs do not apply to such distributions. Therefore, for any ERD made for 2009 that would otherwise have been RMDs but for WRERA:

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- a qualified plan is permitted but not required to offer the participant the right to have the distribution made in a direct rollover under IRC § 401(a)(31) before making the distribution;
 - the plan administrator is permitted but not required to provide the participant with a written explanation of the direct rollover right and related tax consequence as required under IRC § 402(f) before making the distribution; and
 - if the participant does not choose to have the distribution made in a direct rollover, the plan administrator is permitted but not required to withhold the 20% income tax withholding under IRC § 3405(c). (Note that RMDs are generally subject to the voluntary 10% withholding.)
- **Notice of RMD Waiver to Participants:** Even in the absence of a notice requirement, it would be prudent for plans to advise its participants of the law change in some manner because of the very different tax consequences.
 - **Application to Death Beneficiaries:** The temporary waiver allows designated beneficiaries of retirement plans or IRAs to skip the annual payout that would otherwise be required for calendar year 2009.
 - **Plan Amendments:** The need for a plan amendment should depend on how employers choose to treat such distributions, as well as how their plan documents address RMDs. Regardless, an analysis of the plan would be prudent to determine the need for employers to amend their plan documents and/or practices in response to the temporary waiver. An employer has until the last day of the 2011 plan year to amend its plans for the 2009 RMD waiver provisions. Governmental 457 plans have until the last day of the 2012 plan year to amend their plans for the 2009 RMD waiver provisions. In the meantime, it may be to the employer's advantage to discuss with counsel the adoption a good faith amendment detailing its handling of the 2009 distributions.

Bottom Line: Further IRS guidance may be helpful to resolve some of these issues, but employers need to be aware of the temporary RMD waiver and its potential impact on their plans. In particular, employers need to take action on the following:

- Identify the participants currently eligible to receive RMDs and consider notifying those participants of the temporary RMD waiver;
- Determine whether the plan will suspend 2009 RMDs, or allow the participant to choose a distribution;
- If there is a distribution, determine whether the plan offers direct rollover of the distributions;

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- Determine whether the plan will need to coordinate such distributions with the service provider; and
- Determine with help of counsel whether there is a need for a plan amendment depending on how the plan chooses to handle distributions for 2009 that would have been RMDs but for WRERA.

For more information related to this article, please contact [Michael Gilley](#).

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Coverage under Missouri's Recently Enacted Immigration Law

Missouri's new immigration law became effective January 1, 2009 and addresses a variety of topics. The most important provisions for employers include the following: (1) all employers prohibited from knowingly employing, hiring, or continuing to employ unauthorized aliens; (2) businesses receiving a state contract or grant in excess of \$5,000 from the state or any political subdivision of the state required to use E-Verify; (3) businesses receiving state administered or subsidized tax credits, tax abatements, or loans required to use E-Verify; (4) employers with five or more employees must submit Federal 1099-Miscellaneous forms to the Missouri Department of Revenue; (5) new penalties for misclassification of workers; and (6) required construction safety programs for all public works projects effective August 28, 2009. E-Verify is the federal government's computer-based work authorization verification program.

Employers should be aware that the Missouri law is different and separate from the federal regulations requiring federal contractors to enroll in E-Verify. The implementation of the federal regulations has been delayed until May 21, 2009. The regulations apply to prime contracts performed in excess of 120 days and with a value exceeding \$100,000. The federal regulations also apply to subcontracts for services or construction with a value exceeding \$3,000 that are attached to prime contracts subject to the E-Verify requirement.

Prohibition of Employment of Unauthorized Aliens

On February 23, 2009, Attorney General Koster's Office [announced](#) the creation of a new division of Civil, Disability and Workers Rights to enforce the new immigration law. He also announced the appointment of former St. Louis County Senior Judge Barbara Crancer to head the division. According to the statute, enforcement action is initiated when a written signed complaint is received from any state official, business, or state resident. Any employer who is found in violation of Missouri's new immigration law will have its business

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license or permit suspended for 14 days for a first offense, one year for a second offense, and a permanent suspension upon a third offense.

If any employer participates in E-Verify, it has an affirmative defense that it has not violated the law. As of this date, the Attorney General's Office has not issued any regulations. The Attorney General's Office is also required to maintain a database that documents any business entity whose permit or license has been suspended.

State and Local Government Contractors Required to Enroll in E-Verify

State and local government contractors are subject to additional requirements and penalties. These contractors must enroll in E-Verify for any state contracts exceeding \$5,000 executed after January 1, 2009. If a contractor is found in violation of the statute, its violation will be considered a breach of contract, the state may terminate the contract, the contractor may be barred from state contracts (for 3 years on the first offense or permanently on the second offense), and the state may withhold up to 25% of the amount due to the contractor. The Attorney General's office is required to maintain a database that documents businesses whose state contracts have been terminated.

A general contractor will not be liable for the actions of its direct subcontractors if the contract between the contractor and subcontractor states (a) direct subcontractor is not knowingly violating state law, (b) direct subcontractor will not violate state law, and (c) direct subcontractor signs a sworn affidavit under penalty of perjury that its employees are lawfully present in the United States.

Submission of Federal 1099 Forms to State

All employers with five or more employees must file their Federal 1099 Miscellaneous forms with the Missouri Department of Revenue. The forms must be submitted within the time limits established for filing of Missouri 99 forms. Employers who fail to submit forms on five or more occasions will be fined a maximum of \$200 per form after the fifth occurrence.

Misclassification of Employees

Employers with five or more employees performing public works cannot knowingly misclassify workers, for example, claiming the worker is a contractor. If it is determined by a court that an employer has knowingly misclassified a worker, the employer will be fined \$50 per day per misclassified worker up to a maximum of \$50,000.

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Required Construction Safety Programs

Effective August 28, 2009, any person signing a contract to work on the construction of public works for any public body shall provide a ten-hour OSHA construction safety program for on-site employees within 60 days of beginning work. Penalties include a \$2,500 fine plus a \$100 per day per employee fine for each calendar day the employee is employed without the training. The penalties will be withheld from the state's payments to the contractor. The Department of Labor and Industrial Relations is responsible for enforcing this law. The Department recently posted a [frequently asked questions](#) section on its website regarding the requirements of the construction safety program.

For more information related to this article, please contact [Ebony McCain](#).

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EEOC Ready to Assist Lilly Ledbetter Fair Pay Act Complainants

The EEOC has wasted no time in informing potential charging parties of a new avenue of relief under the Lilly Ledbetter Fair Pay Act of 2009 signed into law on January 29, 2009. In a link titled "[Notice Concerning the Lilly Ledbetter Fair Pay Act of 2009](#)" the EEOC summarizes the key provisions of the Act and includes the following statement:

"Notice to Potential Charging Parties: If you are aware of **unexplained** differences between your own compensation and coworkers' compensation and believe that the difference is because of your race, color, religion, sex, national origin, age, or disability, you should call 1-800-669-4000 or 1-800-669-6820 (TTY) for more information on filing a charge with the EEOC."

The Lilly Ledbetter Fair Pay Act of 2009 (the Act) amended Section 706(e) of the Civil Rights Act of 1964 (Title VII) so that it includes the "paycheck rule," meaning that a plaintiff can now maintain a wage discrimination claim so long as it is brought within 180 days (or 300 days depending on the jurisdiction) of receiving discriminatory pay, regardless of when the discriminatory pay decision was made. The law retroactively applies as if it had been enacted on May 28, 2007 (the day before the United State's Supreme Court decision dismissing Lilly Ledbetter's case).

With the EEOC encouraging complainants to bring such actions, it is important to understand the practical implications of the Act and steps employers should take now to help defend against these types of actions in the future:

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- It is important to remember that although Lilly Ledbetter was only challenging her pay based on gender discrimination, the Act is much broader and applies to all types of protected categories including race, color, religion, sex, national origin, age and disability.
- Potentially any employee who has been employed since May 28, 2007 and has received a paycheck in the last 180 or 300 days is a potential plaintiff *even if* the challenged pay decision was made prior to May 28, 2007.
- Current document retention policies may not be effective to preserve evidence to defend such claims. Standard retention policies need to have a carve out provision for documents relating to salary increases, bonuses, or any other decisions that may affect pay.
- Training supervisors to properly document pay decisions is key so that the company is in a position in the future to defend the claims. In the Lilly Ledbetter case, the supervisor alleged to have made the discriminatory pay decision in the early 1980's died before the lawsuit was filed in 1998 and thus there was little evidence to challenge Ledbetter's allegations.

Bottom Line. With the EEOC's encouragement, expect to see more claims of pay discrimination in the future. Employers need to act now in evaluating their compensation systems to ensure that disparities in pay can be explained by non-discriminatory factors and thus are defensible in the event of a claim.

For more information related to this article, please contact [Stephanie Scheck](#).

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Inside Washington

New Laws, Regulations and Agency Guidance

DOL . . . The Department of Labor announced a weekly increase in unemployment compensation under the [American Recovery and Reinvestment Act of 2009](#) enacted on February 17, 2009. The new temporary Federal Additional Compensation program will provide a \$25 weekly increase in unemployment compensation for eligible workers. The additional compensation is 100% federally-funded. The legislation also extended the Emergency Unemployment Compensation program, which was scheduled to expire on August 27, 2009. "The program has been extended to Dec. 31, 2009, for new

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applications, with a phase-out period ending May 31, 2010," announced Secretary Solis.

EEOC . . . The EEOC has followed through with its commitment to focus on the ADA. In February alone it brought three lawsuits challenging employers' decisions in either refusing to hire or terminating employees based upon an alleged ADA violation. Federal Courts, however, are providing employers with some relief under the recent ADA Amendments Act and are consistently recognizing that the Amendments Act is not retroactive. The Court are therefore upholding employer's decisions based upon the case precedent in effect at the time. [Decisions](#) out of the Fifth Circuit and Federal District Courts from Louisiana, Kentucky, and Tennessee have all supported this analysis.

OFCCP . . . The Office of Disability of Employment Policy (ODEP) has issued a new research initiative targeting the employment of people with disabilities. This survey compared employer perspectives across various industries and within companies of varying sizes. ODEP will use the data from this survey to formulate targeted strategies and policies for increasing employment opportunities for people with disabilities. This survey emphasized current attitudes and practices of employers in 12 industry sectors, including some high growth industries as projected by the Bureau of Labor Statistics (BLS). [Survey Report - January 2009](#)

NLRB . . . The National Labor Relations Board announced changes to its e-filing program designed to simplify and encourage electronic filings. It will now allow filing until 11:59 local time; parties will be required to serve opposing parties by e-mail when possible; and physical copies of long documents will no longer be required. The new e-filing procedures were prompted by Agency experience in managing the e-filing program and feedback from users.

Sexual Harassment. . . The Tenth Circuit, which governs Kansas, Oklahoma, Colorado, New Mexico, Utah and Wyoming, recently issued a decision denying an employer's ability to impose the Ellerth/Faragher affirmative defense when a single incident of sexual harassment occurred that resulted in liability despite the fact that the employer acted promptly to prevent and cease the harassment. In [Chapman v. Carmike Cinemas](#), a female employee was sexually assaulted by an assistant manager who had made one inappropriate comment in the past. After the employee reported the assault, the employer fired the assistant manager. The District Court granted summary judgment to the employer but the Appellate Court reversed as to the strict liability portion of the employee's claim because the employer could not meet the second prong of the Ellerth/Faragher defense, i.e. that the employee had unreasonably failed to report

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the harassment, and the Court refused, *sua sponte*, to follow the [McCurdy v. Ark. State Police](#) decision out of the Eighth Circuit, which held that an employer may not be required to meet the second prong of the affirmative defense in certain instances involving a single incident of harassment.

For more information regarding Inside Washington, please contact [Mindy McPheeters](#).