

The Coming Storm: Sweeping Changes Ahead in Labor, Employment, and Employee Benefits Law

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Meet the Key Players: President Obama

- Outspoken supporter of labor and employees' rights
- As Senator, Obama sponsored or co-sponsored several employee and labor friendly bills
- As Illinois state Senator, Obama introduced a bill to preserve the federal overtime exemptions as they existed prior to the 2004 federal amendments
- Organized labor contributed over \$200 million to Obama campaign and organized a massive get-out-the vote effort
- Mission to increase workforce flexibility and work/family balance



Meet the Key Players: Judicial Posts

- Obama has not made significant progress infusing federal courts with his judicial picks
- Obama has stated that he wants to appoint “empathetic judges”
- Only 3 of his 23 nominations have received confirmation
 - Bush sent 95 names to the Senate in the same period that Obama has forwarded 23
- Supreme Court
 - Justice Sonia Sotomayor
 - As a U.S. District Court Judge, was involved in deciding at least 14 officially reported or published labor and employment cases of a substantive nature. Her record in employment cases seems to indicate that she is a jurist who sides with employees some of the time, and with employers some of the time



Meet the Key Players: Secretary of Labor, Hilda Solis

- Pro-union record:
 - Born to immigrant parents from Nicaragua and Mexico, both of whom were unionized employees
 - Vocal supporter of the Employee Free Choice Act
 - Has incredibly strong union support
- Solis declined to discuss specific policy issues during confirmation hearings, including EFCA
- Department of Labor has announced plans to:
 - Introduce job training program
 - Improve safety and fairness in the workplace
 - Protect pensions and retirement savings
 - Increase enforcement efforts



Meet the Key Players: Deputy Secretary of Labor, Seth Harris

- Was Counselor to Secretary of Labor, Alexis Herman, during the Clinton Administration
- Since 2000, Harris has been professor and Director of the Labor & Employment Law Program at New York Law School
 - His scholarship focuses on ADA discrimination issues, including accommodation
- Served as Chair of Obama for America's Labor, Employment and Workplace Policy Committee and Co-Chair of its Disability Policy Committee



Meet the Key Players: Equal Employment Opportunity Commission

- Stuart Ishimaru is Acting Chair
 - Member of EEOC since 2003
 - Senior Democratic member
- What to watch for from the EEOC:
 - Expansion of recordkeeping obligations
 - Significant impact on Internet job applicants
 - Adoption of employee-friendly policies and litigation positions
 - Discrimination based on caregiver status
 - Consideration of conviction records
 - Use of credit checks
 - Rulemaking
 - In its rulemaking capacity, the EEOC can impact how an employer must implement new employment laws.
 - Expansion of systemic initiative
 - If Congress expands EEOC resources as part of its overall agenda to expand and enforce anti-discrimination employment laws, there will likely be an increased emphasis on the systemic initiative looking at patterns/practices/policies having a broad impact on an industry/profession/company



Meet the Key Players: National Labor Relations Board Chairperson, Wilma Liebman

- Commentators anticipate NLRB will dramatically shift under her watch
- She is generally viewed as very pro-union
- Clinton appointee, on NLRB since 2007
- Work history:
 - She has worked as a NLRB staff attorney
 - She has spent 13 years on the legal staff of two unions
 - The International Brotherhood of Teamsters
 - The International Union of Bricklayers and Allied Craftsmen



NLRB Nominees

- **Craig Becker**
 - Currently the Associate General Counsel of the Service Employees International Union and the American Federation of Labor & Congress of Industrial Organizations
 - In a 1992 Minnesota Law Review article, written when he was a UCLA professor, Mr. Becker argued for rewriting current union-election rules in favor of labor, suggesting the NLRB could do this without a vote of Congress
 - Mr. Becker is the most controversial of the nominees
- **Mark Pearce**
 - Currently a partner in the Buffalo, New York labor-side law firm of Creighton, Pearce, Johnsen & Giroux
- **Brian Hayes**
 - Currently Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor and Pensions
 - In the private sector, Mr. Hayes mainly represented management clients in labor and employment matters
- On October 21, the Senate Health, Education, Labor and Pensions Committee approved all three nominees
- If the nominees are confirmed, the Obama Board will consist of three Democratic Members and two Republicans



Additional Changes in the NLRB

- NLRB General Counsel Ronald Meisburg's term expires August 2010
 - The General Counsel acts as a gatekeeper for the cases heard by the Board and could act to somewhat limit the agenda of those who seek to reverse the state of current Board law
 - However, Meisburg's successor will be appointed by Obama, and once confirmed, will be in a position to accelerate the process of changing Bush NLRB precedent



What To Watch For Under The “New” NLRB

- Overturning Bush NLRB precedent
 - Register-Guard decision which said that the e-mail system is employer property from which union organizing activities may be excluded
 - Oakwood Health Care, Inc. decision which broadened the definition of “supervisor” to include supervisory duties of workers to “assign” and “responsibility to direct”
 - Dana Corporation decision which modified “card-check” provisions to permit decertification of a rival union petition within 45 days of recognition
- Expect the NLRB to resolve the split regarding the lawfulness of unions’ stationary bannerings as secondary pressure aimed at neutral employers



Legislative Priorities: Executive Orders and Regulations

- Executive Orders and regulations are likely to have a more immediate impact than new legislation
 - Obama has issued four pro-labor orders dealing with federal contractors
 1. Economy in Government Contracting
 2. Notification of Employee Rights Under Federal Labor Laws
 3. Non-displacement of Qualified Workers Under Service Contracts
 4. Use of Project Labor Agreements for Federal Construction Projects



Legislative Priorities: Employee Free Choice Act

- Status: First version introduced in 2003
 - Previous versions failed to emerge from Committee in prior Congresses
 - Introduced in February 2007
 - The House passed the bill in March 2007, but was blocked in the Senate when supporters lost a cloture vote
 - Introduced in both House and Senate on March 10, 2009
 - Current Status: in flux but far from forgotten



Legislative Priorities: Employee Free Choice Act

- Would:
 1. Require the NLRB to certify a union as exclusive bargaining representative through submission of authorization cards signed by a majority of employees, without the benefit of a government-supervised secret ballot election, if requested by the organizing union
 - Increase the potential for coercion or intimidation by union organizers
 2. Require employers to submit to binding arbitration if a first contract was not reached with the new union after 90 days of bargaining and 30 days of mediation
 3. Impose new, increased penalties for employers
 - Treble back pay for unlawful terminations during organizing



Legislative Priorities: Employee Free Choice Act

- The EFCA has received considerable press and there is a wide divergence of opinions and interest
 - If passed in current form, would be a dramatic change to the NLRA
 - If passed, expected to drastically increase union organizing and unionization rates
- Senator Obama was an original co-sponsor and has stated he will sign the EFCA when it comes across his desk
 - “If a majority of workers want a union, they should get a union. And that is why I intend to sign the [EFCA] when it lands on my desk. It’s that simple”



Legislative Priorities: Lilly Ledbetter Fair Pay Act

- Status: Enacted January 29, 2009, in response to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)
- In *Ledbetter*, the Supreme Court held that the statute of limitations for presenting an equal-pay lawsuit begins on the date the compensation decision was made, not the date of the most recent paycheck
- Under the Act, the 180-day statute of limitations for filing a lawsuit regarding pay discrimination resets with each new discriminatory paycheck regardless of when the discriminatory compensation decision occurred
- Is retroactive and applies "to all claims of discrimination...that are pending on or after" May 28, 2007



Legislative Priorities: Lilly Ledbetter Fair Pay Act

- Applies to all claims under Title VII, the ADA, the Rehabilitation Act and the ADEA
- Theoretically, allows employees to bring a lawsuit challenging an event that happened 10, 20 or even 30 years in the past, so long as the employee can establish the event continues to affect them
- Employee must still file an administrative charge within 180/300 day window
- Remedy: back pay for two years prior to charge, in addition to other remedies



Legislative Priorities: Lilly Ledbetter Fair Pay Act

- *AT&T v. Hulteen*, 129 S. Ct. 1962 (2009).
- *Onyiah v. St. Cloud State Univ.*, 2009 U.S. Dist. LEXIS 8533 (D. Minn. Aug. 27, 2009).
- *Bush v. Orange County Corr. Dep't*, 597 F. Supp. 2d 1293 (M.D. Fla. 2009).
- *Vuong v. New York Life Ins. Co.*, 2009 U.S. Dist. LEXIS 9320 (S.D.N.Y. Feb. 6, 2009).



Lilly Ledbetter Fair Pay Act: What It Means for Employers

- Impact on employers:
 - May resurrect claims for decisions made long ago, which may be difficult to defend
 - Makes it more likely that individuals will link termination and other adverse events with pay discrimination claims that date back several years
- What employers can/should do:
 - Audit claims activity and be prepared for possible revival of claims filed and dismissed since May 2007
 - Justify and document all compensation policies and decisions
 - Ensure system to capture/preserve documentation to memorialize basis for compensation and promotion decision



Legislative Priorities: Paycheck Fairness Act

- Status: Most recent version was passed in the House in January 2009
- Was received in the Senate in January 2009, but has not gone to a vote
- Would amend the Fair Labor Standards Act “to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex”



Paycheck Fairness Act: What It Means for Employers

- In effect, would require employers trying to rebut presumption of pay discrimination to establish that the factor responsible for the pay differential is based on something other than sex, and also that the factor is “job related” and serves a “business necessity”
 - Even if an employer can rebut a *prima facie* case, would still allow employees to prevail if they can show there is an “alternative employment practice” that would serve the same purpose without producing the differential
- Would make it more difficult for employers to defend pay discrimination claims
- In addition to current liability for double back pay, would create unlimited punitive damage awards
- Would adjust rules for class actions alleging discriminatory pay differentials based on gender (opt out, rather than opt in)



Legislative Priorities: Employment Non-Discrimination Act 2009

- Status: Introduced in the House in June and the Senate in August
- If passed as introduced, would prohibit discrimination against any employee with respect to his or her terms or conditions of employment based upon actual or perceived sexual orientation or gender identity
- In other words, would extend federal anti-discrimination protection to gay, lesbian, bisexual, and transgender employees
- If passed as introduced, would allow only disparate treatment claims and prohibit related retaliation



Legislative Priorities: Working Families Flexibility Act

- Status: Introduced in December 2007, with then-Senator Obama as co-sponsor; reintroduced March 3, 2009
- Current law leaves it up to employers to decide whether to offer flexible work arrangements and, if offered, what kinds



Legislative Priorities: Working Families Flexibility Act

- If passed as introduced, would:
 - Give employees the right to request flexible work options
 - Authorize employees to request from their employer changes in:
 1. The number of hours the employee is required to work
 2. The time when the employee is required to work, or
 3. The location of work
 - Give employees the right to request reconsideration of the employer's decision
 - Authorize employees to file complaints with the DOL and would impose penalties for infractions in addition to damages



Legislative Priorities: Family Medical Leave Act Expansion

- Status: Over the past few years, various bills with bipartisan support have been introduced to amend the FMLA
- If passed, they may expand the scope of FMLA covered leave by:
 - Providing leave for employees to address effects of domestic violence
 - Providing employees up to 24 hours of unpaid leave per year to attend school activities or to take family members to regular dental or medical appointments
- Versions of Family Leave Insurance Act introduced in 2007 and 2008, would require a Family and Medical Leave insurance program whereby employees and employers would pay shared premiums into an insurance fund that would finance paid FMLA leave for workers



Legislative Priorities: National Defense Authorization Act

- Signed by Obama on October 28, 2009
- The law contains provisions amending FMLA military family leave entitlements
- The 26 weeks of leave for an employee to care for a covered serve member now allows an employee to take leave to care for a covered veteran
- Provides that the leave can be taken up to 5 years after the veteran leaves military service



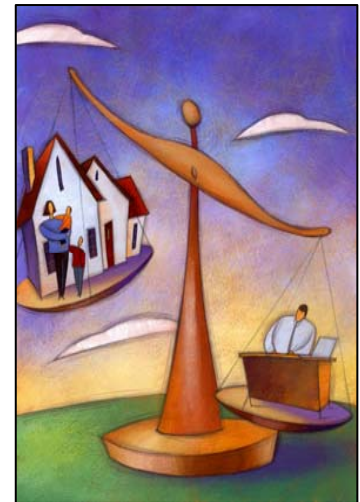
Legislative Priorities: Healthy Families Act of 2009

- Status: Introduced in May 2009. The bill, is largely the same as bills issued in prior sessions of Congress, including the bill that was introduced in 2007, with then-Senator Obama as a sponsor
- Would require employers with more than 15 employees to provide workers up to 56 hours of paid sick leave each year
- Employees would be allowed to use the leave to meet their own medical needs; care for the medical needs of certain family members; or seek medical attention, assist a related person, take legal action, or engage in other specified activities relating to domestic violence, sexual assault, or stalking
- Seen as a way of ensuring that employees and their families get early and preventative medical care



Legislative Priorities: Family-Friendly Workplace Act

- Status: Most recent version introduced February 10, 2009, by a Republican representative from Washington
- Would amend the FLSA to allow private-sector employers to offer employees the option of taking “comp time” PTO rather than receive cash wages for all overtime hours worked, at a rate of 1.5 hours per hour, for which overtime premium would be due
- Employees would have to consent in writing to swap “comp time” for overtime. The employee would be permitted to withdraw at any time by written request
- To be eligible, employee must have worked at least 1,000 hours for the employer during the 12 months preceding the agreement or receipt of “comp time”
- Maximum accrual of 160 hours of “comp time”



Legislative Priorities: Family-Friendly Workplace Act What It Means for Employers

- Would require employers to pay out by January 31 of a given year for all comp time accrued but not used during the previous calendar year, at the regular rate
 - It does not appear to be 1.5 times
 - Provides for pay out of accrued “comp time” at termination of employment
- Employer may provide pay out for an employee’s unused “comp time” in excess of 80 hours at any time after giving the employee at least 30 days notice
- Employers may discontinue the policy upon 30 days notice to employees



Legislative Priorities: FOREWARN Act

Federal Oversight, Reform, and Enforcement of the Worker Adjustment and Retraining Notification Act

- Status: Most recent version introduced June 25, 2009, by a Democratic representative from California
- Populist support
- FOREWARN would amend WARN by:
 - Expanding the scope of covered employers
 - Expanding the scope of what constitutes a “plant closing” triggering WARN obligations
 - Expanding the number of automatically-covered “mass layoffs”
 - Requiring employers to give 90 days advance notice to employees of covered employment losses
 - Expanding the scope of the notice
- Several states have recently amended their state analogue laws to be more protective of employees in layoffs and plant closings



Legislative Priorities: Employee Misclassification Prevention Act

- Status: Introduced in House in May 2008; was cleared from the books at the end of the 110th Congress. Strong possibility it will be reintroduced during Obama's term
- Would amend the FLSA to increase penalties and enforcement against employers who misclassify employees as independent contractors
- Would step up enforcement by requiring state unemployment insurance agencies to conduct audit and investigation programs
- What it would mean for employers: Employers would be required to keep records of employment classifications and notify those classified as "non-employees" in writing of:
 - Their classification
 - The significance of the classification, and
 - Their ability to contact the DOL if they need further information



Legislative Priorities: Protecting Older Workers Against Discrimination Act

- Status: Introduced in both the House and the Senate on October 6, 2009, in response to the Supreme Court's decision in *Gross v. FBL Financial Services Inc.*, 129 S. Ct. 2343 (2009)
- In *Gross*, the Supreme Court held that a plaintiff bringing an ADEA disparate treatment claim must prove that age was the “but for” cause of the adverse employment action
- The stated purpose of the bill is to ensure that the standard for proving unlawful disparate treatment under the ADEA and other anti-discrimination and anti-retaliation laws is no different than the standard for making such proof under Title VII
- If passed, would reverse the *Gross* decision and would reinstate the “motivating factor” framework in age discrimination cases



Legislative Priorities: Notice Pleading Restoration Act of 2009

- Status: Introduced on June 22, 2009 by Senator Arlen Specter in response to the Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)
- In *Iqbal*, the Supreme Court made clear that the pleading standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), that an initial pleading must state a claim that is plausible on its face rather than a statement of the elements of a cause of action or a statement of unsubstantiated conclusions, extends beyond the anti-trust setting
- If passed, would overturn *Twombly* and *Iqbal* and restore the standard for dismissing complaints to the “no set of facts” standard, meaning that, “any statement revealing the theory of the claim would suffice unless its factual impossibility may be shown from the face of the pleading...a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recover.” 550 U.S. at 561



Legislative Priorities: Arbitration Fairness of Act of 2009

- Status: Introduced in the House in February and the Senate in April
- Would invalidate pre-dispute arbitration agreements requiring arbitration of an employment, consumer, franchise, or civil rights dispute
- Validity or enforceability of an agreement to arbitrate would be determined by a court rather than an arbitrator
- Provisions in collective bargaining agreements would be exempt from the Act



Employee Benefits Developments

- New DOL Sheriff in Town – Phyllis Borzi – Asst. Sec. of Labor responsible for Employee Benefits Security Administration (EBSA) arm of Dept. of Labor
 - “The previous Administration focused on compliance assistance, but that’s only good if it is combined with strong enforcement.”
 - To focus on enforcement
 - MEWAs involving health care fraud
 - ERISA action team focused on assisting participants deemed to be at greatest risk, *i.e.*, employers in bankruptcy
 - ESOPs with valuation issues
 - Improper and undisclosed compensation to plan advisors



Benefit Plan Fee Disclosures

- Proposed regulations on fee disclosure for plans not finalized before Bush left office.
- Obama Administration pulled
- Possibly wait for legislative changes before finalizing
- All legislative changes taking a back seat to Health Care Reform



IRS Developments

- Exam and compliance focus will be on plans with international components consistent with larger IRS international tax compliance initiatives.
- 401(k) plan compliance “questionnaire” for plan sponsors coming in 2010 – “We’re from the government and we’re here to help.”



Health Care Reform



Insurance Market Reform

- No preexisting condition exclusions
- No lifetime maximums
- Insurers may not cancel coverage
- Premiums may not vary based on health, but may vary based on age, geographic area, and family composition
 - House bill limits age rating to ration of 2 to 1
 - Senate bill limits age rating to ratio of 4 to 1
- End of anti-trust exemption for insurers



Individual Mandates

- Penalty for individuals who do not purchase coverage
 - Senate: \$750 per adult in household (phased in through 2017)
 - House: 2.5 percent of income
 - Enforcement limited
 - Exemptions available
- Subsidies
 - House and Senate: Up to 400 percent of poverty level (\$88,000 for a family of four on a sliding scale)
 - Example: House Bill would pay for 93% of insurance costs in exchange for a family making \$42,000, 72% for a family making \$78,000



Employer Responsibilities

- Penalty for employers that do not provide coverage
 - House: 8 percent of payroll
 - Senate: \$750 per employee (or if less, repayment of subsidies)
 - Small businesses exemptions and tax credits available
- Benefit Mandates
 - House: “Essential Benefits Package” with basic, enhanced, and premium coverage
 - Senate: Platinum, Gold, Silver, Bronze
 - Grandfathered plans
- House Bill prohibits post-retirement cuts in retiree health benefits



Who Pays: House Bill

- Cost: \$1.055 trillion (\$894 billion after penalties by individuals and employers)
- 5.4% income tax on single people making more than \$500,000 a year and couples making \$1 million (\$460 billion)
- More than \$400 billion in cuts to Medicare and Medicaid
- \$20 billion from medical device industry based on 2.5 percent tax on the sale of any medical device except those sold to the general public
- \$13 billion from limiting contributions to flexible spending accounts
- Mix of other corporate taxes and fees



Who Pays: Senate Bill

- Cost: Under \$900 billion (specifics not available at time of publication)
- Fees on insurance companies, drug makers, medical device manufacturers
- Deal in works to reduce medical device fees from \$40 to \$20 billion
- Excise tax on “Cadillac plans”
- Cuts to Medicare and Medicaid
- Employer fines and individual excise taxes



Senate Bill Tax on “Cadillac Plans”

- 40 percent excise tax on plans if value of coverage exceeds federal limits (currently \$8,000 for individuals and \$21,000 for families)
- Federal limits are increased based on modified Consumer Price Index
- Actual health insurance premiums may grow at much faster rate
- Possible impacts of excise tax on Cadillac plans:
 - Employers will reduce value of coverage to avoid tax
 - If indexed increase does not keep up with medical inflation, employers will drop coverage
 - More coverage will be purchased with after-tax dollars



Public Option

- House and Senate options based on negotiated rates
 - CBO projects more expensive than private plans
 - Little support for Medicare + 5% plan from states with low Medicare reimbursement rates
- Possible implementation:
 - Senate version contains state opt-out clause
 - Other discussions include state opt-in clauses, triggers



Health Insurance Exchanges

- House would create federal exchange for individual and small group market; states could run exchanges in lieu of federal program
- Senate would require states to establish exchanges
- Both bills permit states to operate regional exchanges
- All private insurers in the individual and small group markets must participate
- Senate: Large employers must be allowed to participate by 2018
- House: Large employers may be allowed to participate after Year 3



Interstate Health Insurance Compacts

- States may enter into compacts to offer one or more federally qualified plans across state lines
- State mandated benefits would be preempted
- State consumer protections would be preserved
- Premiums subject to rating rules including geographic variation among rating areas



Health Care Cooperatives

- Senate: \$6 billion authorized in loans or grants
- House: \$5 billion authorized in loans or grants
- Loans available for start-up costs
- Grants available for state solvency requirements
- At least one co-op in all 50 states
- Priority to statewide proposals, integrated health care models, applications with significant private support



Employer-Sponsored Wellness Programs

- Senate legislation codifies HIPAA nondiscrimination rules on wellness programs, allows rewards up to 30% of premiums (50% at discretion of HHS)
- House contains grant program for wellness and prohibits rewards tied to premium or cost sharing in health plan
- New regulations under the Genetic Information Nondiscrimination Act (GINA) causing major disruption in health risk assessments
- Privacy and disability advocates seeking to prohibit incentives altogether



HSAs, HRAs, and FSAs

- FSAs
 - Both bills limit to \$2,500 per year
- HSAs
 - Penalties on HSA distributions not used for medical care increased to 20%
 - Uncertain whether federal qualified plans will qualify as high deductible health plans for Health Savings Accounts
- Over-the-counter medication not reimbursable under FSAs, HRAs, or HSAs unless prescribed by physician
- HRAs, HSAs, and FSA may be included in value of employer-provided coverage in determining excise tax on Cadillac plans under Senate bill



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