Labor and Employment Developments in President Obama's First 100 Days

The program will begin shortly. The slides and a link to a recording of the webinar will be distributed to attendees after the event.

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Labor and Employment Developments in President Obama's First 100 Days

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April 30, 2009

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Introduction

The Employee Free Choice Act

"Card Check" -- Changing The Rules Of The Game

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EFCA – Principal Provisions

- Recognition/Certification Without An Election
- Mandatory “Interest Arbitration” of First Contracts Absent Agreement on Fast-Track Timeline
- New Draconian Penalties Against Employers

Card Check Recognition

- a/k/a “majority sign-up”
- 50% plus 1 of employees in an “appropriate bargaining unit”
- Automatic NLRB certification without an election
- Traditional election petitions still possible, at the union’s choice, but unlikely

First Contract Arbitration

- 120 days to negotiate a contract
- If bargaining unsuccessful after 90 days, mandatory mediation
- And then mandatory “interest” arbitration
- Terms imposed by arbitrators for 2 years

New Penalties Against Employers

- Increased monetary penalties
- Increased availability of injunctive relief against employer campaign activity
- A gag order against employers?

EFCA - Consequences

- Union Organizing – Much Easier
- Collective Bargaining – Less Predictable to the Employer
- Labor Costs – Much Higher

EFCA – Unanswered Questions

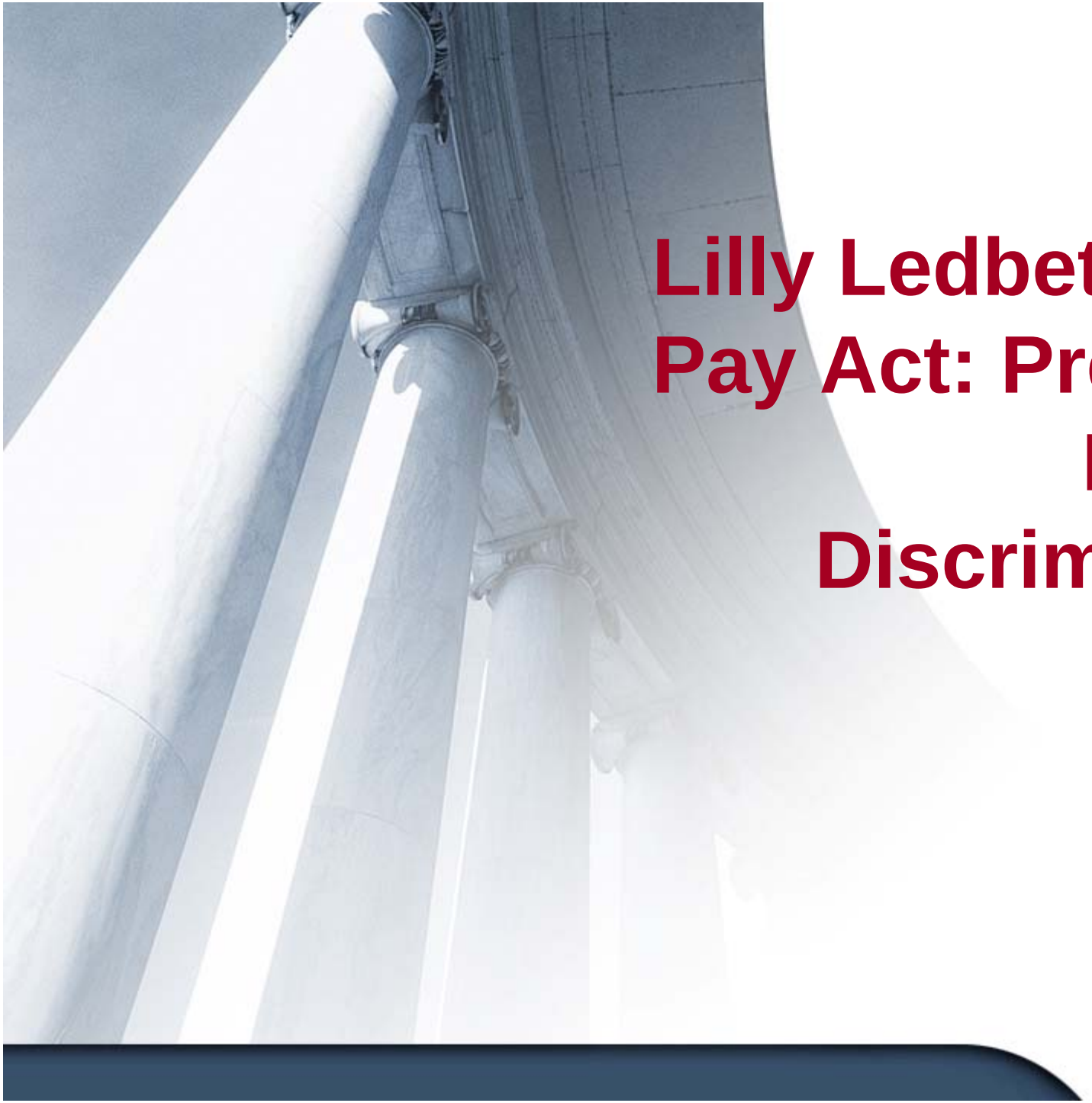
- Validity of authorization cards
- Can an employer challenge the proposed bargaining unit
- Use of economic weapons during first contract negotiations
- Mandatory arbitration standards
- Effect on other NLRB rules in organizing campaigns and first contract bargaining

Political Considerations

- Status of EFCA
- The Sestak bill and the “Costco third way”
- Senator Specter’s party affiliation
- Possible Compromise Terms
  - The Canadian “quickie election”
  - Equal access
  - Verification of authorization cards
  - Additional standards for mandatory arbitration
- Will it Pass?

EFCA – What To Do Now

- A Vulnerability Assessment
  - Type and location of facilities
  - Wages/Benefits
  - HR Practices and Procedures
  - Utilization of available HR Diagnostics
- Training
  - Managers
  - Early Warning Signs
  - Legal Constraints
- Employee Communications
  - Timing
  - Content
  - Tone
- Organizational and Operational Considerations



Lilly Ledbetter Fair Pay Act: Preparing For Pay Discrimination Claims

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Lilly Ledbetter Fair Pay Act

- Amends Title VII, the ADEA, the ADA, and the Rehabilitation Act
- Charge timely if filed within 300 days after employee is "affected by" discriminatory pay decision *or other practice*
- Eviscerates SOL for pay claims; two year limit on back pay
- Retroactive to May 28, 2007

Lilly Ledbetter Fair Pay Act

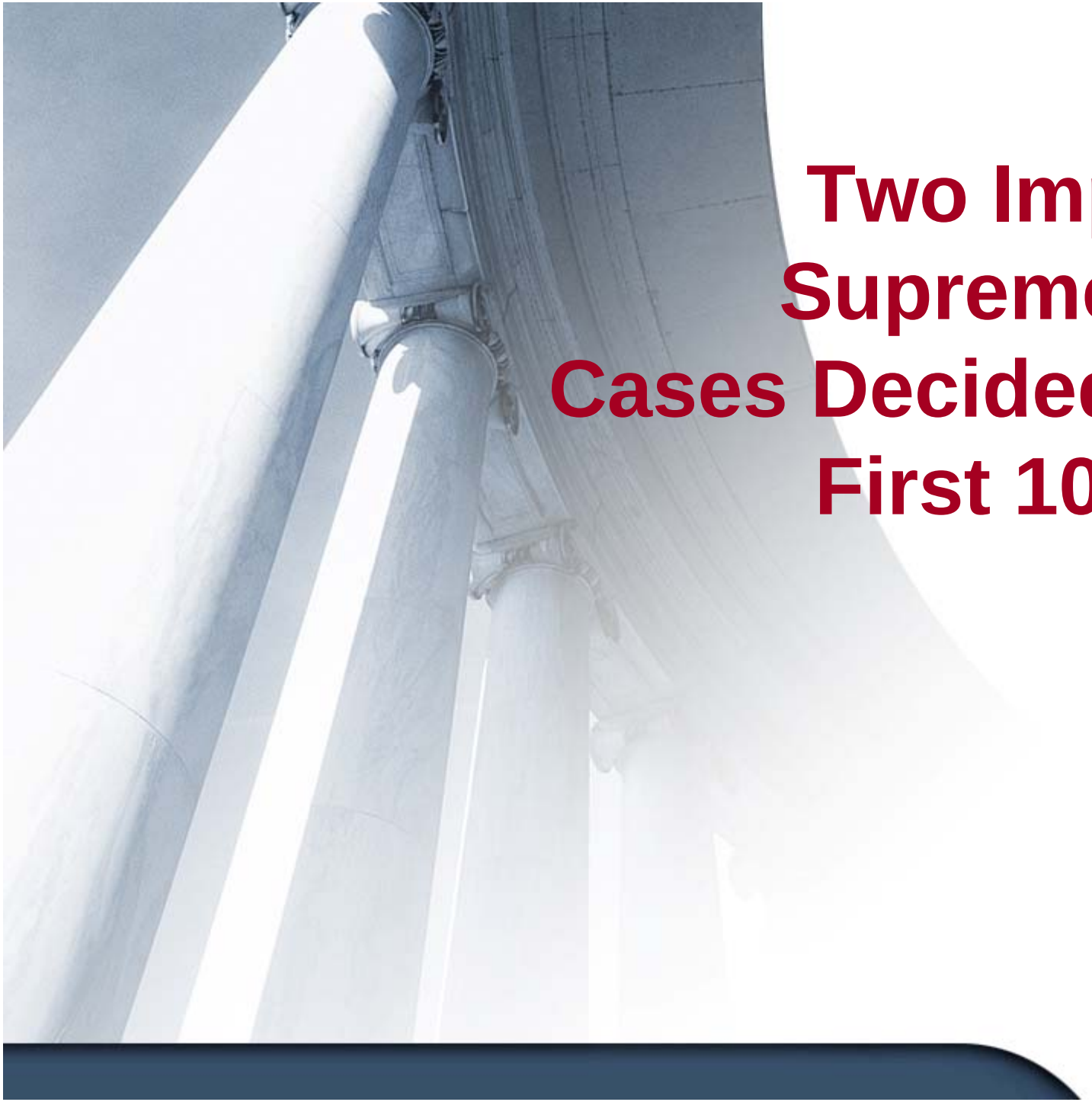
- Immediate Impact – 30-plus decisions applying Ledbetter due to retroactivity provision
  - *Gentry v. Jackson State Univ. (S.D. Miss.)* – 2004 denial-of-tenure claim timely
  - *Gilmore v. Macy's Retail Holdings (D.N.J.)* – court *sua sponte* revives dismissed claim based on prior promotion decision
  - *Bush v. Orange County Corrections Dept. (M.D. FL)* – wage claims based on demotion 16 years before complaint filed deemed timely

Lilly Ledbetter Fair Pay Act

- Longer-term Impact
  - Significant in class action context
  - Single plaintiff cases more attractive
  - More workplace discussion of pay equity issues

Lilly Ledbetter Fair Pay Act

- Proactive Measures
  - Holistic privileged review of compensation practices
    - Focus on all areas of managerial discretion
  - Privileged analyses of pay
    - Base pay analysis
    - “Real-time” analysis of pay change decisions
  - Expand data capture and retention – electronic



Two Important Supreme Court Cases Decided in the First 100 Days

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14 Penn Plaza LLC v. Pyett
129 S. Ct. 1456 (2009)

Decided:	April 1, 2009
Issue:	Whether a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims under the ADEA is enforceable.
Holding:	Yes (Decision 5:4 with Justices Souter, Stevens, Ginsburg and Breyer dissenting)

14 Penn Plaza LLC v. Pyett
129 S. Ct. 1456 (2009)

Facts:

- CBA included an antidiscrimination provision requiring that all employees submit employment discrimination claims to binding arbitration.
- After respondents were reassigned by employer, union filed grievance including age discrimination claim.
- Union subsequently withdrew age discrimination claim.
- Respondents filed age discrimination claims in federal district court.

14 Penn Plaza LLC v. Pyett
129 S. Ct. 1456 (2009)

Procedural History:

- Federal district court denied Petitioners' motion to compel arbitration citing 2nd Circuit precedent in *Rogers v. New York.*
- *Rogers* held that a CBA negotiated by union waiving an individual employee's right to bring a statutory claim in court is unenforceable.

14 Penn Plaza LLC v. Pyett
129 S. Ct. 1456 (2009)

Supreme Court Reversed and Remanded:

- Arbitration provision enforceable under NLRA.
- Nothing under ADEA precludes arbitration of age discrimination claims.

14 Penn Plaza LLC v. Pyett
129 S. Ct. 1456 (2009)

Supreme Court addresses tension:

Gardner-Denver Co. held "a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress."

Gilmer held "an individual employee who had agreed individually to waive his right to a federal forum could be compelled to arbitrate a federal age discrimination claim."

14 Penn Plaza LLC v. Pyett
129 S. Ct. 1456 (2009)

- Supreme Court held *Gilmer* is applicable in context of collective bargaining agreements.
- *Gardner-Denver* should be limited to the unique facts of that case.

14 Penn Plaza LLC v. Pyett
129 S. Ct. 1456 (2009)

Dissenting Opinions:

- (Justice Stevens)
  Argues that Court's decision driven by policy favoring arbitration.
- (Justice Souter)
  Argues that the Court violated precedent and inappropriately narrowed the Court's holding in *Gardner-Denve*r.

Crawford v. Metropolitan Gov't of Nashville 129 S. Ct. 846 (2009)

Decided: January 26, 2009

Issue: Whether Title VII's anti-retaliation protection extends to "an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation."

Holding: Yes

(Unanimous Decision with Justices Alito and Thomas concurring)

Crawford v. Metropolitan Gov't of Nashville 129 S. Ct. 846 (2009)

Facts:

- Employee participated in school district's investigation of supervisor's alleged sexual misconduct.
- During investigation employee disclosed inappropriate sexual advances made toward her by supervisor.
- Employee subsequently investigated and terminated for meritless reason.

Crawford v. Metropolitan Gov't of Nashville 129 S. Ct. 846 (2009)

U.S. District Court and 6th Circuit held:

- Title VII's anti-retaliation protections did not extend to employee.
- Her cooperation in the internal investigation did not fall within the "opposition" or "participation" clauses of the statute.

Crawford v. Metropolitan Gov't of Nashville 129 S. Ct. 846 (2009)

Supreme Court Reversed and Remanded:

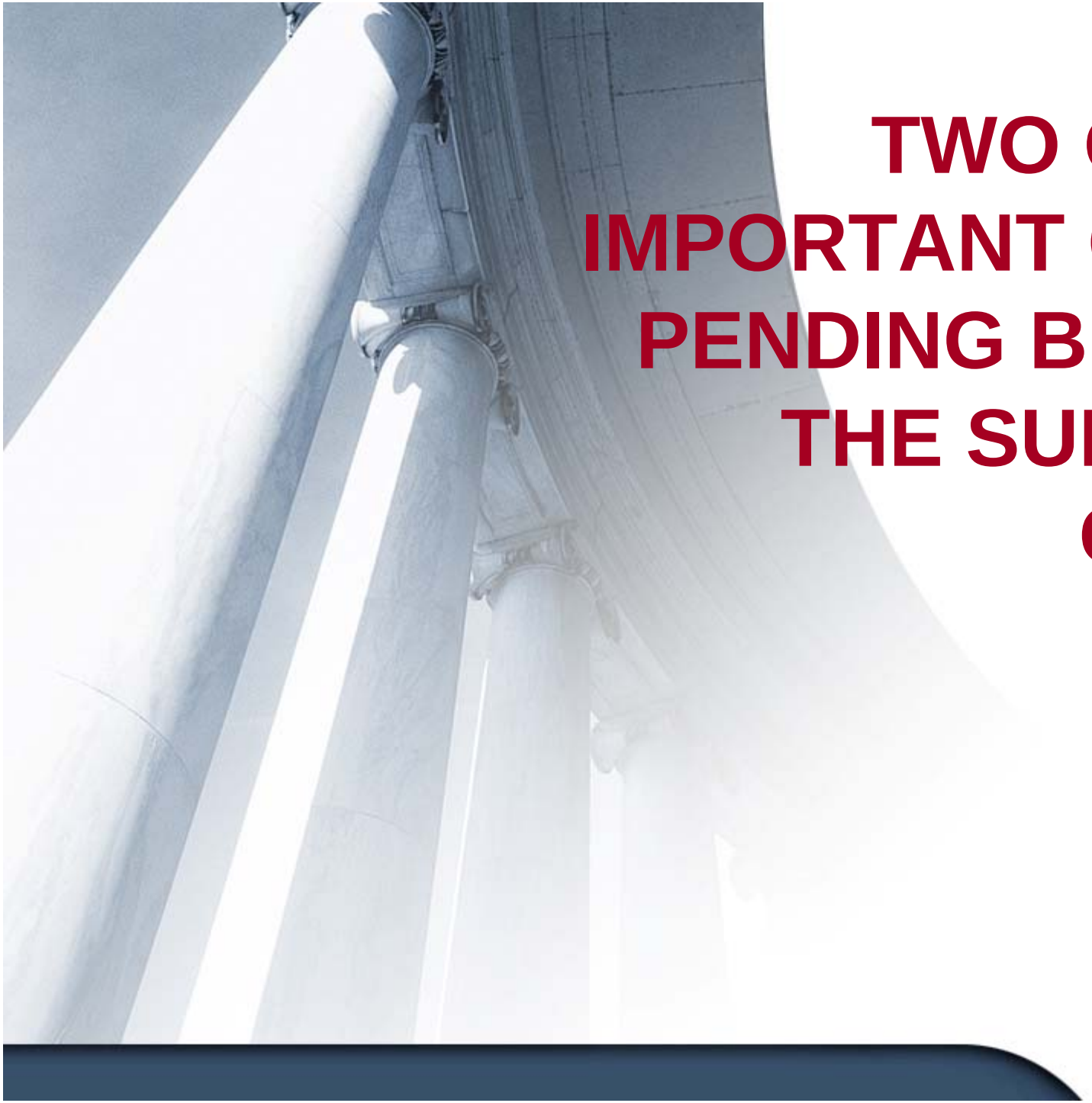
- Term "Oppose" carries its ordinary meaning.
- Term "Oppose" does not require "active, consistent" activity or initiation of complaint.
- An employee can "oppose" discriminatory behavior by responding to someone else's question.

Crawford v. Metropolitan Gov't of Nashville 129 S. Ct. 846 (2009)

- Court rejected amici arguments that not requiring "active, consistent" activity would discourage employers from raising questions about discrimination.
- Court did not reach "participation" clause issue.

Concurring opinion (Justice Alito)

- Definition of “oppose” should require “active” and “purposive” conduct.
- Warns against creation of a definition that would protect “silent opposition” or opposition that was never communicated to employer.



TWO OTHER IMPORTANT CASES PENDING BEFORE THE SUPREME COURT

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Gross v. FBL Financial Services, Inc.
526 F.3d 356 (8th Cir. 2008)

Issue:	Whether in a "mixed motives" case an employee in an age discrimination trial must present direct evidence that discrimination occurred, in order to obtain a jury instruction that places the burden of proof on the employer.
Case Argued:	Before Supreme Court on March 31,2009.

Gross v. FBL Financial Services, Inc.
526 F.3d 356 (8th Cir. 2008)

Facts:

- Employee sued employer alleging age discrimination following a series of demotions.
- Employer asserted "mixed motives" defense. Employee presented no direct evidence that age was motivating factor.

Jury Instruction:

- Verdict must be for employer "if [*employer] has proved* by a preponderance of evidence that [employee] would have been demoted regardless of his age."

Gross v. FBL Financial Services, Inc.
526 F.3d 356 (8th Cir. 2008)

Eighth Circuit holding:

- Jury instruction was improper.
- To obtain an instruction that places burden of proof on employer, employee must produce direct evidence that age was the motivating factor.
- If no direct evidence of discrimination, then burden remains, at all times, on employee.
- The 1991 Amendments to Title VII (which place burden of proof on employees in mixed motive cases) do not apply to ADEA cases.
- *Price Waterhouse v. Hopkins* applies to ADEA cases.

Ricci v. John Destefano
554 F. Supp. 2d 142 (D.Conn. 2006), affirmed 264 Fed. App. 106 (2d Cir. 2008)

Issue:	Whether a city may lawfully refuse to certify test results that would disproportionately make more white applicants eligible for promotions.
Case argued:	Before Supreme Court on April 22, 2009.

Ricci v. John Destefano
554 F. Supp. 2d 142 (D.Conn. 2006), affirmed 264 Fed. App. 106 (2d Cir. 2008)

Facts:

- City Fire Department administered oral and written tests for promotion to Lieutenant and Captain.
- "Rule of Three" required promotions to be filled by one of the top three test scorers.
- City refused to certify test scores because test results revealed disparate impact against African-Americans and Hispanics.
- City asserted desire to comply with Title VII's anti-disparate impact requirements as basis for refusal.

Ricci v. John Destefano
554 F. Supp. 2d 142 (D.Conn. 2006), affirmed 264 Fed. App. 106 (2d Cir. 2008)

Procedural History:

- Class of White (and one Hispanic) employees brought suit alleging disparate treatment under Title VII and violation of the Equal Protection Clause.
- Alleged that African-Americans and Hispanics received race-based preferential treatment.
- Parties filed cross motions for summary judgment on Title VII and Equal Protection claims.

Ricci v. John Destefano
554 F. Supp. 2d 142 (D.Conn. 2006), affirmed 264 Fed. App. 106 (2d Cir. 2008)

Plaintiffs' Title VII Argument:

- City's alleged desire to comply with Title VII's anti-disparate impact requirement was a pretext for intentional discrimination against white candidates.

Ricci v. John Destefano
554 F. Supp. 2d 142 (D.Conn. 2006), affirmed 264 Fed. App. 106 (2d Cir. 2008)

Plaintiffs' Equal Protection Argument:

- City's refusal to certify exam results amounted to a race-based classification system for promotion.
- Alternatively, the City applied facially neutrally promotion criteria in a discriminatory manner.

Ricci v. John Destefano
554 F. Supp. 2d 142 (D.Conn. 2006), affirmed 264 Fed. App. 106 (2d Cir. 2008)

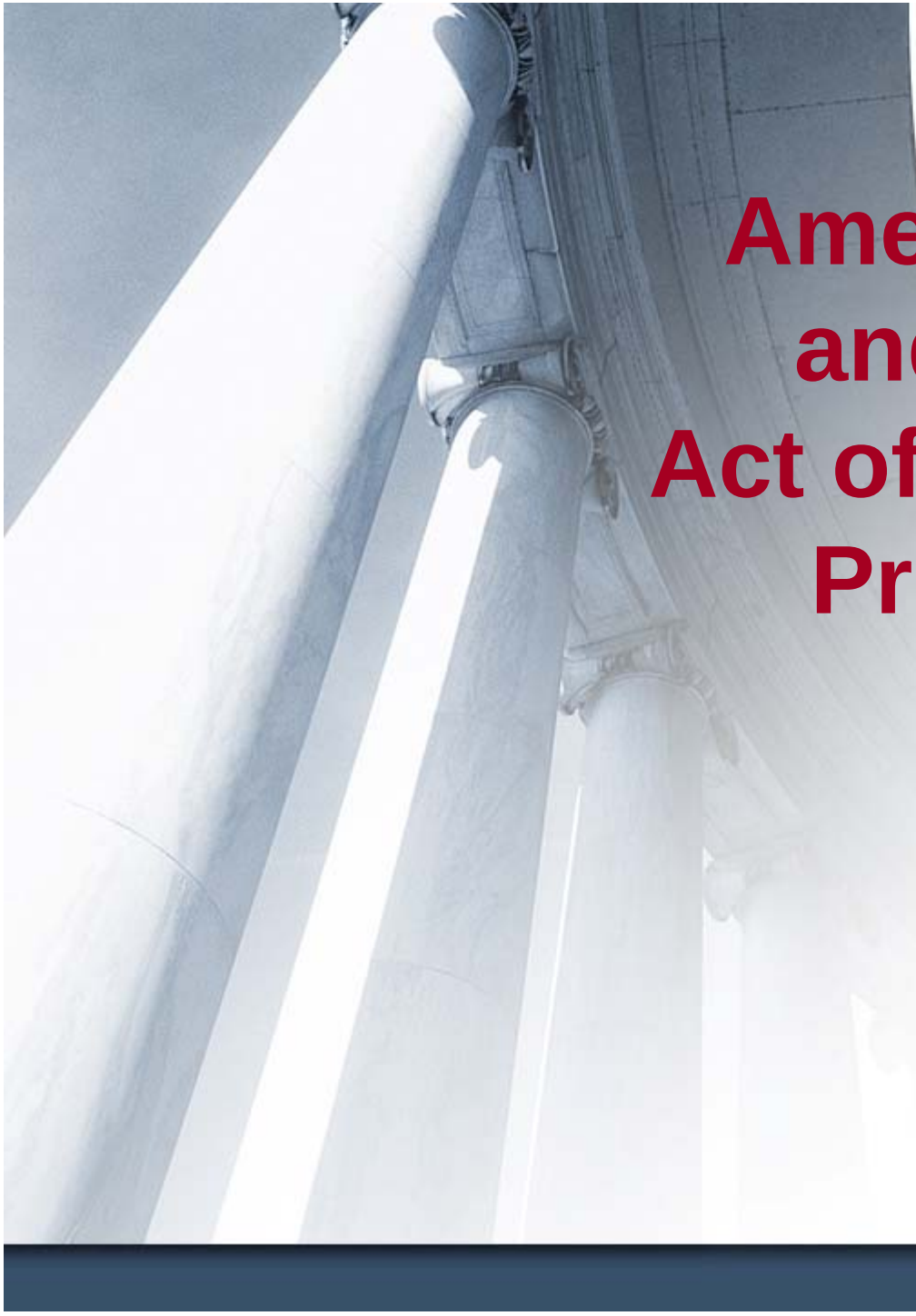
Lower Courts Rejected Title VII Arguments:

- The failure of the test results to satisfy EEOC's "4/5 Rule" demonstrates that disparate impact was statistically significant.
- Title VII does not require the City to obtain a validation study or demonstrate that there were less discriminatory alternatives available.

Ricci v. John Destefano
554 F. Supp. 2d 142 (D.Conn. 2006), affirmed 264 Fed. App. 106 (2d Cir. 2008)

Lower Courts Rejected Plaintiff's Equal Protection Arguments:

- No equal protection violation because everyone was treated the same. The exam was administered and score identically, and nobody was promoted.
- Plaintiffs had no "entitlement" to promotion.
- No evidence of discriminatory purpose.



American Recovery and Reinvestment Act of 2009 – COBRA Premium Subsidy

BENEFIT FOR EMPLOYEES

BURDEN FOR EMPLOYERS

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COBRA SUBSIDY – THE BASICS

- Who's Covered – "Assistance Eligible Individual" ("AEI")
  - Any COBRA "Qualified Beneficiary"
  - "Involuntary Termination" of Employment from 9/1/08 – 12/31/09
    - IRS Guidance regarding Reduction in Hours
  - Resulting in Loss of Group Health Coverage
    - Employer Structuring Options
  - Income Limitations
  - Open Question – Need for Pre-Qualification

COBRA SUBSIDY – THE BASICS (cont'd)

- What's the Benefit?
  - 35%/65% Split of COBRA Premium
  - AEI pays 35%
    - Treated as payment in full of COBRA premium
    - Payment by third party other than the Employer
  - 65% is the responsibility of "the person to whom premiums are payable under COBRA continuation coverage"
    - Reimbursement through credit against income tax withholding for that person's own employees

COBRA SUBSIDY – ADMINISTRATIVE ISSUES

- Who Pays the 65%?
  - Only “the person to whom premiums are payable” can pay and receive reimbursement for the 65%
  - Multi-employer plans – the plan (no IRS guidance)
  - Self-Insured Plans Subject to COBRA – Employer
  - Insured Plans Subject to COBRA – Employer
    - The “Direct Pay” Problem
  - Plans Subject to Comparable State Law – Insurer
    - The Problem of “Comparable Coverage”

COBRA SUBSIDY – ADMINISTRATIVE ISSUES (cont'd)

- DOL Models -- the Need for "Complete Notice"
  - Model General Notice (Full Version)
    - Complete Package of Forms
  - Model General Notice (Abbreviated Version) – All AEIs who already elected COBRA
  - Model Notice of Extended Election Periods – Potential AEIs Who Refused or Canceled COBRA
  - Model Alternative Notice – Insurers under State Programs
  - http://www.dol.gov/ebsa/COBRAmodelnotice.html

COBRA SUBSIDY – TRAPS FOR THE UNWARY

- (1) Payment by AEI guarantees coverage
  - Importance of Contractual Relationship with Insurer
  - Difficulties in the "Direct Pay" Structure
- (2) Involuntary Termination – Limitations
  - IRS Notice 2009-27, Q&A 1-9
- (3) "Complete Notice" Requirement
  - Potential for reopening previously closed COBRA election periods

COBRA SUBSIDY – TRAPS FOR THE UNWARY (cont'd)

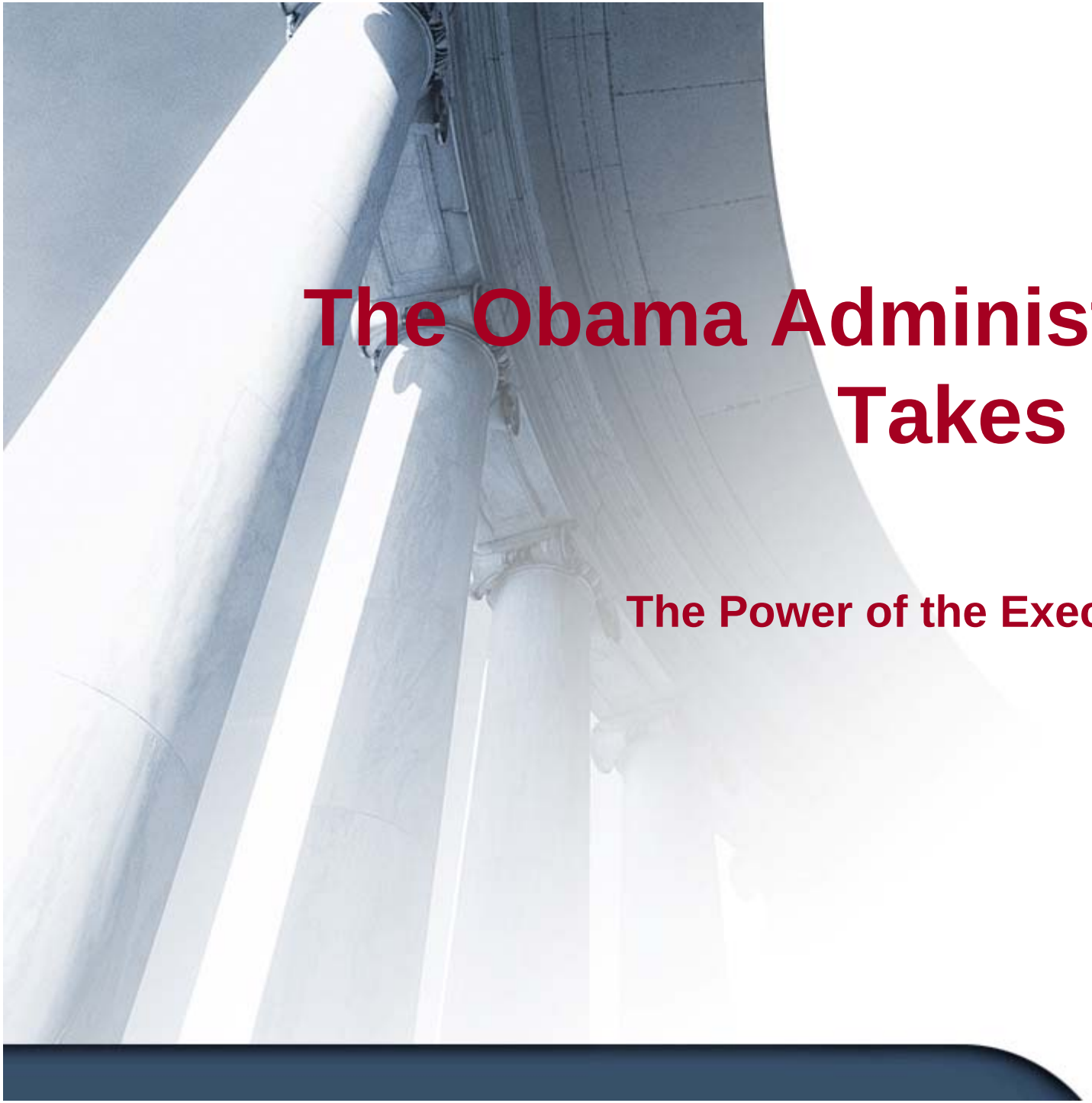
- The Severance Package Problem
  - Employer Extension of Coverage
  - Employer Payment of COBRA Premiums
- Eligibility Determinations
  - IRS Notice 2007, Q&A 45 – No refusal even if employer knows the income limit is exceeded
  - Conflict with DOL eligibility form
- Applying for Reimbursement – Offset or Repayment

COBRA SUBSIDY – TRAPS FOR THE UNWARY

- Potential Multiple Notice Requirements
  - Special rules for involuntary terminations in January and February 2009
- The State "Comparable Coverage" Conundrum
  - HHS -the need for state insurance commissioner action

COBRA SUBSIDY – EVOLVING STRATEGIES

- Coordination between Employers and Insurers
  - Potential Need for Contract Restructuring
- Use of the “Cover Letter”
  - Need to avoid employee confusion
- Importance of Recordkeeping
  - An IRS/DOL audit program is inevitable
  - Avoid potential excise taxes and civil penalties



The Obama Administration Takes Action

The Power of the Executive Order

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Executive Order #13502

- "Use of Project Labor Agreements for Federal Construction Projects"
  - Announces a government policy of encouraging use of PLAs on large-scale construction projects for the "efficient and expeditious completion" of projects funded by the federal government
  - Broad discretion to executive agencies to require PLAs on construction projects
  - Agencies can require all contractors and subcontractors to be signatory to PLA

Executive Order #13496

- "Notification of Employee Rights under Federal Labor Law"
  - Revokes E.O. 13201 requiring posting of "Beck" notice at job sites covered by government contracts
  - New notice, to be promulgated by DOL to be posted at all job sites; notice must affirmatively advise employees of the right to organize
  - Contractor must comply with "all provisions of the . . . Notice, and related rules, regulations and orders"
  - Applies to almost all government contracts

Executive Order #13495

- "Non-displacement of Qualified Workers under Service Contracts"
  - Successful bidders on "follow-on" service contracts must offer a right of first refusal to employees of predecessor contractor "in positions for which they are qualified."
  - Managers and supervisors excluded

Executive Order #13495

- Exception where new contractor has reasonable belief, based on employees' past performance, that they have "failed to perform suitably on the job."
- Applies to almost all contracts awarded under the Service Contract Act
- Effectively negates the successful bidder's ability to hire a new workforce thus guaranteeing labor law successorship
- Does not require new employer to assume predecessor's collective bargaining agreement

Executive Order #13494

- "Economy in Government Contracting"
  - Order changes settled "cost principles" to preclude an employer from charging the government for costs incurred as part of union organizing campaigns
  - Costs "undertaken to persuade employees . . . to exercise or not to exercise. . . the right to organize and bargain collectively" are unallowable
  - Applies to almost all government contracts

Executive Order #13494

- Examples of unallowable costs:
  - preparing and distributing campaign materials;
  - hiring or consulting legal counsel or consultants;
  - holding meetings (including paying the salaries of the attendees at meetings held for this purpose);
  - Planning or conducting campaign activities by managers, supervisors or union representatives during work hours

Executive Order #13494

- Order permits costs incurred in “maintaining satisfactory relations between the contractor and its employees, including costs of labor-management committees” to be treated as allowable costs

Q&A

Reminder: The slides and a link to a recording of the webinar will be distributed via e-mail.