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All you need to know to keep up with the proposed changes by the Obama Administration

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Labor & Employment Update

Obama Election to Lead to Labor and Employment Law Changes

By Thomas R. Bagby

With the election of Barack Obama and a Democratic majority in both the House and Senate, employers must prepare immediately for potential and already enacted changes in labor and employment laws. The following are legislative items that will be on the Obama and Congress's agendas for 2009 (the checked items have already been signed into law by President Obama):

The Employee Free Choice Act:

1. Under long standing federal law, employees decide whether they wish to be represented by a union through an election conducted by secret ballot. The democratic process starts when the union solicits authorization cards from employees. If the union convinces 30% of the employees to sign authorization cards, the National Labor Relations Board ("NLRB") will oversee and conduct an election by secret ballot.
2. If the union convinces 50% + 1 of the employees to sign authorization cards, the union can ask the employer to recognize the union voluntarily as the exclusive bargaining representative for the unit. The employer is not required to accept the union voluntarily, however, and can insist upon an election by secret ballot, which employers nearly always do.
3. The Employee Free Choice Act ("EFCA") would overturn this long-established process. Under the EFCA, the NLRB would be required to certify a union as bargaining representative where the union has signed authorization cards from 50% + 1 of employees. Thus, employees would lose their right to a secret ballot election.

4. But loss of the democratic choice of an election is only one aspect of the proposed legislation. The EFCA also would require management to commence bargaining after receiving a written request to do so from a newly elected union. If the parties do not reach an agreement within 90 days after bargaining commences, the Federal Mediation and Conciliation Service ("FMCS") will be called in from Washington and will attempt to mediate for 30 days. If an agreement is not reached after 30 days of mediation, the FMCS will refer the "negotiations" to an arbitration board. The arbitration board will write the parties' labor agreement, including the setting of wages, benefits and other terms and conditions of employment, and its decision will be binding on the parties for two years.

5. The EFCA also has stiffer penalties for employers (but not unions) engaging in unfair labor practices, but its most significant features are that it is contrary to sixty years of labor relations law and would effectively remove the right of employees to have their fate established by a secret ballot election.



The Lilly Ledbetter Fair Pay Act:

Overtaken the Supreme court's 2007 Ledbetter v. Goodyear Tire and Rubber Company decision. Under the legislation, each paycheck an employee receives restarts the statute of limitations for purposes of bringing a wage discrimination claim, leaving employers exposed potentially to pay claims for an employee's entire career.

The Employment Non-Discrimination Act:

Prohibits discrimination based on an individual's sexual orientation. At present, federal law does not prohibit discrimination based on sexual orientation, although same sex harassment claims currently are actionable.

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

Under this bill, an employer could not classify an employee as a "supervisor" unless the employee engages in managerial duties "for a majority of the individual's worktime." The legislation also would revise the NLRA definition of supervisor by eliminating "assign" and "responsibility to direct" from the law's list of accepted supervisory duties. By narrowing the definition of supervisor, the RESPECT Act will reduce the number of employees who qualify as supervisors under the NLRA.

The Healthy Families Act:

Requires employers employing fifteen (15) or more employees to provide seven (7) days of paid sick leave per year for employees to care for themselves or an ill family member.

The Family Leave Insurance Act:

Would replace the current unpaid leave protections under the Family and Medical Leave Act with paid leave.


The Civil Rights Act of 2008 (presumably to be reintroduced in 2009):

The Civil Rights Act of 2008 would, among other things:

1. Eliminate Eleventh Amendment immunity shielding states from individual damages under the Age Discrimination in Employment Act and the Fair Labor Standards Act, thereby overturning Supreme Court decisions affording such immunity to states.
2. Eliminate Eleventh Amendment immunity shielding states from individual damages for violations of the Uniformed Services Employment and Reemployment Rights Act.

3. Give individuals a private right of action to sue federally funded programs for activities that have an allegedly discriminatory impact under Title VI of the Civil Rights Act of 1964, Title IX of the 1972 Education Amendments, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.
4. Clarify that disparate impact claims brought under the ADEA are to be analyzed under the same analysis as such claims brought under Title VII. In a 2005 ruling, the Supreme Court held that a more employer friendly defense was available to combat disparate impact claims under the ADEA.
5. Eliminate the current caps on damages under the Americans with Disabilities Act and Title VII.
6. Amend the Equal Pay Act by making it more difficult for employers to rely on the statutory defense that a pay differential is based on a "factor other than sex." This provision also would require employers to show that such a factor is "job-related" or that it "furthers a legitimate business purpose" and that the factor was "actually applied and used reasonably in light of the asserted justification."
7. Make compensatory and punitive damages available under the Equal Pay Act.
8. Amend the Federal Arbitration Act to prohibit pre-dispute agreements requiring mandatory arbitration of statutory claims, thereby overturning an entire body of Supreme Court and lower court precedent recognizing the validity of certain agreements to arbitrate claims brought under Title VII, the ADA, the FLSA, USERRA, the FMLA, and the ADEA.
9. Authorize the National Labor Relations Board to award back pay to undocumented workers fired for their union activities. This provision would overturn a 2002 Supreme Court ruling to the contrary.

Pro-Labor Executive Orders:

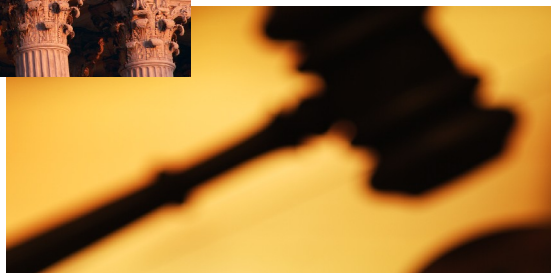
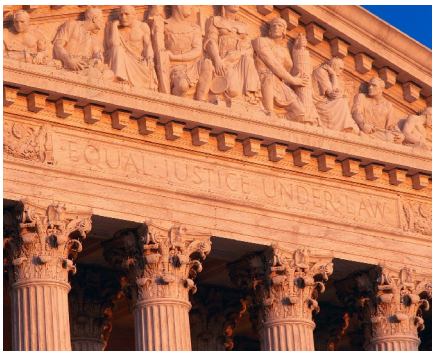
-  On January 30, 2009 President Obama signed three Executive Orders aimed at reversing Bush-era policies that were considered to be anti-union. The Executive Orders:
1. Prevent federal government contractors from being reimbursed for expenses related to efforts to influence employees as to whether to unionize or engage in col-

lective bargaining;

2. Require successor federal government service contractors and their subcontractors to offer jobs to incumbent employees when a contract is awarded to a different contractor; and
3. Require federal government contractors to post notices informing employees of their rights to unionize under federal labor laws and revoking a Bush Executive Order which required federal government contractors to post a notice informing employees of their right not to join a union and not to pay agency fees for nonrepresentational union expenditures.

With the change in administration, employers also should anticipate increased enforcement actions by federal government agencies such as the U.S. Department of Labor, the National Labor Relations Board, and the Equal Employment Opportunity Commission. President Obama has nominated Rep. Hilda Solis, a strong union supporter, for Secretary of Labor and has appointed Wilma Liebman, former legal counsel to the International Brotherhood of Teamsters, Chairman of the National Labor Relations Board.

If you have questions regarding this or any other Labor & Employment law issue, please call any of our attorneys.



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