

# Labor and Employment Issues Arising From the Election

The following is a list of the labor and employment issues that we believe are affected by the results of the 2012 federal and state elections.

## Employee Benefits Issues

- » There is the possibility for increased government regulation or a government bailout of upside-down multi-pension plan funds, such as the Teamsters Central States Pension fund.
- » Employers will be affected by the issuance of implementing regulations for the Patient Protection and Affordable Care Act. We are likely to see some legislative attempts to modify the “pay or play” provision and the 50-employee threshold, which go into effect in 2014.

## Wage and Hour Issues

- » We could see a crackdown on employees misclassified as independent contractors as a way of generating revenue. This is one area where Democrats and Republicans could find common ground to pass legislation designed to increase revenue flow while not raising taxes.
- » There will be increased efforts to collect and analyze employee compensation data with an eye to further reducing pay disparity between men and women (i.e., following up on the Lilly Ledbetter Fair Pay Act of 2009, much referenced during the presidential election campaign).
- » We expect to see finalization of a proposed rule that will, for the first time, require the payment of overtime for home health aides who work more than 40 hours in a workweek.

- » The Department of Labor (DOL) will pursue increased enforcement of the FLSA, including requiring the updating and modification of recordkeeping obligations, self-monitoring plans, and mandatory notices to employees concerning the specifics of how they are compensated (similar to or even broader than the New York City Ordinance).
- » The DOL will use regulation and administrative enforcement to expand SOX whistleblower protections.

## Discrimination/Hiring/Regulatory Issues

- » We expect to see increased OSHA enforcement and finalization of the Illness and Injury Prevention Program (I2P2); increased and faster illness and injury reporting obligations; and an increase in – and overhaul of – workplace safety standards, including crystalline silica.
- » The OFCCP will step up enforcement of government contractor affirmative action obligations, including goals and timetables for the disabled and veterans. The OFCCP will likely develop new compensation data collection tools and revise its sex discrimination guidelines.
- » The EEOC will promulgate additional regulations on the hiring process through limitations on criminal and credit checks.
- » The EEOC will increase efforts to add sexual orientation to the list of legally protected categories.
- » In light of Superstorm Sandy, efforts to repair infrastructure as a way to create jobs will increase, resulting in increased government payrolls, and additional attention being paid to regulation of public construction projects. Unions will seek to gain



increased influence through project labor agreements and other methods.

At the same time, businesses and state and local governments (not in the union-heavy Northeast) may resist efforts to tie federal construction funds to PLAs due to increased project costs.

- » It is highly probable that the federal administration will attempt to engage in comprehensive immigration reform. Whether or not that is successful, administrative enforcement of existing laws and regulations is likely to increase with substantial impact on employers.

### Labor Issues

- » **The Employee Free Choice Act.** Despite optimistic comments from some labor leaders, it is unlikely that this bill will be passed during the next four year. Even with a greater Democratic majority in the Senate, there are too many conservative Democratic senators, and the bill is certainly not filibuster proof. That means that organized labor, which invested a lot in this campaign, will be looking to achieve its goals by lateral means (i.e., other than direct amendments to the NLRA).
- » In late 2011, the NLRB published new election rules that sped up the election process (expedited elections tend to favor petitioning unions).
- » In May 2012, the rules were invalidated because the NLRB had lacked a quorum.
- » It can be expected that the NLRB will reissue the rules or publish new rules that will have the same effect.

The new rules may add other components of the failed EFCA that could facilitate union election victories.

- » **NLRB Decisions.** We should continue to see labor-friendly appointments to the NLRB and the maintenance of a majority of Board members who are favorable to labor. As a result, the NLRB can be expected to issue more decisions that favor

organizing and advance employee/union rights. For example:

- » The NLRB will likely overturn *Register Guard* and rule that employees (and unions?) are protected when they use employer email systems for soliciting other employees on union matters. This decision may be subject to challenge under property rights laws and on constitutional grounds.
- » Employees will be allowed to return to the premises on off-duty hours; this rule already exists, but will be reinforced.
- » There are likely to be more attempts by the NLRB to use its regulatory powers to modify rules governing union elections, which could result in a higher success rate for petitioning unions.
- » **NLRB Activism.** Encouraged by the presence of a labor-friendly Board, the administrative wing of the NLRB will continue its expansive interpretation of the NLRA and will find more ways to “protect” employee rights, even in the absence of a union (e.g., posting notices, social media policies, attacks on “at will” policies).
- » The DOL’s Office of Labor Management Standards (OLMS) will likely enforce its proposed new regulations expanding the definition of “persuader activity” to cover legal advice in the context of union-organizing activity, corporate campaigns, normal collective bargaining, strike preparation, and day-to-day employee and labor relations. As a result, many law firms, in order to avoid the reporting and disclosure consequences that flow from engaging in “persuader activities,” will decline to provide counsel to employers in these areas.
- » Additional Executive Orders may be issued, designed to enhance unions’ ability to organize, such as preferences to companies who bid on federal contracts if they pay higher wages and have not violated labor laws.
- » **Health Care Industry Organizing.** We will see increased union organizing efforts in the health care industry as that industry’s payrolls grow as a result of





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aging population and the Patient Protection and Affordable Care Act.

- » Unions are facing irrelevancy or even extinction unless they increase “market share.” This need to survive demands more membership and health care will remain the favorite target.
- » **Public Sector Bargaining.** At the state and local level, anti-organized labor forces will continue to push to eliminate mandatory union membership as a condition of public employment.
- » Notwithstanding the above, unions will continue to experience headwinds in their attempts to recapture lost ground. Macroeconomic forces remain unfavorable to union organizing, or even maintenance of current levels, except in discrete areas such as the health care industry and the public sector.

