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Employment Regulation To Watch In 2012

By **Ben James**

Law360, New York (January 01, 2012, 12:00 AM ET) -- Attorneys don't expect significant labor and employment legislation to be passed by Congress in 2012, but they are keeping a close eye on National Labor Relations Board rules poised to go into effect next year, as well as rulemaking initiatives from other federal agencies that could change the game for employers.

The partisan atmosphere on Capitol Hill, combined with 2012 being an election year, make the prospects for meaningful legislative changes to labor and employment law slim at best, said Morgan Lewis & Bockius LLP partner and former Deputy Secretary of Labor Howard Radzely.

“There's not a significant likelihood that something is really going to pass that would cause me to alter my thinking,” he said.

The coming year could see congressional hearings scrutinizing regulatory activity and movement on bills such as the Workplace Democracy and Fairness Act, which aims to block the NLRB's push to streamline union elections and which was passed Nov. 30 by the U.S. House of Representatives, lawyers said. But such legislation making its way through the Senate and being signed into law by President Barack Obama is far from likely.

“I think most observers would say, in 2012, we shouldn't expect any major or even minor changes in employment laws,” said Reed Smith LLP partner John DiNome.

But there are a variety of regulatory measures that could have a noteworthy impact in the coming year on issues such as union organization, age discrimination claims and disclosure requirements under the Labor-Management Reporting and Disclosure Act. Here's a look at some of the initiatives labor and employment attorneys will be watching in 2012.

NLRB Union Election Rule

The NLRB's push to expedite union elections was probably the regulatory measure being most closely watched by labor and employment lawyers as 2011 drew to a close, and will continue to be at the forefront in 2012, when the rule takes effect.

“Certainly, the drama at the NLRB is captivating our attention,” said Stephen Sheinfeld, head of Winston & Strawn LLP's labor and employment relations practice group in New York.

In June, the NLRB proposed a rule containing a wide range of amendments that would streamline union elections, drawing fire from critics who claimed the board was trying to give organized labor a leg up by limiting the timeframe in which employers could communicate with workers on unionization.

That proposal drew some 65,000 public comments, and the sole Republican board member, Brian Hayes, considered resigning to block the rule.

On Nov. 30, facing the possibility that the board would lose its quorum when member Craig Becker's term expires at year's end, the NLRB voted along party lines to draw up a final rule that would implement a narrower version of that proposal. On December 21, the NLRB adopted the final rule and said it would take effect on April 30.

That doesn't give employers a lot of time to adapt to the new procedures, said Akin Gump Strauss Hauer & Feld LLP's Richard Appel.

"The challenge of conducting an effective campaign in a compressed time frame will require companies to consider new and creative techniques for delivering their message. Plus they will have to learn to navigate the significant changes in the timing and manner of how legal issues will be resolved and to factor in how this will impact the election," Appel noted.

The election rule would put off any employer challenges to the scope of a proposed bargaining unit until after a union election. That, with the NLRB's August decision in the Specialty Healthcare and Rehabilitation Center of Mobile case, makes fighting bargaining units a tough proposition for employers, said Vinson & Elkins LLP's Tom Wilson.

The Specialty Healthcare ruling set a heightened standard for challenging narrow bargaining units, which can be easier for unions to organize. So, not only is the standard tougher, but employers may have to bargain with the union while their challenge is pending, Wilson said.

Challenges over whether employers are supervisors — and thus are not eligible to vote in union elections — are also deferred until after the election, leaving open the prospect of ineligible voters casting ballots.

Uncertainty about an employee's supervisory status puts employers in a bind, Wilson said, pointing out that employers can communicate their message opposing unionization through supervisors, while such communications with nonsupervisory employees are forbidden.

If an employer communicates with an employee who is ultimately deemed not to be a supervisor, that can invalidate the election, Wilson said.

“It really puts the employer in a difficult situation and calls for judgments that may result in the election being overturned,” he said.

NLRB Notice Posting Rule

The NLRB issued a final rule in August requiring employers to post notices informing employees of their rights under the National Labor Relations Act. The notice posting rule, which drew legal challenges in Washington and South Carolina federal courts, was initially slated to take effect Nov. 14, but has been delayed twice. The effective date is now set for April 30.

The business group plaintiffs say the rule goes beyond the bounds of the NLRB's authority and tramples their First Amendment rights. The rule requires all employers subject to the National Labor Relations Act — roughly 6 million — to post a notice with selective information about employee rights that favor or promote unionization, according to the National Association of Manufacturers, a plaintiff in the Washington litigation.

Assuming that the election and posting rules survive court challenges, lawmakers will probably look to restrict funding for enforcing the measures in the coming year, said Ogletree Deakins Nash Smoak & Stewart PC's Harold Coxson. Ogletree Deakins represents the U.S. Chamber of Commerce and the South Carolina Chamber of Commerce, the plaintiffs in the South Carolina case.

Regardless of how the court cases over the rule play out, appeals are a virtual certainty, Coxson added.

“The battle is a long way from over, and I think it will reverberate deep into 2012,” he said.

EEOC Rule on 'Reasonable Factors Other Than Age' Under the ADEA

On Nov. 16, the Equal Employment Opportunity Commission voted 3-2 to send a draft final rule clarifying the “reasonable factors other than age” defense standard under the Age Discrimination in Employment Act, to the Office of Management and Budget for review.

The rule aims to bring EEOC regulations in line with U.S. Supreme Court rulings that said plaintiffs in ADEA cases could rely on a disparate impact theory, and that the business necessity test used to justify employment practices in Title VII suits didn't apply when determining RFOA in age cases.

The business necessity test is an onerous burden for employers to meet, and it appears that the agency is trying to bring the RFOA test as close to the business necessity test as possible while staying within the boundaries of Supreme Court precedent, according to former EEOC general counsel Ron Cooper, now with Steptoe & Johnson LLP.

The EEOC is essentially erecting barriers for employers using the RFOA defense for disparate impact claims in age cases, Cooper said, adding that the rule will likely "create a more hospitable environment for these claims in court."

“It will be a troublesome source of lots of litigation, I'm sure,” Cooper said. “The employer has the burden of proof on the defense, but what exactly they have to show is where the debate is, and probably will be.”

In 2005, the Supreme Court ruled in Smith v. City of Jackson that the ADEA permitted older workers to bring disparate impact claims over their employers' policies, but did not expand on what the RFOA standard required. In 2008, in Meacham v. Knolls Atomic Power Laboratory, the high court clarified that the business necessity test had no application when determining RFOA.

It's not certain exactly what the draft final rule will look like yet, but it is expected to be along the lines of the Notice of Proposed Rulemaking the EEOC published on the definition of RFOA under the ADEA in February 2010, Cooper added.

The NPRM said an individualized approach was warranted when ascertaining whether an employment practice is grounded in reasonable factors other than age, and proposed a standard that was lower than Title VII's business necessity test but higher than the Equal Pay Act's “any other factor” test.

“It is stretching the law beyond where it is now, and that's unfortunate,” Proskauer Rose LLP's Larry Lorber said of the draft final rule, adding that it will likely translate to an uptick in litigation.

If the OMB approves the draft final rule, the EEOC can then approve it and publish it in final form. If the OMB wants modifications, that could drag out the process indefinitely, Cooper said.

But it's probable that a final rule will be issued in the first quarter of 2012, he said.

U.S. Department of Labor's Persuader Activity Rule

In June, the DOL proposed a rule narrowing the advice exemption to the Labor-Management Reporting and Disclosure Act's reporting requirements, to combat what the DOL calls "significant underreporting" of employer and consultant persuader agreements.

By shrinking that exemption, the rule would broaden those disclosure requirements to cover lawyers for the first time, making the proposal “a huge ticket item” for law firms, according to Lorber.

Under the LMRDA, employers and labor relations consultants or law firms representing employers must file disclosure reports when the consultant is retained to persuade employees with respect to union organizing or collective bargaining.

One of the forms the consultant has to file — Form LM-21 — calls on the filer to report receipts for all labor relations advice or services, regardless of whether they constitute persuader activity.

The proposed rule may be objectionable for lawyers, but it's even more objectionable for small businesses that don't have in-house counsel, which rely on expert advice to deal with union organizing campaigns and steer clear of unfair labor practices, Coxson said. Such businesses could see access to this advice impeded, he added.

The problem is that the disclosure requirements under the proposed regulations would go way beyond mere persuader activities, Coxson said, pointing out that reporting obligations would be triggered by things like reviewing an employer's speech or written materials for legal compliance during union organizing, collective bargaining and strikes. There are criminal penalties for violating the LMRDA, he noted.

“They would require financial reporting and disclosure of privileged client information as to all of the labor relations advice given to any client, even if it had nothing to do with persuader activity, and no law firm, and no company, is going to want that,” Coxson said.

In September, the American Bar Association urged the DOL to reconsider the rule and said the change would force lawyers to disclose confidential client information.

“I think that has the potential for wreaking havoc on the current labor relations environment and really undermining, to a great extent, what an employer is able to do in terms of communicating with its employees during a unionizing campaign,” Appel said of the proposal. “It's something that every management labor lawyer in the country, and every company, has to be very concerned about. “

Wilson said that a final rule on the persuader regulations is expected in 2012 and that the proposal appeared to be flying under the business community's radar. He noted that the NLRB election rule drew about 65,000 public comments, while the persuader rule had drawn about 6,000.

“It is a very unfortunate development and one that I think is going to have a more significant impact on employers than they realize,” Wilson said.

OSHA's I2P2 Rule

The Occupational Safety and Health Administration's I2P2 rule has yet to be proposed, but is at the forefront of OSHA's agenda, said Fisher & Phillips LLP's Ed Foulke, who served as the head of OSHA from 2006 to 2008 after being tapped by President George W. Bush.

“They’ve stated clearly that this is their top priority,” Foulke said. “I think it will be hard to get there, but I think they’ll push to get it done.”

If OSHA focuses its efforts on the rule and speeds up the process, finalization isn't out of reach, Foulke said, noting that OSHA issued final regulations on ergonomics standards in the waning days of the Clinton administration, and there could be a similar push to get the I2P2 rule out before the 2012 presidential election.

If finalized, the rule is expected to put the onus on companies to locate and address workplace health and safety hazards. One criticism of OSHA is that it has not updated its permissible exposure limits — which deal with how much exposure to chemicals, or things like noise, a worker can have — and implementing the I2P2 rule could absolve OSHA of the need to do that, by shifting the burden for identifying hazards onto employers, Foulke said.

An I2P2 rule could be very expensive, both in terms of the research employers would have to do and the implementation of safeguards to deal with hazards, according to Foulke.

It would impact small and mid-size companies, which account for most U.S. businesses, much more dramatically than larger, more sophisticated companies, which may already be doing something similar to what the rule would call for, Foulke said.

State Laws on Employee Credit Checks

Starting in the new year, California will join what has become a growing list of states in which employers' ability to utilize credit checks for employment purposes is curtailed. The new California law, one of 22 signed by Gov. Jerry Brown in October, says employers can obtain employees' or applicants' credit reports for only certain types of jobs, such as law enforcement, and positions that involve regular access to $10,000 or more, or confidential or proprietary data.

In October, a law restricting the use of credit reports by Connecticut employers took effect, and in April, Maryland's governor signed off on the Job Applicant Fairness Act, which limits employers' use of credit reports and credit history for workers and applicants. Illinois, Oregon, Washington and Hawaii also have laws limiting employers' use of credit information.

The trend toward states regulating the use of credit checks in employment is one employers ought to be aware of, Sheinfeld said. The EEOC has expressed concern about whether the use of credit histories as a selection criterion improperly excludes certain applicants and held a public hearing on the issue in October 2010, but lawyers don't expect federal legislation to tackle the topic any time soon.

“They're able to accomplish what's not not going to happen on the federal level,” Sheinfeld said of the states.

The EEOC's interest could manifest itself in enforcement actions or regulatory guidance, and employers ought to be aware that the credit history issue is on the agency's radar, DiNome said.

But the bottom line is, with respect to the use of credit histories as well as other employment issues, the states have more potential to make legislative moves in the coming year.

“Lawyers would be well-advised that there could be more activity at the state level, given the paralysis of Congress right now," DiNome said.

Radzely said employment law changes at the state level were much more likely than changes at the federal level and added that states had been getting more aggressive.

“State law is much more of an issue today than it ever has been,” Radzely said.

--Editing by Lindsay Naylor.