

FOLEY EXECUTIVE BRIEFING SERIES



Labor & Employment Law...What to Expect Under a New President and a New Congress

Ellen C. Kearns
Foley & Lardner LLP
Boston, Mass.





The Crystal Ball – A Look Back and Forward

- 2000 – 2008 has been devoid of significant new employment legislation
 - Last broad expansion of employee rights was FMLA in 1993
- Organized labor activity has decreased dramatically
 - NLRB has 3 openings that will be filled by next President
- Employee rights have been reduced in past eight years by court and agency rulings
 - Very conservative rulings by the National Labor Relations Board and some federal courts have restricted, if not reduced, previous broad interpretations of employment law



The Crystal Ball – A Look Back and Forward

- 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 now exists a "pent up" demand for employment and labor law changes



What's In the Hopper Now and What May Come?

- Many new laws were proposed following the 2006 elections
 - With rare exception these proposals have not become law
 - The bills remain active and they are likely to receive strong consideration from the new President and new Congress
- Many new bills are likely to be proposed in addition to what has already been filed



Employee Free Choice Act

- H.R. 800—top of employer’s legislative concerns
 - Radical change in labor law and thought by some to be the “lifesaver” of the organized labor movement
- Barack Obama website: “Obama cosponsored and is strong advocate for the Employee Free Choice Act, a bipartisan effort to assure that workers can exercise their right to organize. He will continue to fight for EFCA's passage and sign it into law.”



Employee Free Choice Act

- Act would replace the secret ballot system employees now use to select union representation with a card check system.
- Under the card check system, if a majority of a given company's employees signed cards indicating they wanted a union, then that union would become the workers' representative.



Employee Free Choice Act

- The role of the National Labor Relations Board to conduct secret ballot elections would be fundamentally changed.
- Experts have said that the EFCA could be the most significant change to the NLRA since the Taft-Hartley Act of 1947.



Employee Free Choice Act

- H.R. 800 also addresses the collective bargaining period after a union has been selected.
 - If the employer and the union cannot agree on the terms of a new contract after 90 days of bargaining, either side can ask the FMCS to step in and try to work out an agreement.
 - If the parties cannot reach agreement within 30 days after the mediation request is made, the unresolved contract issues would go to an arbitrator, who would then issue a new contract that would be binding for two years.



Employee Free Choice Act

- Experts project that this “mandatory arbitration” provision could
 - Stall the negotiations process
 - Artificially curtail the bargaining process
 - Create a disincentive for the parties to reach agreement at the bargaining table in the hopes of getting a better deal with the arbitrator



Employee Free Choice Act

- H.R. 800 also calls for increased penalties for employers who violate the National Labor Relations Act's organizing provisions
 - Mandatory injunctions
 - Liquidated damages
 - Civil Penalties up to \$20,000/violation

 - BUT, no corresponding increase in penalties for unions that violate the organizing provisions
 - Despite the potential for coercing workers in an anonymous voting process



Employee Free Choice Act

- H.R. 800 passed the House of Representatives in 2007 but failed to pass the Senate due to a filibuster
- Although Obama has promised organized labor that making EFCA a reality is a priority for his administration, some experts say he will seek to delay a vote on EFCA due to the economic crisis.



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

- Called the RESPECT Act
- Introduced in the Senate in March 2007 by Senators Dodd (D.- Conn.) Durbin (D-Ill.) and Kennedy (D.- Mass.)



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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” set forth in recent decisions of the NLRB in which the Board held that charge nurses were supervisors.



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

- The RESPECT Act would amend the definition of a supervisor under the NLRA.
- It would require that a supervisor 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 one 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 by Representative Hank Johnson and Senator Russ Feingold.
- The Act's sponsors describe it as “comprehensive legislation to ensure Americans are not forced into mandatory arbitration agreements in employment, consumer, franchise or civil rights disputes.”



Arbitration Fairness Act (AFA)

- They add “arbitration clauses in everyday contracts forces individuals to forgo their right to a court or jury if dangerous products, services or workplaces harm them.”
- The sponsors’ literature implies that the outcome of arbitration cases involving employees almost always favor employers.



Arbitration Fairness Act (AFA)

- Note: Some studies have shown that assumption to be false, and that
- Individuals prevail slightly more often in arbitration than employers



Amendments to the FMLA

- Advocates are expected to work for paid FMLA time.
- 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



Amendments to the FMLA

- HR 389 filed 1/9/09
 - Eliminates the hours of service requirement for benefits under the FMLA



Employment Non-Discrimination Act (ENDA)

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



Employment Non-Discrimination Act (ENDA)

- Many states (including Massachusetts) have laws that protect gays and lesbians from employment discrimination. Moreover, gays and lesbians can sue under the gender provisions of Title VII, if they feel they have been discriminated against.
- Political experts opine that the 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 implored Congress to change the statute of limitations provisions of Title VII.
- Lily Ledbetter Fair Pay Act passed House in July, 2007.
- If a claim is filed within 180 days of the issuance of an allegedly discriminatory paycheck, the bill would allow the claim to be filed, regardless of when the initial violation took place.



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

- According to experts, it appears that Ledbetter would have less dramatic impact than EFCA and the Arbitration Fairness Act.
- However, the act is likely to inspire a short term increase in lawsuits.



Lily Ledbetter Fair Pay Act

- Filed in the House as HR 11 on 1/6/2009
- Passed in the House 247 – 171
- Filed in the Senate as S 181 on 1/8/2009
- January 16th—the Senate voted 72-23 to consider the bill.



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."
- Current Minimum wage is \$6.55 per hour effective July 24, 2008; and \$7.25 per hour effective July 24, 2009.



Equal Remedies Act

- Elimination of Caps on Damages under Title VII and the ADA
- Current Cap ...\$300,000 in compensatory and punitive for employers with more than 500 employees
- Obama co-sponsored this legislation and is likely to support it in 2009



Independent Contractor Proper Classification Act of 2007

- Filed in the Senate by Barack Obama as S.2044
- The bill requires the Secretary of the Treasury to establish a procedure for workers to petition for a determination of their status as employees or independent contractors.
- Requires the Secretary of the Treasury to take certain actions upon determining that an employee has been misclassified as an independent contractor including informing the DOL
- Directs the Secretary of Labor to include on workplace posters a notice informing workers of their right to seek a status determination
- Requires employers to notify their independent contractors of their federal tax obligations and their right to seek a status determination from the Secretary of the Treasury.



Prognostications

- With a sweeping Democrat majority in both the House and Senate—and no threat of a Presidential veto—it would not be surprising if these measures become law in the next two years.



Prognostications

- Most labor experts believe that because the country has had a Republican Congress since the mid-90's, the pent-up demands of the labor side will be addressed in a Democratic Congress.



Prognostications

- What areas of employment law will spawn new legislation
 - Immigration?
 - The contingent workforce?
 - Employer 401(k) plans?
 - Employee privacy? (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?