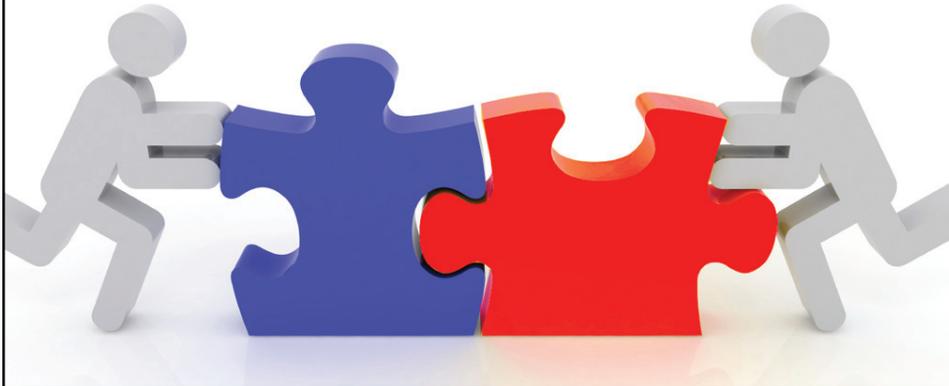


Puzzling It Out:

Labor and Employment Issues Post-Election



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What to Expect After November... Employment Law and President-Elect Obama

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The Crystal Ball – A Look Back and Forward

- The past 8 years have largely been devoid of significant new employment legislation
 - Last broad expansion of employee rights was FMLA in 1993
- Organized labor activity has decreased dramatically
 - But NLRB has 3 openings that will be filled by President-Elect Obama
- Many argue employee rights have been reduced in past eight years
 - Very conservative rulings by the National Labor Relations Board and federal courts have restricted, if not reduced, previous broad interpretations of law
 - Example – demise of ADA as a truly viable cause of action (leading to Congressional action to overturn these rulings)
 - Example – definition of supervisor under NLRA
- There are some exceptions to this trend
 - Supreme Court broadened definition of retaliation and made cases easier to prove
 - Instead of requiring adverse employment action such as termination, does employer's action "reasonably chill" the likelihood of an employee filing a charge?
- There is a "pent up" demand for employment and labor law changes, most of which will require legislative approval



Where Are We Headed?

- Many new laws were proposed following the 2006 elections
 - With rare exception these proposals have not become law
 - The bills became the cornerstone of the Obama platform
- President-Elect Obama (as well as Congress) is likely to make a major push in employment and labor legislation at the outset of the administration
 - EFCOA within first 100 Days? (covered in separate presentation)



Where Are We Headed?

- The appointment of a new Labor Department Secretary will signal much about the new Administration's stance
 - Names mentioned: David Bonior, Dick Gephardt, George Miller (all former congressmen)
- Public stance: I will “fight to protect overtime rights...enforce wage and hour laws, and ensure that OSHA enforces workplace safety laws.” I will pursue “policies that truly value families, such as paid family leave, flexible work schedules and telework.” (Oct. 20, 2008 letter to American Federation of Government Employees.”



Where Are We Headed?

- Strong political pressure from organized labor
 - The piper must be paid. Organized labor contributed more than \$400 million on the election and voter-turnout efforts
 - Pressure to enact the agenda of “Change to Win” Federation within first 100 days
 - “We have an opportunity to reclaim the American Dream. What we want to do in this first 100 days is give workers a voice on the job. We do want to win health care for every single man, woman and child in America...We think that is what people voted for, that is how people got elected, and that is what we are ready to do.” (Anna Burger, chairwoman of Change to Win, November 7, 2008)





Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers Act

- Called the RESPECT Act
- Introduced in the House and Senate in March 2007 by Senators Dodd (D.- Conn.) Durbin (D-Ill.) and Kennedy (D.-Mass.)
 - Notice strong ties to Obama (home state, overpowering endorsement, Chairman of Banking committee)



Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers Act

- Senator Dodd said that the RESPECT Act was meant to correct an unfair policy stemming from a series of decisions by the NLRB in which the Board held that charge nurses are supervisors.



Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers Act

- The RESPECT Act would amend the definition of who qualifies as a supervisor under the NLRA.
- It requires that a worker spend the majority of his/her time supervising other employees.



Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers Act

- It will also strike the following language, generally used as a condition for being a supervisor, “have the authority to assign and responsibly direct other employees.”
- Obama website: He is a cosponsor of legislation to overturn the NLRB's "*Kentucky River*" decisions classifying hundreds of thousands of nurses, construction, and professional workers as "supervisors" who are not protected by federal labor laws.



Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers Act

- “The RESPECT Act will trample six decades of well-settled policy and precedent by striking two of the criteria used to determine supervisory status.”—Rep Buck McKeon (R-Calif), Ranking Member, Education and Labor Committee



Arbitration Fairness Act (AFA)

- Introduced in July '07 in the House and Senate.
- Would ban pre-dispute arbitration agreements in several contexts.
- Resulted from a “great distrust” of arbitration on the part of employees and an assumption that arbitration favors employers.



Arbitration Fairness Act (AFA)

- Note: Studies over the past 8 years have shown that assumption to be false.
- Individuals prevail slightly more often in arbitration than employers



Amendments to the FMLA

- A push is expected to make the FMLA a paid leave statute.
- January 28, 2008 amendments to the FMLA—covering spouses, children and parents of service members called to active duty, and anyone who cared for a spouse, child, parent or next of kin injured during military service—were the first expansion of FMLA since 1993.



Amendments to the FMLA

- Proposed amendments include
 - Paid leave (Healthy Families Act)
 - FMLA leave for participation in school activities
 - A narrowing of the threshold for businesses that are currently exempt under the Act
- Many states and localities are also considering paid leave legislation
 - Milwaukee voters approved paid leave for employees



Employment Non-Discrimination Act (ENDA)

- Prohibits discrimination based on sexual orientation
- A version of ENDA (HR 3685) passed the House in November, but brought criticism because it didn't deal with gender identity.
- Original bill (H.R. 2015) extended protection to transgender individuals.



Employment Non-Discrimination Act (ENDA)

- Many states already have laws protecting gays and lesbians from discrimination, and gays and lesbians who feel they have been discriminated against can sue under the gender provisions of Title VII.
- Bill may be more significant for the message it sends.



Lily Ledbetter Fair Pay Act

- Justice Ginsberg's dissent in Ledbetter v. Goodyear Tire & Rubber Co directed Congress to change Title VII.
- House passed Lily Ledbetter Fair Pay Act in July, 2007.
- Bill would allow workers to reclaim lost pay if a claim is filed within 180 days of the issuance of an allegedly discriminatory paycheck, no matter when the initial violation took place.
 - Obama frequently spoke of Lily Ledbetter, including in his Democratic nomination acceptance speech



Lily Ledbetter Fair Pay Act

- “Resetting the statute of limitations every time an allegedly discriminatory paycheck is received, as opposed to letting the clock run from the time the allegedly discriminatory decision to underpay a worker is made, opens employers up to perpetual liability and threatens the solvency of retirement programs for all workers.” McKeon



Lily Ledbetter Fair Pay Act

- Ledbetter would have less dramatic impact relative to proposals like the EFCA and the Arbitration Fairness Act
- But would inspire short term increase in lawsuits.



Minimum Wage

- Barack Obama's web site: "Barack Obama will raise the minimum wage, index it to inflation and increase the Earned Income Tax Credit to make sure that full-time workers earn a living wage that allows them to raise their families and pay for basic needs."



Prognostications

- Most of this legislation has a substantially improved chance of becoming law because of Democratic gains



Prognostications

- “The problem with many of these proposals is that they actually breed litigation, encouraging confrontation over cooperation.” McKeon
- Because we’ve had a Republican Congress since the mid-90’s a movement addressing some of the pent-up demands of the labor side is likely.



Prognostications

- Perhaps the greatest unknown is whether changing employment laws can keep up with a faster changing workforce
 - What laws will address contingent workforce?
 - Will benefits laws keep up with employee movement?
 - Employee privacy laws likely to be passed
 - Ex – H.R. 5228 - prohibits video or audio monitoring in areas where employees change clothes
- Will Congress brake the continued growth of class and collective actions?
 - Recent Class Action Fairness Act had no meaningful impact on employment litigation
 - Florida leads the nation in FLSA collective actions



Prognostications

- Expect immense political pressure due to overwhelming political support for Obama and Democratic candidates