

A New Political Environment for Labor and Employment Issues

November 5, 2008

The election of Barack Obama as President and the Democratic gains in Congress mean that employers face a new legislative, regulatory, and enforcement environment on labor and employment issues. Employers should use the transition period to the Obama administration to examine those issues that are most important in their workplaces and to develop strategies to prepare for this change.

Outsourcing and Globalization

Jobs were a central issue in the election and efforts to curb outsourcing could gain ground under a new administration. The Patriot Employers Act, co-sponsored by Senator Obama in the 110th Congress, would provide a tax credit to employers who increase the number of full-time workers in the United States relative to the number of full-time workers outside the United States. Other legislative proposals include requiring businesses to provide workers with advance notice of impending layoffs and penalizing employers that fail to do so, and extending healthcare and COBRA coverage in certain layoff situations. These proposals passed the House of Representatives in the 110th Congress as part of the Trade and Globalization Act. Employers should anticipate other regulatory efforts to curb an employer's ability to outsource jobs outside the United States.

Independent Contractors

A proposed amendment to the Fair Labor Standards Act (FLSA) would result in increased penalties for employers that misclassify workers as independent contractors. The Employee Misclassification Prevention Act would require employers to inform their workers of their classification as employees or independent contractors, and of their right to challenge their classification. Willful or repeated misclassifications could result in fines of up to \$10,000 per violation. Both the Department of Labor and the Internal Revenue Service are likely to become significantly more active in examining independent contractor arrangements.

Union Organizing

Reinvigorating the labor movement appears to be a high priority for the new administration. The Employee Free Choice Act, which passed the House in March 2007 and is expected to be a top priority for the 111th Congress, would dramatically change both the process through which unions become certified as the exclusive bargaining representatives of employees as well as the negotiation of the initial postcertification collective bargaining agreement. Under the legislation, certification would be based on a showing of majority support through authorization cards instead of on the results of secret-ballot

elections administered by the National Labor Relations Board. Employers would be required to commence bargaining with a union within 10 days after receiving a written request to bargain following the union's certification. If the parties do not reach an agreement within 90 days, either party may request mediation, and if the parties still cannot agree on a contract after another 30 days, the dispute will be referred to an arbitration panel whose decision—an actual collective bargaining agreement—would be binding on the parties for two years. During the campaign, Barack Obama indicated strong support for the Employee Free Choice Act.

Employers also can anticipate that new appointments to the National Labor Relations Board will result in new Board precedent on topics such as employee use of company email systems to conduct union activities, joint employer status, the ability to file timely decertification petitions, and the right of nonunion employees to have representation during disciplinary interviews.

Supervisory Status

Federal legislation could narrow the definition of a “supervisor” as set forth in Section 2(11) of the National Labor Relations Act so that many individuals now classified as supervisors will become employees, and eligible to unionize. Under the Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers (the RESPECT Act), an individual must spend the majority of his or her time engaged in supervisory activities in order to be classified as a supervisor.

Project Labor Agreements

Early in his first term, President Bush issued an executive order banning project labor agreements for federally financed construction projects. The Obama administration will likely overturn the executive order, permitting expanded use of project labor agreements at a time when federal efforts to rebuild the nation's infrastructure are likely to increase dramatically.

Title VII Claims

The statute of limitations for claims of pay discrimination may be expanded under a new Congress and new administration. The Ledbetter Fair Pay Act was introduced in the 110th Congress, and would have overturned a Supreme Court decision that limited the filing period for pay discrimination claims. Other proposals seek to extend Title VII coverage to include acts of discrimination based on sexual orientation. The Employment Non-Discrimination Act has passed the House of Representatives only, and will likely be reintroduced in the 111th Congress.

Arbitration

The Arbitration Fairness Act would prohibit companies from using predispute arbitration agreements that require arbitration of employment, consumer, or franchise disputes. It would also invalidate predispute arbitration agreements for conflicts “arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.” The legislation would not affect arbitration provisions in collective bargaining agreements.

Government Contracting

The Honest Leadership and Accountability in Contracting Act would “blacklist” companies from future government contracts for exhibiting “a pattern of failing to comply with” labor and employment laws, along with a host of other laws, such as immigration, environmental, and tax laws. Employers that

contract with the government can also anticipate more aggressive enforcement by the Office of Federal Contract Compliance Programs (OFCCP).

Pay Discrimination

Companies should expect increased interest in government efforts to eradicate unequal pay based on gender. The Paycheck Fairness Act, which passed the House in 2008, requires that employers justify unequal pay and bear the burden of proving that pay decisions are job related and consistent with a business necessity. The legislation prohibits employers from retaliating against employees who share salary information with their co-workers and places gender-based discrimination on equal footing with other forms of wage discrimination, such as those based on race, disability, or age, by allowing women to sue for compensatory and punitive damages.

Executive Compensation

Executive compensation has received increased attention in the current unstable financial climate. Both the House and the Senate in the 110th Congress considered proposals addressing executive pay. The version passed in the House would require public companies to give their shareholders an advisory vote on executive compensation. A similar Senate version, the Corporate Executive Compensation Accountability and Transparency Act, was referred to the Banking Committee, but further action has not been taken. The recent financial bailout legislation also set limits on executive pay.

Pension Protection

Pension protection is likely to be a priority for the Obama administration and the 111th Congress, particularly in the wake of the recent market fallout. Defined benefit plan values have declined dramatically, which could lead to funding relief for the 2008 period, an extension of the time limit for lump-sum distributions, and a reduction on mandatory 2009 contributions.

401(k) Fiduciary Liabilities

Plan fiduciaries are likely to face increased responsibility for investment decisions. Other retirement security proposals may include increased participant contribution limits, mandatory participation in a 401(k) plan for those who do not have defined benefit plans, and an expansion of permissible hardship early 401(k) withdrawals.

Upcoming Webcast

We hope you will join us in early 2009 for a webcast presentation examining in greater detail the possible legislative and regulatory changes that may follow yesterday's national election.

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