

# THE JOB DESCRIPTION



## Healthcare Planning in 2013

Many employers have not yet invested much time or energy into analyzing how healthcare reform will impact their businesses. Many employers took a wait-and-see approach as to whether the Supreme Court would invalidate some or all of the Affordable Care Act (“ACA”) and/or whether Mitt Romney would win the presidency. As we know, the Supreme Court upheld the ACA in June 2012, and President Obama won re-election in November 2012, so the ACA is here to stay.

Now that the uncertainty of whether the ACA would survive has ended, it’s time to get to work and focus on the many healthcare compliance obligations and economic impacts. Most items, such as the automatic enrollment provision and “pay or play” mandate, will not take effect until 2014. Some experts predict health insurance premiums will rise 50% or more. Therefore, employers should use 2013 to plan for additional economic burdens by budgeting and planning accordingly.

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## New Illinois Employment Laws in 2013

Many new employment laws took effect on January 1, 2013. Here is a synopsis:

**Employees' Facebook Password Protection (HB3782):** The Illinois Right to Privacy in the Workplace Act now forbids an employer from requesting a password or other account information in order to access an employee's or prospective employee's social media sites. Illinois joins Maryland and California as the only states with such prohibitions. Employers may still view employee's social media sites as part of workplace investigations and may still investigate an applicant's social media site during the application process.

Employers just cannot force an employee to hand over passwords or login information. Notably, the Illinois law contains no express exceptions, including for legitimate workplace investigations. It also does not address the issue of employees who save their personal social media passwords on their employers' computers.

**Illinois Equal Pay Act - Individual Liability (SB 2847):** This law expands liability under the Equal Pay Act to individuals and officers of a corporation who willfully and knowingly evade the payment of a final award or final judgment under the Act.

**Service Members Protections (SB3287):** The Illinois Service Member Civil Relief Act amends several existing statutes and creates numerous new legal protections to service members and their families. In the employment context, this new law now states that a violation of specified parts of the Illinois Service Member Civil Relief Act also constitutes a civil rights violation under the Illinois Human Rights Act.

**Unemployment Insurance (HB5632):** The new law makes numerous stylistic and substantive changes to the Illinois Unemployment Insurance Act. It imposes an additional penalty for obtaining benefits by means of a false statement or failure to disclose a material fact. It also now requires an employer account to be charged for benefits that were incorrectly paid if the incorrect payment was the result of the employer's repeated failures to respond timely to information requests from the Department of Employment Security. It also changes employers' requirement to report newly-hired employees to the Department of Employment Security.



**Prevailing Wage Notice (HB5212):** A public body or other entity must still notify contractors and subcontractors of changes in prevailing wage rates and revisions. However, that notification requirement will now be met by including in the contracts that the prevailing wage rate is revised by the Illinois Department of Labor and

is available on the Department's official website. This removes the burden on the public body to notify contractors of changes and places the burden on the contractors to check with the Department to see if rates have changed.

**Employment Discrimination (HB3915):** The Illinois Human Rights Act changed the word "handicap" to "disability." This change has been in force for a while, having taken effect on August 2, 2012. There is no substantive change, but this will make it easier in 2013 and beyond for employees to rely on the federal Americans with Disabilities Act as persuasive authority in interpreting employers' obligations related to disability protections under Illinois law.

## Implications of Presidential Election on Labor & Employment Laws

In light of President Obama's reelection, the labor and employment law landscape will continue to grow employee-friendly. Federal agencies will be given even more leeway to enforce regulations and to interpret existing laws in creative, pro-employee ways.

Now that President Obama will remain in office for the next four years, what can employers expect from a second-term Presidency? The first act President Obama signed into law was the pro-employee Lilly Ledbetter Fair Pay Act. President Obama and the federal agencies responsible for enforcing federal employment laws likely will continue to pursue a number of pro-employee initiatives. An overview of what to expect is provided below.

### Department of Labor

Over the next four years, we may continue to see initiatives from the Department of Labor, including the Wage and Hour Division, Occupational Safety and Health Administration (OSHA) and Office of Federal Contractor Compliance Programs (OFCCP), which will add to employers' compliance obligations.

At the Wage and Hour Division, we can expect regulations such as one restricting the scope of the companionship services exemption under the Fair Labor Standards Act. Likely to occur are aggressive enforcement initiatives, increased demands for liquidated damages in order to resolve wage and hour investigations, higher levels of civil money penalties, and other guidance documents taking positions that can make it harder for employers to prevail. Employers may see a more active OSHA. From a regulatory perspective, rules that could impact many employers are about to be proposed or published in final form. From an enforcement perspective, employers should expect to see the same high level of OSHA enforcement. This includes stricter illness and injury reporting obligations.

### Equal Employment Opportunity Commission

The EEOC likely will continue its aggressive enforcement agenda. This may include implementing components of its 2012 Draft Strategic Enforcement Plan. The Plan lists eliminating systemic barriers in recruiting and hiring discrimination as the EEOC's first priority, followed by protecting immigrant and migrant workers from discrimination. The EEOC also is committed to investigating "emerging" issues. Among these are scrutinizing common Americans with Disabilities Act (ADA) defenses invoked by employers, utilizing Title VII of the Civil Rights Act to protect members of the LGBT community, and pushing employers to accommodate pregnant women. The EEOC also may move forward on issuing potentially controversial guidance on leave as a reasonable accommodation under the ADA and guidance on the use of credit checks.

### Health Care

The 2010 Affordable Care Act is here to stay. Government agencies charged with enforcing the ACA (Department of Health and Human Services, Department of Labor, and Internal Revenue Service) will likely promulgate regulations soon. Even though employers have been filing lawsuits challenging various provisions of the ACA, employers must ensure they are in compliance with the new law's requirements.

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**National Labor Relations Board**

During President Obama's first term, the National Labor Relations Board ("NLRB") favored organized labor and expanded employee protections even in the non-union sector. There is no reason to doubt this trend will continue.

Over the past few years, the NLRB has acted both through adjudication (i.e., new decisions overturning or expanding existing case law) and administrative agency rulemaking that broaden the impact of the National Labor Relations Act ("NLRA") and make it easier for unions to organize workers. The NLRB will likely revive its efforts to require employers to post its Notice of Employee Rights. The expedited election rule (if upheld or reissued by the NLRB), and bargaining unit composition changes will all work together to increase pressure on employers in 2013 and beyond.

In addition, the NLRB's "protected concerted activity" initiative is creating a significant alternative for unrepresented employees to contest employer policies and practices. The NLRA protects the rights of both union and non-union employees to engage in "concerted activities" for their mutual aid and protection. This includes discussions among employees concerning their wages, benefits, and terms and conditions of employment. Employer policies dealing with social media, "at-will" status, class action waivers, electronic communications,

**Missouri Minimum Wage Increased**

On January 1, 2013, Missouri's minimum wage rose ten cents to \$7.35 per hour. This affects not only minimum wage workers, but also commission-only salespeople, who, unless they qualify for the "outside salesperson" exemption of the Fair Labor Standards Act, must be guaranteed minimum wage, no matter how few sales they make.

confidentiality of investigations, harassment, and solicitation/distribution are among those the NLRB is scrutinizing. For example, under recent NLRB decisions, unlawful conduct can be found not only in written workplace policies, but also in seemingly reasonable statements made by executives, supervisors, and human resource representatives that are construed as interfering with an employee's rights. The Board's aggressive, employee-friendly agenda will no doubt continue.

**Immigration**

During his second term, President Obama probably will likely try to revive comprehensive immigration reform. Efforts have failed repeatedly over the past several years because of lack of agreement in Congress over the elements of such reform. Key issues have included whether to create a "path to citizenship" for certain illegal aliens, how to maintain national security, how to strengthen the I-9 employment eligibility verification system to ensure that employers hire legal workers (a new Form I-9 is pending and workplace enforcement efforts remain vigorous), and how to make the system more welcoming to foreign investors, entrepreneurs, and those with technical, STEM skills (science, technology, engineering, and mathematics) in high demand in the U.S. labor market.



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