IMA UPDATE

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Obama's LGBT Executive Order raises more questions than it answers

More than two years after expressly declining to do so, this past Monday, President Obama signed an Executive Order prohibiting federal contractors from discriminating against individuals on the basis of sexual orientation or gender identity. The Executive Order is short on substance and long on unanswered questions. Some of the questions that are not addressed in the Executive Order will probably be answered in proposed regulations, which the Department of Labor must publish in 90 days.

What the EO Says

The new Executive Order amends Executive Order 11246 (first issued by President Johnson in 1965) by adding the following bold language to the existing provisions in all government contracts:

• The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, **sexual orientation, gender identity,** or national origin.

• The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, **sexual orientation, gender identity,** or national origin.

• The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, **sexual orientation, gender identity**, or national origin.

These new provisions will apply to federal contracts and subcontracts entered into on or after the effective date of the regulations to be issued by the DOL.

The EO also prohibits the federal government from discriminating against applicants and employees on the basis of gender identity; sexual orientation was already a protected characteristic for federal public sector employees.

What the EO Doesn't Say

President Obama has left much to the DOL to implement in its regulations. Here are just some of the basic questions that the regulations will need to address:

• What is the definition of "sexual orientation" and "gender identity"? We all know generally what these terms mean, but we will need a technical, legal definition. Presumably, the definition of "gender identity" will go beyond the sexual-stereotyping theory that the Equal Employment Opportunity Commission and some courts have used to find that such discrimination is already prohibited by Title VII.

• What is the "affirmative action" that contractors will be required to take with respect to LGBT applicants?

• Will the DOL interpret this "affirmative action" obligation to require outreach toward the LGBT community? What about tracking the LGBT demographics of applicants and employees? Will contractors be required to analyze selection decisions to ensure there is no adverse impact against LGBT individuals?

• Will contractors have to develop written affirmative action plans or set

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Update from the President

Covered Federal Contractors must make affirmative efforts to recruit Veterans, Veterans with Disabilities and Individual With Disabilities. They must also document and monitor their results and make additional efforts if their current efforts are not successful.

Many contractors asked for assistance with locating community and other resources for recruiting veterans and individuals with disabilities. To meet this stated need, OFCCP, working with other DOL and federal agencies, created a non-exhaustive directory of groups and organizations that are available to provide assistance with training, recruiting, and hiring veterans and individuals with disabilities.

If you are not having success with your current recruiting efforts, click HERE to search for additional organizations in your area. [Note: Leave blank "Organization Name and Organization City].

If you have any questions, please do not hesitate to contact us.

Thank you for your membership.

Larry Donnelly

National Position Evaluation Plan
A Measure of Value

NPEP is a Point Factor Evaluation System. It evaluates each position according to 11 established criteria that can be applied to any position in any organization. As a result, your salary structure is Objective, Equitable, and Nondiscriminatory. It will help you to use your salary dollars more efficiently, organize your Wage & Salary system, improve employee morale and have a system that is defensible against discrimination claims.

Affirmative Action Plan Preparation

Are your AAPs up to date and ready in the event of an audit?

Do you know that a well written plan may exclude you from an in-house audit?

Are you prepared for the changes to Section 503 and VEVRAA?

Changes have been made to the regulations that give an OFCCP investigator options on how to proceed with a contractor. As a result, fewer companies are having full audits and many more companies are being audited. Being prepared, will reduce the chances of your organization going through a complete audit.

Contact IMA for information on the above services

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goals for LGBT representation in their workforces as required for females, minorities, individuals with a disability, and protected veterans?

• Will contractors be required to submit a report on LGBT data, similar to the EEO-1 or VETS-100A Reports?

• How will contractors satisfy the requirement that job advertisements sufficiently notify applicants that they will be considered without regard to their LGBT status? Will the addition of "LGBT" to the current EOE tagline suffice? • Will there be any exemption for small contractors, or will the existing thresholds for coverage under EO 11246 apply?

• How does the current religious exemption in EO 11246 apply to these new obligations? Currently, the non-discrimination and affirmative action provisions do not apply to a contractor that is a "religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities." However, such religious entities are not excused from complying with the other provisions of the EO. Presumably, because the new EO did not include any special exemption for religious organizations – despite significant pressure on President Obama to do so – the DOL is likely to provide that even religious entities are prohibited from discriminating against LGBT individuals because they are not "individuals of a particular religion."

This is just one more in a series of executive actions in which the President uses the nation's federal contractors as a vehicle for measures that he cannot get passed through Congress. The additional administrative burden placed on federal contractors of all sizes puts these companies at a competitive disadvantage and is a disincentive to doing business with the federal government.

If past experience holds, contractors can expect the current DOL to issue expansive and burdensome regulations. We'll keep you informed of all developments on this topic.

Robin Shea, Constangy, Brooks & Smith, LLP, 7/ 23/14

U.S. Supreme Court rules Michigan's voter-approved affirmative action ban not unconstitutional as to university admissions policies

In a 6-2 decision, the U.S. Supreme Court has ruled that Michigan's voter-approved affirmative action ban is not unconstitutional as to university admissions policies, rejecting arguments that the ban violates equal protection by impermissibly burdening racial minorities. Although the case focused on the ban as it pertains to university admissions, the constitutional analysis could also be applicable to race-conscious decisions in state employment and the awarding of government contracts. Justice Kennedy wrote the plurality opinion, which was joined by Chief Justice Roberts and Justice Alito. The Chief Justice also filed a concurring opinion. Justice Scalia's concurring opinion was joined by Justice Thomas. Justice Breyer also filed a separate concurrence. Justice Sotomayor filed a dissenting opinion, which was joined by Justice Ginsburg. Justice Kagan took no part in the consideration or decision of the case (*Schuette v Coalition to Defend Affirmative Action*, April 22, 2014, Kennedy, A).

Sixth Circuit decision. The High Court's ruling reverses an en banc Sixth Circuit decision that the voter-approved ban on government affirmative action in the state of Michigan, as it applies to race-conscious admissions policies in public colleges and universities, violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The deeply divided Sixth Circuit ruled 8-7 that the measure violated equal protection under the political process doctrine because equal protection does not permit the kind of political restructuring that the measure affected.

Voters may decide. However, Justice Kennedy concluded that there is no authority in the U.S. Constitution or in Supreme Court precedent for the judiciary to set aside state laws that commit to the voters the determination whether racial preferences may be considered in governmental decisions – in particular with respect to school admissions. He also noted that the principle that the consideration of race in admissions is permissible when certain conditions are met is not being challenged in this case. Rather, the issue was whether, and in what manner, voters in states may choose to prohibit the consideration of such racial preferences. The decision by Michigan voters reflects the on-going national dialogue about such practices, he wrote.

Similar ballot measures in other states. The Michigan initiative is similar to measures passed by voters in California (1996), Washington state (1998), Nebraska (2008), Arizona (2010), and Oklahoma (2012). Colorado, in contrast, became the first state to reject an anti-affirmative action ballot measure in the November 2008 election.

Cynthia L. Hackerott, J.D.

Notice to Late Filers of Form 5500 Regarding Relief from Penalties under the Internal Revenue Code and Reminder About Fee Disclosures

This advisory addresses an important update regarding additional steps that plan administrators must take, in order to avoid penalties under the Internal Revenue Code, if they failed to timely file the Form 5500 series of annual reports. This advisory also includes a critical reminder concerning the timing of fee disclosures regarding qualified retirement plans.

Relief from Internal Revenue Code Penalties for Late Filing of Form 5500 –December 1, 2014, Deadline for Some Filings

Plan administrators who fail to timely file the Form 5500 series annual reports can be subject to penalties under both ERISA and the Internal Revenue Code. The penalties that can be assessed for a late filing are significant, and both the Secretary of Labor and the Internal Revenue Service (IRS) are authorized to impose penalties against plan administrators that fail to file complete and timely reports.

The Department of Labor (DOL) Employee Benefits Security Administration administers the Delinquent Filer Voluntary Compliance (DFVC) Program, which allows plan administrators who fail to file a timely annual report to pay reduced civil penalties if they voluntarily comply with ERISA annual reporting requirements. The IRS previously stated that it would not impose penalties on a person who was eligible for and who satisfied the requirements of the DOL's DFVC Program, with respect to the filing of a Form 5500.

The DOL updated the DFVC Program to reflect the DOL's final regulations requiring electronic filing of annual reports as part of the transition to the electronic ERISA Filing Acceptance System known as "EFAST2." The DFVC Program now requires that all delinquent annual reports be submitted using EFAST2.

Prior to the 2009 plan year, certain required information regarding deferred vested participants was reported on Schedule SSA (Form 5500). However, as part of the transition to mandatory electronic filing via EFAST2, the Schedule SSA was replaced by Form 8955-SSA, Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits. The Form 8955-SSA is now filed instead of the Schedule SSA.

Importantly, the Form 8955-SSA is a standalone form that must be filed with the IRS, not the DOL. Some plan administrators may have been filing their delinquent annual reports with the DOL over the EFAST2 system, thinking that was all that was needed. The DOL has issued a notice informing filers that they cannot submit the Schedule SSA or Form 8955-SSA under the DFVC Program to the DOL, even for 2008 and prior plan years.

Recently, the IRS issued Notice 2014-35, stating that the IRS will not impose penalties relating to the filing of Form 5500, Form 5500-SF and Form 8955-SSA with respect to a year for which a person (1) is eligible for and satisfies the requirements of the DOL's DFVC Program with respect to a delinquent Form 5500 series report and (2) files separately with the IRS a Form 8955-SSA. Significantly, the IRS will only provide relief for the late filing of Forms 5500 and 5550-SF if any applicable Form 8955-SSA is also filed with the IRS for the plan years at issue. The filing of the Form 8955-SSA must be filed as a paper version with the IRS because the necessary systems that would allow electronic filing of the Form 8955-SSA with the IRS are not yet in place.

The Form 8955-SSA must be filed with the IRS in hard copy by the later of 30 calendar days after the filer completes the DFVC filing or by December 1, 2014. This requirement applies to any DFVC filing submitted through EFAST2 (which includes most DFVC filings from December 31, 2009, to present), regardless of whether the DFVC filing was submitted before the IRS issued this notice regarding the Form 8955-SSA.

For example, if in 2012 you submitted a delinquent 2008 Form 5500 via EFAST2, but did not also submit to the IRS the information required under Internal Revenue Code Section 6057, a paper copy of Form 8955- SSA must be filed with the IRS for the 2008 plan year by no later than December 1, 2014, to qualify for relief from the IRS's penalties for late filing related to the 2008 Form 5500.

Please note that this additional step does not apply to welfare plans and is a requirement for qualified retirement plans only.

If you have any questions about this additional step that may need to be taken regarding this new requirement to avoid the assessment of penalties by the IRS for the late filing of a Form 5500 (including those that you previously submitted within the past several years electronically through the DOL's DFVC), please contact Alston & Bird's Employee Benefits &

Executive Compensation Group as soon as possible.

Important Reminder Regarding Participant Fee Disclosures

To comply with 29 C.F.R. § 2550.404a-5, defined contribution plan sponsors of qualified retirement plans are required to disclose investment, administrative and other fees to plan participants, in a report that must include a detailed chart that outlines the fees and expenses for each investment option. Many of these disclosures must be provided once every 12 months. For example, if a plan sponsor initially provided the fee disclosures on July 31, 2012, then the disclosures for 2013 were due on July 31, 2013.

However, last summer, the DOL provided a one-time extension for the enforcement of the 12-month deadline for the second round of fee disclosures, to an 18-month deadline. For example, if a plan sponsor provided the initial fee disclosures on July 31, 2012, and then took the extended 18-month deadline to submit the second round of fee disclosures, the 2013 fee disclosures would have been due by January 31, 2014. The next round of fee disclosures would then be due 12 months from that date (January 31, 2015).

Depending on when your plan issued its disclosures last year, the 2014 disclosures may be due sometime in the coming month. For example, if you did not take the DOL one-time extension last summer and filed the 2013 disclosures on July 31, 2013, the fee disclosures must be made again on July 31, 2014. If you are a plan sponsor who met the 2013 deadline without taking the optional extension, you have one last opportunity to take the extension for the 2014 disclosures. For example, if a plan sponsor provided the original round of fee disclosures on July 31, 2012, and provided the second set of disclosures on July 31, 2013, the plan sponsor has one last opportunity to elect to take the one-time extension so that the fee disclosures for 2014 would be due 18 months from the date of the last disclosures (i.e., by January 31, 2015).1 The next round of fee disclosures would be due 12 months later on January 31, 2016.2

The DOL may revisit the timing rules that apply to the 404a-5 fee disclosures in the future, but for now, plan sponsors have another opportunity to adjust their annual deadline for making the disclosures.

Alston & Bird 7/24/2014

President Signs Workforce Innovation and Opportunity Act Into Law

President Obama signed the Workforce Innovation and Opportunity Act (H.R. 803) into law on July 22, 2014. The House approved the legislation on July 9, and the Senate approved the bill in late June. The law reauthorizes 33 Department of Labor (DOL) job training programs, streamlines the job training system, and provides a single set of outcome metrics for every federal workforce program under the Act. Among the many provisions, the law includes changes to the workforce development system, training and employment services, Job Corps, adult education, and state vocational and rehabilitation services.

The full text of the legislation is available here.

New Jersey

New Jersey Employment Posters Updated

The New Jersey Division on Civil Rights (NJDCR) just modified its Discrimination in Employment poster, which all New Jersey employers are required to display. The new poster adds "pregnancy" to the list of protected categories, and also removes any reference to the Jersey City and Paterson branch offices of the NJDCR, both of which closed (and merged into the Newark office). Similar changes were made to the Public Accommodation poster, as well as the Spanish-language versions of these posters. Employers may obtain a copy of the new posters by clicking here, and should replace their prior versions of the posters with these new versions as soon as possible.

Undocumented Workers Entitled to WC Protection

Undocumented workers are entitled to workers' compensation protection in New Jersey because there is no legislative directive barring undocumented aliens from receiving benefits under the New Jersey Workers' Compensation Act. Fernandez-Lopez v. Jose Cervino, Inc., 288 N.J. Super. 14 (App. Div. 1996) held that the act specifically excludes certain types of workers from coverage (e.g., independent contractors) and by virtue of not being excluded, undocumented workers are entitled to workers' compensation benefits. The Appellate Division acknowledged the public policy argument for discouraging illegal immigration but highlighted the public policy reasoning behind its decision. The court reasoned that employers may be more willing to hire illegal workers rather than citizens if they are not forced to insure or absorb the cost of injuries associated with an injured undocumented worker.

Cory A. DeCresenza and Debra L. Doby, Goldberg Segalla's

New York

WCB No Longer Accepting Paper Forms

May 23, 2014, was the cutoff date for the Workers' Compensation Board (WCB) to accept paper forms. This mandatory change required all claim administrators to switch over to Electronic Data Interchange (EDI) for the submission of employer claims data.

A new regulation, Section 300.22, requires FROI/SROI filings for all claim administrators and the WCB will no longer accept C-669, C-8/8.6, or C-7 forms. Any of these forms sent to the board will not be scanned into the case folder and they will not be considered duly filed.

Additionally, the C-2F will replace the C-2, VAW-2, and VF-2 forms, which will be disabled on the board's website and will be no longer available for use. Employers, and claims administrator acting on the employer's behalf, will be required to use the C-2F. However, if the employer's insurer submits the accident information electronically via FROI, the employer is not required to submit the C-2F form. Employers should communicate early with their insurer to verify whether they will be submitting the accident information electronically via FROI or whether it will be the employer's responsibility to file a C-2F.

The board will continue to provide eClaims support, conduct outreach on any changes in reporting requirements or updates, and have available special examiners dedicated to answering eClaims questions. These examiners may be reached at eClaims@wcb.ny.gov. As always, Goldberg Segalla remains committed to providing support and guidance to make this transition as smooth as possible.

New Maximum Compensation Rate Announced

On April 17, 2014, the Office of the Chair of the NYS Workers' Compensation Board announced a new maximum rate of $808.65, effective July 1, 2014, through June 30, 2015. Since 2010, the maximum benefit rate for workers' compensation claims has been set at two-thirds of the average weekly wage for New York State using Department of Labor statistics for the previous calendar year.

Goldberg Segalla, Summer 2014

GHS Adoption in the Face of Daubert

On March 26, 2012, OSHA adopted the United Nations Globally Harmonized System (GHS), an international approach to hazard communication. GHS was negotiated through a multi-year process by hazard communication experts from many different countries, international organizations, and stakeholder groups. While GHS is based on major existing hazard communication standards from around the world, including OSHA's hazard communications standard (1994), GHS employs separate and distinct criteria and methodology for hazard classification and categorization of chemical substances.

OSHA, in adopting GHS, recognized that diverse and sometimes conflicting international requirements created confusion among workers and companies seeking to effectively use information contained in various hazard communication documents. OSHA noted that labels and safety data sheets for foreign-made products included unfamiliar symbols and hazard statements. OSHA further determined that given the differences in hazard classification criteria, labels on U.S. product exports and foreign product imports could be inconsistently or incorrectly interpreted once they cross the border. OSHA's expectation in the adoption of GHS appears to be that international acceptance of GHS will promote utilization of consistent information on labels and safety data sheets for various chemical products sold worldwide.

Unfortunately, in its wholesale adoption of GHS, OSHA may have overlooked the fact that this harmonization system has detailed criteria and methodologies for determination of acute and chronic adverse health effects from exposure to given chemical substances that may be inconsistent with judicial standards of causation promulgated by federal and state courts following *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Standardization of format, order of information, label elements, signal words, precautions, and hazard statements is laudable, but the substance and choice of a given standardized statement/precaution will still depend on the hazard risk assessment based on tools and methodology incorporated in GHS. To the extent that this methodology is inconsistent with *Daubert*,1 chemical manufacturers/importers may face increased regulatory and litigation risks in attempting to designate hazard classification and categorization for a given chemical substance. GHS may require manufacturers/importers to reference health hazards that would not otherwise be recognized under *Daubert* and its progeny. Manufacturers/importers' reference to health hazards pursuant to GHS may constitute admissions where causation is otherwise disputed.

In *Daubert* the Supreme Court of the United States determined that federal courts must evaluate the validity of scientific evidence that purports to establish a credible case of causation between exposure to a given substance and an adverse health effect before its admission into evidence. Under *Daubert*, the scientific proposition a party seeks to admit into evidence must not only be generally accepted, but also be validated through accepted scientific methodology. Both the scientific conclusion and methodology by which causation is established must meet an accepted framework applied by the court as part of its "gatekeeper" responsibility.

The Federal Judicial Center has produced a "Reference Manual On Scientific Evidence" for use by federal courts. Many state courts have adopted the principles enunciated in *Daubert* in order to establish proof of general causation. Courts following *Daubert* generally refuse to accept causation evidence based on extrapolation, for example, in the absence of reproducible studies demonstrating an adverse human health effect from exposure to a given chemical substance.

EU Courts Have Rejected *Daubert*

The important dates for purposes of application of the Hazard Communication Standard (HCS) as amended by GHS, as it pertains to manufacturers'/importers' responsibilities, include June 15, 2015 (the date manufacturers must comply with GHS); Dec. 1, 2015 (the date that distributors shall not ship a product unless it contains a GHS label); and June 1, 2016 (the date for updating alternative workplace labeling and hazard communication).

GHS has been adopted as a component of the European Union's regulatory framework for regulation of chemical substances. The European Regulatory Framework that adopted GHS was updated in December 2006 (REACH).2 REACH is an integrated system for registration, evaluation, authorization, and restriction of chemicals presently managed by the European Chemical Agency (ECHA).3 These regulations require manufacturers and importers to draw up a detailed technical dossier, including information on each chemical manufactured, its potential uses, and its intrinsic hazards based on relevant studies. Hazard classification is determined in many cases by the European Commission for the Environment working group composed of recognized experts.4

Courts in the European Union will not overturn hazard classifications and/or categorizations made by the Commission and approved by member states unless a complaining party demonstrates a manifest error of assessment or misuse of power. The European Union judicature confers on the Commission broad discretion in determining the hazard classification and categorization of a chemical substance and will not substitute its assessment of scientific and technical facts for that of the Commission.5

Hazard classification under GHS is determined on the basis of the total weight of evidence as evaluated by application of expert judgment. Responsible parties are to review all information bearing on the hazard classification, including but not limited to in vitro testing, animal studies, human epidemiological and clinical studies, case reports, extrapolations, implementation of the Read Across Method based on the similarity of chemical molecules, as well as data based on structure activity relationship models. Several of these methods, used to demonstrate general causation, are frequently rejected by U.S. courts following *Daubert*.6 Human epidemiological evidence is not necessary to establish a classification or categorization under GHS if other relevant evidence supports classification and/or categorization.7

Courts in the European Union have, in turn, rejected *Daubert*, noting that admissibility of expert opinion evidence in Europe is governed by §79 of their Evidence Act, which enunciates a different and more liberal standard for establishing causation than §702 of the Federal Rules of Evidence.

The adoption of GHS may result in what several authors have described as "classification shock",8 the realization that a given chemical substance is more hazardous than previously described.9

Adoption of GHS would appear to reflect a relaxed standard of "proof of causation," at least as it relates to the definition of type, degree, and severity of a hazard associated with a given chemical substance as it appears on labels and within data sheets, particularly in cases of risk of injury from chronic exposure. *Daubert* and its progeny generally reject use of case reports alone, as well as extrapolation and/or structural activity relationship models among other evidence as demonstrating proof of causation in the absence of human data.10

Appendix A to the Hazard Communication Standard, as amended, consistent with GHS, appears to adopt these various methods for hazard classification and categorization contained in GHS as valid evidentiary principles to be considered in the completion of a hazard analysis. Federal OSHA modified its hazard communication standard to conform to GHS to, in part, facilitate international trade of chemical products and promote consistency in the classification and labeling of chemicals internationally. However, standardized warning symbols, pictograms, and phrases are, to a large degree, dependent on hazard classification and categorizations that, in turn, are dependent on the definition of acceptable methodology and proof as it pertains to demonstration of a causal link between exposure to a substance and a given health effect.11

Under GHS, a chemical substance will be classified based upon type, degree, and severity of the hazard (hazard class and category). The GHS standards (commonly referred to as the "Purple Book") establish agreed hazard classifications and communication provisions with explanatory information on how to apply the system. The definition of health and physical hazards provided in Appendix A and B to HCS, as amended, and the definitional paragraphs of 29 C.F.R. 1910.200(c) appear to be consistent with criteria provided in the GHS "Purple Book."

Appendix A to HCS provides a general approach to classification of chemical substances, including "bridging principles." Hazard classification includes concepts such as acute toxicity and "carcinogenicity," among others. Hazard categorization not only reflects the degree or severity of adverse health effects, but also, in many cases, *is defined by the strength of evidence supporting the purported health effect categorization*.

GHS suggests a tiered approach for mixtures. In assessing a mixture, the manufacturer or importer must use available test data for the mixture as a whole, use "bridging principles" to extrapolate from other data, and/or estimate hazard type and severity based upon known information relating to the individual ingredients of the mixture.

Under previous HCS standards, a manufacturer/importer would generally simply determine whether a given substance caused a health effect or not. (For example, a given substance either was or was not a carcinogen.) Under the new standard, classification of a chemical substance as a carcinogen is categorized under one of two categories, Category 1 having two subcategories. Categories relating to carcinogenicity, for example, are as follows: Category 1 – known or presumed human carcinogen; Category 1(a) – known carcinogen based upon human evidence; Category 1(b) – presumed to be a carcinogen based on animal data,

extrapolation, and other evidence; Category 2 – suspected carcinogen based on the strength of the evidence and additional considerations. Similar categorizations are applied to other adverse health effects associated with chemical exposure, including but not limited to reproductive toxicity, mutagenicity, and target organ systemic toxicity.

The potential problems in using the GHS hazard classification system, in light of long-standing precedent reflected in *Daubert* and its progeny, are clear based on review of opinions written by European Union courts upholding hazard classifications and categorizations under GHS.

In *Etimine SA v. Secretary of State for Work and Pensions*, the European Union court ruled against manufacturers contesting the classification of boric acid as a Category II reproductive and developmental toxin. The court dismissed arguments relating to the lack of human data in upholding the classification. The court accepted results from validated structural activity relationships and expert judgment consistent with GHS principles. The court also accepted extrapolation from animal data as support for the Category 1 classification. The court rejected criticism of methodology cited by chemical manufacturers used to perform the animal testing. The court held that the route of administration used in carrying out animal testing was not a matter of legal assessment but of scientific opinion.12

In *Nichol Institute v. Secretary of State for Work and Pensions*, the European Union court rejected a manufacturer's challenge that nickel sulfate and nickel chloride should be categorized as Category I carcinogens. This classification was based upon existing data not including epidemiological studies. In addition, experts, in coming to the conclusion that nickel nitrate should be defined as a Category I carcinogen, applied the Read Across Method to nickel nitrate, taking the view that the degree of water solubility of nickel nitrate and its chemical components were sufficiently similar to nickel sulfate and nickel chloride to classify it as a Category I carcinogen.13 The court found that the methodology and conclusion of government experts were consistent with GHR and REACH and that the Read Across Method was widely recognized by the European scientific community. The court noted that REACH legislation, in Article XIII, recognizes the importance of the use of alternative methods to evaluate human toxicity secondary to exposure to chemical substances other than by animal testing and epidemiological studies.

Problems for U.S. Manufacturers and Importers

Under *Daubert*, experts are required by courts to look at the reliability of a study's findings, its design, and the sufficiency of the data before suggesting that a HazCom-triggering event has occurred. In addition to study design, other factors that should be assessed under *Daubert* and its progeny include statistical significance and exposure and dose/response parameters. Extrapolation from animal data in the absence of human experience is generally frowned upon and denoted as a questionable practice under *Daubert*. Federal and state courts in this country have recognized that differences in animal metabolization of a substance often prevent extrapolation of data to humans.

In light of longstanding legal precedent reflected by *Daubert* and its progeny, the wholesale adoption of GHS will create potential problems for manufacturers/importers both in terms of future regulatory actions and common law toxic tort claims. The adoption of internationally consistent and accepted signal words, pictograms, and hazard statements is laudable; unfortunately, wholesale adoption of GHS hazard classification system principles will disrupt various chemical hazard assessment programs and heighten problems manufacturers and importers will face, inappropriately describing the hazards and precautions to be taken in the use of a given product.

Manufacturers may well face situations where application of GHS principles as applied to a given chemical substance require a warning about a health effect which U.S. courts would not otherwise require, in the absence of credible evidence as defined by cases following *Daubert* that the product can actually cause the health effect. This places the manufacturer/importer in a potential catch-22 situation. Should manufacturers/importers follow GHS methodology to the letter, they may be required to include Health Hazard risks on labels and data sheets not otherwise required under *Daubert*.

OSHA should consider clarification of its adoption of GHS methodology and parameters in relation to the classification and characterization of the health hazards of a given chemical substance to ensure consistency with established requirements relating to proof of causation under principles set forth by *Daubert*.

James M. Hofert, Daniel W. McGrath, Frederick J. Ufkes, May 01, 2014

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13. See footnote 2.

Affirmative Action Plan Preparation

Are your AAP's up to date and ready in the event of an audit?

Do you know that a well written plan may exclude you from an in-house audit?

Are you prepared for the changes to Section 503 and VEVRAA?

Changes have been made to the regulations that give an OFCCP investigator options on how to proceed with a contractor. As a result, fewer companies are having full audits and many more companies are being audited. Being prepared, will reduce the chances of your organization going through a complete audit.

Contact IMA at imamg@verizon.net and someone will contact you to set up an appointment.