The 2008 Election and the Future of Labor and Employment Law: *What Will President Obama and the Democratic Congress Do?*

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With a new party taking residence at the White House and larger Democratic majority in Congress, many of the legislative priorities of organized labor and the leadership of Democratic Party will be more readily politically achievable. For employers, the question is how will labor and employment law change under President Obama and the Democratic Congress.

2008 Election Results

In the 2008 election, the Democrats achieved a political double play: a Democratic President and a continuing governing Democratic majority in the House of Representatives. The Democrats also increased their majority in the Senate, but may not have achieved a filibuster-proof Democratic majority in the Senate (at the time of this writing, the Democrats were 3 seats short of the 60 votes needed to defeat a filibuster, with the election results for those three seats still in doubt).

For the enactment of legislative change in labor and employment laws, the ability of the Democrats to prevent Republicans from blocking legislation by the use of the filibuster will have a major, if not determinative, effect on whether, to what extent, and in what form legislative change in labor and employment laws will occur. Senate Democrats, depending on the proposed legislation in question and the number of Republicans who will support that Democratically-sponsored legislation, may effectively have a filibuster-proof majority in some instances.

The election of President Obama and an effectively filibuster-proof majority in the Senate, if that comes to pass, could result in 2009 in the most extensive revisions of labor and employment law since the 1960s or, regarding union organizing, the 1930s.

Whether all of the proposed changes will be enacted into law is unknown. Variables will include the national economy, the political unity or disunity within the Democratic and Republican Senate caucuses on each issue, especially the ability of the Republicans to use the filibuster to block legislation, and the amount of political pressure generated by supporters and opponents on each issue, including, for example, the opposition of the business community.

Potential Labor and Employment Law Changes

Legislative initiatives of the past few years which were stalled by political balance which has been greatly altered on November 4th, as well as campaign promises made by President-Elect Obama, suggest that the new political climate will allow these initiatives and promises to become law. The changes in labor and employment law that may or are likely to be enacted in 2009 or 2010 will benefit labor unions, employees alleging discrimination, employees seeking time off work, and employees' lawyers. Conversely, those changes may present significant challenges and burdens for employers.

Among the areas in labor and employment law already targeted for significant changes are:

- Labor unions and union organizing
- Employee leaves of absence and time off work
- Employment discrimination
- Employee protections

Labor Unions and Union Organizing

The unionization rate of American workers has been declining for 50 years. Currently, only 7.5% of private sector workers are unionized. For labor unions, organizing new members and reversing the 50-year decline are essential to their future, if not their survival. The labor unions' solution to the problems of how to reverse the decline in the unionization rate and to organize new members is the revision of federal labor laws. Under President Obama, an even stronger Democratically controlled House, and a weakened ability of Republicans to filibuster in the Senate, organized labor's legislative proposals may become law in 2009.

Employee Free Choice Act

The labor unions' top legislative priority is the enactment of the Employee Free Choice Act. In 2007, the House of Representatives passed the EFCA, but a Republican filibuster prevented its passage in the Senate. At that time, only one Republican chose not to support the Republicans' successful filibuster.

In 2009, the EFCA may become a law, either as proposed or as modified as a result of political compromises. As a Senator, Barack Obama co-sponsored the EFCA. As a presidential candidate, Senator Obama promised its enactment: "I will make it the law of the land when I'm President of the United States." In 2007, Democrats in the House of Representatives and the Senate supported the EFCA. If Democratic Senators can prevent a Republican filibuster of the EFCA in 2009, it will be enacted, either as proposed or in a modified form. As in 2007, the key to whether the EFCA will pass the

Senate will likely be whether the Senate Republicans engage in a successful filibuster. Further, there is no longer a threat of a veto and the need to override a veto, if made.

The EFCA, as proposed, would revolutionize union organizing and would make it far easier for unions to organize new members. The reason is the EFCA's elimination of the secret ballot election. For over 70 years, employees have had the right to vote for or against union representation in a secret ballot election. The EFCA would end that right to make a choice in the privacy of a secret ballot election. For that reason, the EFCA has been characterized as the "No Employee Choice Act." Retired Senator George McGovern, the Democratic presidential nominee in 1972, has opposed the EFCA's elimination of the secret ballot election for that reason: "We cannot be a party that strips working Americans of the right to a secret-ballot election."

Currently, an employer can refuse to recognize a union based on signed union authorization cards from over 50% of its employees and can insist upon a secret ballot election in which employees can vote, in the privacy of a voting booth, for or against union representation. Under the EFCA, however, an employer would be legally required to recognize a union on the basis of signed union authorization cards from more than 50% of the employees, and there would be no secret ballot election.

This "card check" method of union organizing is favored by unions and would substantially facilitate the organization of new members. One reason is that it is much easier for a union to get an employee to sign a union authorization card than it is to get the employee to vote for the union in a secret ballot election. Currently, many employees sign union authorization cards to mollify co-workers or union organizers, but then vote against union representation in the secret ballot election. Because employees sign union authorization cards for reasons other than their support of the union, signed union authorization cards are not necessarily a reliable indicator of employee support for a union.

In opposing the EFCA's "card check" system, retired Democratic Senator George McGovern acknowledged the problem: "There are many documented cases where workers have been pressured, harassed, tricked and intimidated into signing cards that have led to mandatory payment of dues."

Under the EFCA, as proposed, by obtaining signed union authorization cards through the use of any methods—fair or unfair,—from more than 50% of the employees, a union would demand recognition. The employer would then have the legal duty to recognize the union as the exclusive collective bargaining representative without an opportunity for the employees to vote in the privacy of a secret ballot election, regardless of whether the signed union authorization cards accurately and reliably reflect the employees' support for the union.

Another reason why the EFCA, as proposed, would make it easier for unions to organize new members is the elimination of an employer's opportunity for employers to

educate its employees, in a pre-election campaign, about unionization and its consequences for the business and its jobs. Once more than 50% of the employees have signed union authorization cards, which typically occurs without an employer's knowledge, no opportunity will exist for the employees to weigh the employer's viewpoint before making a binding decision. That is because under the EFCA, the employer will be required to recognize the union on the basis of the signed union authorization cards.

One potential compromise that has been suggested would be to preserve a secret ballot election, but to require that the election be held within 5 days, which would provide employers a very brief period during which to educate its employees in a pre-election campaign. A longer period before an election may end up being negotiated as a political compromise on the issue. In contrast, current National Labor Relation Board procedures call for an election within approximately 6 weeks after the filing of a petition requesting an election.

The enactment of the EFCA, as proposed, would expose all non-unionized employees and their employers, especially small employers, to the risk of unionization under the "card check" method. The EFCA could result in the unionization of millions of employees. That is the impact that the labor unions want and expect from the EFCA's "card check" system. For example, Andy Stern, President of the Service Employees International Union, has predicted that as a consequence of the enactment of the EFCA, labor unions could organize 1,500,000 new members each year for the next 10 to 15 years. Similarly, it has been estimated that labor unions' dues revenues would increase by $5 billion per year due to new members. Increased membership and increased dues revenues would result in increased economic and political clout for labor unions. As the Wall Street Journal opined, the EFCA would result in "union supremacy."

Importantly, the "card check" system would not be the only revolutionary change that the EFCA would cause. The EFCA, as proposed, would also result in an artificial negotiating process and potential government intervention in the collective bargaining process for the negotiation of a first contract between an employer and a union. Currently, the NRLB enforces the legal duty of employers and unions to bargain in "good faith," but it does not impose the terms of collective bargaining agreements on employers and unions or, for that matter, even require that employers and unions reach any negotiated agreements.

Under the EFCA, as proposed, the Federal Mediation and Conciliation Service could appoint a mediator if no contract is negotiated within the first 90 days after the start of negotiations. The FMCS would assign an arbitration board if there is no negotiated agreement after another 30 days. The government-appointed arbitration board would impose a contract on the employer and the union that would be binding for 2 years. A union may have little incentive to make reasonable proposals or to negotiate a contract due to the availability of a binding 2-year contract that the government-appointed

arbitration board could impose. This system would amount to an unprecedented intrusion of the federal government into the collective bargaining process for private sector employers where currently the parties have the right to set the terms of their own contracts.

The EFCA, as proposed, would also increase the penalties on employers for violating employee rights during a union organizing campaign or the negotiation of a first contract:

- Triple back pay for unlawful discharges of employees
- Civil fines of up to $20,000.00 for each violation by an employer
- Mandatory injunctions against an employer for "significantly" violating employees' rights

To date, employers have generally ignored or discounted the risks posed by the potential enactment of the EFCA, as proposed. The election results should serve as a signal for employers to start preparing for the potential enactment of EFCA and for the challenge of how to remain union-free if the EFCA, either as proposed or in a modified or limited form, is enacted. Because a signed union authorization card remains valid for a year, labor unions will almost certainly accelerate their union efforts to obtain signed union authorization cards between now and the start of the Obama Administration in anticipation of the potential enactment of the EFCA. For employers to fail to prepare for that potential enactment based on the expectation of a successful Republican filibuster to block the EFCA in the Senate may be imprudent.

In preparation for the potential enactment of the EFCA, employers should engage in comprehensive and aggressive actions for staying union-free. The time for action is now, rather than after the potential enactment of the EFCA. The overall objective is to ensure that employees are not receptive to the promises and inducements of union organizers and do not sign union authorization cards. That is because under the EFCA, as proposed, the signing of union authorization cards by more than 50% of the employees will be both the beginning and the end of the organizing drive process.

An employer can achieve the goal of making its workforce resistant to union organizing efforts by making its workplace as problem-free and as positive as possible for its employees. Among the actions that employers should take are the following:

- Educate employees and supervisors/managers about unions and why it is in the best interest of the employees and the employer to remain union-free
- Educate employees about what signing a union authorization card would mean under the EFCA: unionization with no opportunity to vote in the privacy of a secret ballot election
- Train supervisors and managers how to provide positive leadership
- Conduct an employee opinion survey
- Conduct an employee relations/human resources audit

- Solve the problems identified in the employee opinion survey and the employee relations/human resources audit
- Create an effective employee concern procedure that employees use and trust
- Solve discrimination and harassment claims promptly and internally
- Publish an effective, reader-friendly employee handbook that conveys why the company is a good place to work
- Pay competitive wages and benefits
- Provide promotional opportunities under a fair job posting system
- Engage in fair, consistent discipline, after a fair investigation, under published work rules and attendance rules
- Provide the training, supplies, equipment, and supervisory support so that employees can do their jobs efficiently
- Recognize and appreciate employees' good work and length of service
- Involve employees in decisions that affect them and their work areas
- Maintain a clean, safe workplace
- Review hiring practices to ensure that the best available applicants are hired
- Discharge new employees before the end of the probationary period unless their job performance, attendance, and conduct are excellent
- Develop, audit, and update a formal plan for staying union-free

The EFCA, if enacted, would be the most radical revision of federal labor law in over 70 years and would expose all non-unionized employers, especially smaller employers, to a substantially elevated risk of unionization.

Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act (RESPECT Act)

The RESPECT Act is a proposal that would narrow the legal definition of a "supervisor" for the purpose of increasing the number of front-line supervisors who can join a union. This proposal will be another top legislative priority for labor unions in 2009. As a Senator, President-Elect Obama supported the RESPECT Act. Passage of the RESPECT Act, which labor unions support, may depend, as with the EFCA, on whether the Senate Republicans can use the filibuster to successfully block it.

The RESPECT Act would remove two common supervisory duties—"assigning" and "responsibly directing" other employees—from the current definition of a supervisor. Because most supervisors spend most of their time engaged in "assigning" and "directing" other employees, the RESPECT Act would convert those tasks into non-supervisory ones with the objective of converting, for the purpose of federal labor law, front-line supervisors into non-supervisory employees who can be unionized.

The RESPECT Act would also require an employee to exercise authority over employees for a "majority of the individual's worktime" in order to qualify as a supervisor. Currently, a specific minimum percentage of time spent on supervisory

duties is not required for supervisory status. And, in reality, supervisors only spend a small part of their time managing their employees' employment status—hiring, transferring, suspending, laying off, recalling, promoting, disciplining, discharging, or rewarding employees—and a large part of their time "assigning" and "directing" employees, which would no longer count as supervisory duties under the RESPECT Act. By establishing a "majority of the individual's worktime" threshold in the legal definition for a supervisor, the RESPECT Act would further exclude front-line supervisors from that legal definition and include them in the group of employees who can be unionized.

For employers, the negative effects of the RESPECT Act would be substantial. The RESPECT Act would permit unions to organize supervisors in the same group as their subordinates. The unionization of supervisors would create divided loyalties—to the employer and to the union/other unionized employees—among supervisors who assign work to and direct employees. The RESPECT Act would also enable supervisors to go on strike against an employer. In sum, the RESPECT Act would destroy the traditional recognition that front-line supervisors are part of management.

Patriot Employers Act

The Patriot Employers Act is a proposal that would use the federal tax laws to influence employers' labor and employment practices.

As a Senator, President-Elect Obama was one of the co-sponsors of this proposal. He has stated that "we should encourage corporations to be patriot employers that create good jobs with good benefits for American workers." Whether, especially given the current economic conditions, Congress and President Obama will seek to enact this proposal and whether it will garner enough support to pass Congress remain to been seen.

Under the Patriot Employers Act, an employer would receive a tax credit of 1% of its taxable income if the employer satisfies all of the following requirements:

- Has its headquarters in the United States
- Pays at least 60% of its employees' health care premiums
- Is neutral in union organizing campaigns
- Maintains or increased the number of full-time workers in the United States compared to the number of its full-time workers outside the United States
- Pays each employee not less than an amount equal to the federal poverty level
- Provides a defined contribution retirement plan with at least a 5% contribution or a 100% matching contribution not less than 5% of an employee's compensation
- Provides "full differential salary and insurance benefits" for all National Guard and Reserve employees who are called for active duty (employers with at least 50 employees)

Repeal The "Right To Work" Laws

Currently, the federal labor law permits states to have "right to work" laws. A "right to work" law prohibits "union security" provisions that require an employee to become a union member and to financially support a union as a condition of employment.

22 states now have "right to work" laws. Unions in "right to work" states are generally weakened by the absence of required financial support by all employees. A "right to work" employee's ability to resign from a union, to stop financially supporting a union, and to remain employed also can weaken a union's ability to maintain internal discipline over its membership, including during a strike.

Repealing the state "right to work" laws by revising the federal labor law would increase union power in current "right to work" states and could result in increased union organizing activity, especially under the EFCA, in those states.

No proposal to revise federal labor law for the purpose of repealing state "right to work" laws has yet been presented in Congress. Nor has President-elect Obama publicly stated his position on the issue. But repealing state "right to work" laws remains a long-time goal of labor unions. Whether the labor unions and their political allies will pursue achieving that goal in 2009 remains unknown at this time. This is particularly true in light of the possibilities that Democratic Senators from "right to work" states may decline to support the repeal of the "right to work" laws, that President-elect Obama would not support it or would not view supporting it as politically advisable, the Republicans succeeding in a filibuster effort in the Senate.

National Labor Relations Board

The National Labor Relations Board enforces the federal labor law. It has 5 members who are appointed by the President and confirmed by the Senate. Customarily, 3 members are from the President's political party, and 2 members are members of the other political party.

Currently, there are 3 vacancies on the NLRB. One Republican and one Democrat are now on the NLRB. President Obama will have the opportunity to appoint 3 NLRB members.

With a 3 to 2 Democratic majority on the NLRB, pro-union decisions on key issues will replace the generally pro-employer decisions under the Bush NLRB, many of which were returns to the precedent long in place prior to the major changes created by the Clinton NLRB. As is common when a shift in the composition of the NLRB occurs, an Obama NLRB may reverse Bush NLRB precedents and grant rights to employees and unions, for example, in the following areas:

- Temporary employees can unionize

- Non-unionized employees can have the right to bring a representative to an investigative interview with management
- Employees have legally-protected rights to use an employer's email system for union purposes

Employee Leave of Absence Laws

There are several proposals to expand employee leave of absence and work scheduling rights. The enactment of some or all of these proposals may occur in 2009. As a Senator, President-Elect Obama supported all of these proposals. Whether Congress will pass these proposals and whether the Obama Administration will support them remains unknown at this time. One factor militating in favor of expansion of the FMLA is its popularity among voters and members of Congress in both parties.

Expansion of the Family and Medical Leave Act

In 2009, the enactment of various expansions of the Family and Medical Leave Act is at least possible and may be likely. The key proposals for expanding the FMLA include the following:

- Size of the employer—To be covered by the FMLA, an employer will only have to have at least 25 employees, not 50 employees as is the current threshold
- Part-time employees—An elimination of the current requirement that to be eligible for FMLA leave, an employee must work at least 1,250 hours, so that all part-time employees who have worked at least 12 months for the employer will be eligible to take FMLA leave, regardless of whether they have worked 1,250 hours.
- School/community activity leave—An employee will be entitled to take up to 24 hours of FMLA leave in a 12-month period for a school or community activity involving the employee's child or grandchild
- Children's routine family medical care needs—A modification that the FMLA applies to time off for routine family medical care needs, including transportation of a son, daughter, or grandchild to medical and dental appointments for annual check-ups and vaccinations
- Elderly relatives' routine family medical care needs—A modification that the FMLA applies to time off for routine family medical care needs of elderly individuals who are related to an employee, including visits to nursing homes and group homes

The Bush Administration's Department of Labor has been developing revised FMLA regulations, but has not yet implemented those regulations. Unless the Bush Administration implements them before the start of the Obama Administration, the regulations are likely to be reconsidered and revised by an Obama Department of Labor to be more favorable to employees and less favorable to employers.

Administering and complying with the FMLA have been challenges for employers since its enactment in 1993. With an Obama Administration a Democratic Congress, and Republican supporters of FMLA expansion, the FMLA is very likely to change in ways that will increase, not decrease, the challenges and the burdens that the FMLA will create for employers.

Healthy Families Act

The Healthy Families Act would require employers to provide employees with 7 paid sick days per year. Enacting a law that creates a legal entitlement to employer-paid sick days has been a goal of some Congressional Democrats, including, for example, Senator Ted Kennedy, since at least the enactment of the FMLA in 1993.

The enactment of this proposal in 2009 is possible. As a Senator, President-Elect Obama co-sponsored this proposal. As a presidential candidate, he stated that it is not "fair" for an employee to be "punished for getting sick or dealing with a family crisis…I'll require employers to provide all of their workers with seven paid sick days a year." Whether there will be bipartisan support for this proposal and whether Senate Republicans would seek to block it by the use of a filibuster are unknown at this time.

The details of the proposed Healthy Families Act are as follows:

- Coverage—Any employer with 15 or more employees would be covered
- Number of paid sick days—7 paid sick days for an employee who works at least 30 hours per week (a prorated number of paid sick days for an employee who works between 1,000 and 1,500 hours per year).
- Accrual of paid sick days—Accrued paid sick days will carry over from year to year, but an employer will not be required to permit an employee to accumulate more than 7 days of paid sick time
- Protection of the use of paid sick days—As with FMLA leave, an employer cannot use the "taking of sick leave" as a "negative factor in an employment action" or a "disciplinary action" and also cannot count the paid sick days against an employee under a no-fault attendance policy

An even more ambitious proposal for paid time off work is the Family Leave Insurance Act. This proposal would provide employees with a percentage of their pay for up to 12 weeks of paid family and medical leave. To fund the 12 weeks of paid leave, a trust would be funded by contributions from employers and employees. Whether the enactment of this kind of broad and expensive entitlement system is likely or even possible in 2009 is unknown at this time.

Working Families Flexibility Act

The Working Families Flexibility Act would create a new legal entitlement for an employee: the right to request flexible working options from the employer. This kind of entitlement exists in European nations. But there is no precedent for it under American federal employment law, except for "reasonable accommodations," which may include scheduling changes, for disabled employees under the Americans with Disabilities Act.

The Working Families Flexibility Act may be enacted in 2009. As a Senator, President-Elect Obama co-sponsored it. In support of this proposal, he stated: "We've heard a lot of talk about family values, but this important legislation would actually help families with the increasingly challenging job of earning a living and raising kids or caring for an ill relative…The demands of the global economy mean that Americans are working harder and harder. If we're going to have strong families, we need to make it easier for Americans to work more flexible hours." If Congressional Democrats pursue the passage of this legislation, whether it is enacted may depend on either the absence of or an unsuccessful filibuster by Senate Republicans.

The key aspects of the proposed Working Families Flexibility Act consist of the following:

- Covered employer—Any employer with 15 or more employees
- Covered employee—Any employee who works at least 20 hours per week and 1,000 hours per year
- Employee's right—Every 12 months, the employee may apply for a change in the required number of work hours, the work schedule, and the work location
- Employer's duties—An employer does not have to agree to any request change, but must meet with the employee (and a representative of the employee's choosing) within 14 days to discuss the request. The employer may propose an alternative change to the employee's hours, schedule, or location. The employer must give a written decision to the employee within 14 days, and if it rejects the application, the employer must provide detailed reasons for the rejection. The proposed legislation lists the kind of reasons that will need to be addressed.
- Employee's right to request reconsideration—An employee can appeal a rejection by requesting reconsideration by the employer within 14 days. Then the employer and the employee (and a representative of the employee's choosing) have to meet again within 14 days, and if it denies the request for reconsideration, the employer must issue another written decision with detailed reasons for the rejection.
- Enforcement procedures—An employee may file a complaint with the Department of Labor, which can fine an employer from $1,000.00 to $5,000.00 for each violation. If either the employee or the employer disagrees with the DOL's decision, a hearing will be held

The Working Families Flexibility Act would result in an unprecedented legal regulation in the scheduling of employees' number of work hours, work schedules, and work locations. If enacted, the Working Families Flexibility Act, with its requirements of meetings, detailed written decisions, and DOL investigations and enforcement procedures, would create both administrative burdens and legal exposures for employers. An expansion of human resources staffs in order to ensure the timely and lawful handling of employee applications, with the associated meetings and written decisions, may be one of the direct expenses that employers will have to incur as a result of the enactment of the Working Families Flexibility Act. Granting employee requests may result in scheduling and staffing disruptions or even the hiring of additional employees. Furthermore, the creation of an entitlement to request changes in work hours, schedules, and locations, in all likelihood, will result in an employee expectation that the employer should grant applied-for changes. That kind of expectation, to the extent that it is unfulfilled, may cause both friction between the employee and the employer and decreased employee morale.

Employment Discrimination Laws

There are a number of proposals in the area of employment discrimination that may be enacted in 2009. The principal ones are summarized in the following sections. The effect of these proposals, if enacted, would be to expose employers to more lawsuits and to higher potential damage judgments.

Lilly Ledbetter Fair Pay Act

The purpose of this proposed legislation is to reverse a Supreme Court decision about the time period during which employees may file claims for pay discrimination.

This proposal had substantial support in Congress in 2008. As a Senator, President-Elect Obama co-sponsored this legislation. His presidential campaign even featured Ms. Ledbetter as a supporter. The enactment of this legislation in 2009 is likely. Whether Senate Republicans would attempt to or could mount a successful filibuster to block this legislation is unknown as of now.

The Lilly Ledbetter Fair Pay Act would effectively eliminate the statute of limitations for a pay discrimination claim. It would accomplish this objective by providing that the statute of limitations for a pay discrimination claim would start when:

- A discriminatory compensation decision or practice is adopted, or
- An employee becomes subject to a discriminatory compensation decision or practice, or
- An employee is affected by a discriminatory compensation decision or practice, *including each time wages, benefits, or other compensation is paid*

Under this proposal, a new statute of limitation would start with the payment of each paycheck because the employee's receipt of any paycheck that would have been higher without the alleged pay discrimination—regardless of when the pay discrimination originally occurred—would amount to a new violation of the law.

Paycheck Fairness Act

The purpose of this proposal is to make it easier for women to successfully sue for sex-based unequal pay under the Equal Pay Act.

The Paycheck Fairness Act may be enacted into law in 2009. As a Senator, President-Elect Obama co-sponsored it, and there was substantial Congressional support for this proposal in 2008.

This proposal would require employers in a lawsuit about sex-based unequal pay to prove that the pay inequality was not based on sex, but on another factor that was job-related, further a legitimate business purpose, and was applied and used for those reasons. Compared to the current legal standard under the Equal Pay Act, this part of the Paycheck Fairness Act would impose a more stringent burden of proof on an employer.

In addition, the Paycheck Fairness Act would permit an employee to claim that an alternative employment practice would not have resulted in the pay inequality, but the employer refused to adopt the alternative practice.

Significantly, under the Paycheck Fairness Act, an employer would be subject to unlimited or uncapped compensatory and punitive damages for violating the Equal Pay Act, even if the unequal pay was not the result of intentional discrimination.

Another part of this proposal would make it illegal for an employer to retaliate against employees who disclose their wages or another employee's wages. For years, the Michigan Payment of Wages and Fringe Benefits Act has prohibited employer rules against an employee's disclosure of his or her wages. For Michigan employers, this part of the Paycheck Fairness Act would not change how employers act.

Equal Remedies Act

Currently, compensatory and punitive damage awards under the Americans with Disabilities Act and Title VII of the Civil Rights Act are limited to or capped at $300,000.00. The proposed Equal Remedies Act would eliminate that $300,000.00 limit or cap. The passage of this proposal in 2009 is possible and may depend on whether Senate Republicans successfully block it by a filibuster.

If enacted, the Equal Remedies Act would expose employers to potentially unlimited damages in ADA or Title VII lawsuits. The availability of unlimited damages may induce employees' lawyers to file more lawsuits and may also cause employers to settle for lesser amounts rather than risking exposure to unlimited damages.

Employment Non-Discrimination Act

Currently, federal employment discrimination law does not prohibit employment discrimination on the basis of sexual orientation, although some state laws and local ordinances prohibit that kind of employment discrimination.

The proposed Employment Non-Discrimination Act would prohibit employment discrimination on the basis of "actual or perceived sexual orientation" of an individual or against those people with whom the individual associates. If enacted, the Employment Non-Discrimination Act would add "sexual orientation" to the list of categories that are already legally protected from employment discrimination under federal law, including race, sex, age, national origin, religion, and disability.

The proposal, however, would not require an employer to offer domestic partner benefits to its employees.

Whether the Employment Non-Discrimination Act will be enacted in 2009 is unknown. It was introduced in the House of Representatives, but a companion bill was not introduced in the Senate.

Employee Protection Laws

There are several proposals that would provide employees with legal protections against their employers.

Arbitration Fairness Act

Currently, employers, under federal law, can generally require employees to agree, as a condition of employment, to arbitrate, rather than litigate, most employment law claims. The arbitration agreement may be included in an employment application. An employee may not have any choice about whether to agree to or to reject arbitration because the employer requires it as a condition of employment. The employer's ability to impose that condition of employment on an employee without any negotiations has resulted in the reaction that is contained in the proposed Arbitration Fairness Act.

This proposal would prohibit any "pre-dispute arbitration agreement" about any "employment dispute." It would permit, however, an employer and an employee to agree to arbitrate an employment dispute after the dispute has arisen.

The proposed Arbitration Fairness Act would have no effect on any arbitration provision in a collective bargaining agreement between an employer and a union.

Eliminating an employer's ability to compel an employee to arbitrate, rather than litigate, an employment dispute would increase both the risk and the expense, including potential damages, of employment litigation for employers. Employees and lawyers who represent employees in litigation would be the beneficiaries of this proposal. Enactment of this proposal would result in the filing of more employment lawsuits against employers.

Whether the Arbitration Fairness Act will be enacted into law in 2009 is unknown.

Expansion of the Workers Adjustment and Retraining Notification Act (WARN)

Under the WARN Act at this time, an employer must give employees 60 days' advance notice of a "mass layoff" or a "plant closing." A "mass layoff" is currently defined as 1/3rd of the workforce, but at least 50 employees.

In the House of Representatives, there was a proposal to expand the WARN Act. The proposed expansions would consist of the following:

- Increase the advance notice requirement from 60 to 90 days
- Expand the definition of "mass layoff" so that a layoff of only 50 employees would qualify as a "mass layoff"
- Double the penalty for insufficient advance notice from back pay to double back pay for each day less than the full 90 days' advance notice

Whether the WARN Act will be expanded in 2009 is unknown. The House proposal was attached to another bill, but was not passed in part due to the threat of a veto by President Bush. There was no companion proposal in the Senate so the level of support in the Senate has not publicly disclosed. The existence of enough support to pass a WARN expansion in both the House and the Senate may or may not be present in 2009. Also, as a Senator, Barack Obama did not state a position on this issue.

Conclusion

The current Secretary of Labor, Elaine Chao, recently challenged the Congressional trend toward the "Europeanization of the American workforce." She cited a European system in which the "government would dictate to employers what leave policies they must offer, who they can promote, which benefits their health insurance plans must offer, what kinds of investments can be included in their pension plans and how they can even handle the most basic business decisions, and this is the short list."

Ms. Chao asked and answered the following rhetorical question: "Does anyone really think it's really, truly a good idea to make the federal government the human resources manager, the union representative, the plant manager for the entire country? I don't think so."

But the election of a new President and the possibility of an effectively filibuster-proof Senate, depending on the issue, may result in labor and employment law changes that will provide a markedly different answer to Secretary Chao's rhetorical question. For labor and employment laws, 2009 and 2010 could bring momentous and substantial changes that may accelerate the trend to a European-style of governmental intervention in the employer-employee relationship. One of the key obstacles to the enactment of substantial revisions of those laws or the implementation of new laws may consist of the ability or the inability of the Republican minority in the Senate to block these legislative proposals, if pursued by the Democratic majorities in the House of Representatives and the Senate and also supported by the Obama Administration, by the use of filibusters.

Labor and employment law changes could include the following consequences for employers:

- The imposition of new and onerous obligations, as proposed in the EFCA, the Healthy Families Act, and the Working Families Flexibility Act
- The exposure of all non-unionized employers, especially including small employers, to the risk of unionization based on signed union authorization cards under the EFCA, as proposed
- An increase in potential employment law claims and potential damages, as proposed in the Lilly Ledbetter Fair Pay Act, the Paycheck Fairness Act, the Equality of Remedies Act, and the Non-Discrimination in Employment Act

For employers, the potential labor and employment changes that appear to be coming over the horizon may be unwelcome, cumbersome, disruptive, expensive, and fraught with increased risks and monetary exposures. The impact of these changes on economic growth, productivity and competitiveness, and job creation will remain to be determined.

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