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an Obama administration's impact on labor and employment issues



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Union Organizing

President-elect Obama has openly expressed his desire to work with various labor organizations to alter existing labor laws. On top of the union agenda is passage of the Employee Free Choice Act (EFCA), which passed the House in 2007. EFCA would dramatically change the union organizing process by eliminating "secret ballot" elections under the auspices of the National Labor Relations Board. Instead, it would allow unions to be certified to negotiate pay, benefits and working conditions after collecting signed authorization cards from a majority of eligible employees. Republican opposition to the anti-democratic "card check" component of EFCA is sure to re-emerge in the new Congress. A possible response to the criticism of EFCA as currently structured might be an amendment providing for expedited union elections within a limited time period, e.g., ten days. However, such an expedited election procedure would have the same goal as the "card check" provision - sharply curtailing the ability of employers to provide information to employees about the costs and other drawbacks of unionization, thereby increasing unionization rates across a host of business sectors.

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➤ In addition, EFCA would require mandatory arbitration for first contracts. Currently, after a union is certified, labor and management are required to bargain in good faith, but are not obligated to reach an agreement. Under EFCA, if parties cannot settle on a contract within 120 days, the dispute would be referred to an arbitration panel which would be empowered to impose a contract that is binding for two years. EFCA also would provide harsher penalties for unfair labor practices committed by employers in response to union organizing efforts.

Mr. Obama also supports overturning the NLRB's *"Kentucky River"* decisions by passage of the Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (RESPECT) Act. The RESPECT Act would narrow the current definition of "supervisor" by requiring that an individual spend the majority of time engaged in supervisory activities. As a result, many existing supervisors may be classified as employees eligible to join unions.

Job Outsourcing

Given the current economic climate and unemployment rate, employers should anticipate increased focus on outsourcing and globalization. During his tenure as Senator, Mr. Obama cosponsored the Patriot Employer Act which would amend the existing tax laws and provide a tax credit to employers who increase the number of full-time workers in the United States relative to those outside the United States. There are also other legislative proposals which would further expand employers' obligations to notify workers of plant closures or layoffs and penalize those who fail to comply.

Infrastructure And Government Contracts

The rebuilding of America's national transportation infrastructure—highways, bridges, roads, ports, air, and train systems—has been highlighted as critically important. During his campaign, Mr. Obama detailed proposals to invest in infrastructure and to fortify the Davis-Bacon Act, which requires paying "prevailing wages" on public works projects. Prevailing wages are almost always union wages in the relevant area. There are also legislative proposals that would ban companies from future government contracts for a "pattern" of

failing to comply with labor and employment laws. Mr. Obama has effectively notified employers who contract with the government that they should expect increased enforcement by the Office of Federal Contract Compliance Programs (OFCCP), which monitors compliance with non-discrimination and affirmative action programs by government contractors and subcontractors. Watch for OFCCP to expand the practical effect of the affirmative action regulations by reaching out to greater numbers of subcontractors.

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Discrimination Claims

Significant changes are likely in the area of employment discrimination. Gender-based pay disparities were frequently cited by Senator Obama on the campaign trail. Expect a new push for the Lilly Ledbetter Fair Pay Act, which was introduced to overturn a 2007 Supreme Court decision that limited the time for filing pay discrimination claims. The Ledbetter Fair Pay Act would amend Title VII to allow pay discrimination claims to be brought within 180 days of the receipt of a disputed paycheck—no matter how far in the past the underlying discrimination actually occurred. Another law, The Fair Pay Act of 2007, would amend the Equal Pay Act and the Fair Labor Standards Act (FLSA), to require that employers justify

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unequal pay and bear the burden of proving that pay decisions are job related.

The Employment Non-Discrimination Act (ENDA)), which was supported by Mr. Obama's newly appointed Chief-of-Staff, Rahm Emanuel, would make actual or perceived discrimination on the basis of sexual orientation illegal. ENDA was passed in the House and will likely become a priority for Congress during the next session. Mr. Obama co-sponsored the Equal Remedies Act and the Civil Rights Act of 2008, both of which would remove the current \$300,000 cap on compensatory and punitive damages for violations of Title VII and the Americans with Disabilities Act (ADA).

Arbitration

The ability to mandate use of alternate dispute resolution for resolving employment-related disputes might change during an Obama administration. The Arbitration Fairness Act was introduced in 2007 and would eliminate pre-dispute arbitration agreements. Although arbitration provisions in collective bargaining agreements would not be affected, this significant change to the Federal Arbitration Act (FAA) would not require arbitration of employment, consumer or franchise disputes and instead would shift numerous disputes from arbitrators to state courts.

Employee Classification

President-elect Obama also co-sponsored the Employee Misclassification Prevention Act, which would amend the FLSA to increase penalties and enforcement against employers who misclassify employees as independent contractors. Employers who misclassify employees could face fines of up to \$10,000 per violation as well as collection of back social security and Medicare taxes.

Work/Family

Both President-elect Obama and his wife have openly stated their intent to focus on work/family issues within the workplace. Mr. Obama co-sponsored the Working Families Flexibility Act, which would require employers to negotiate employee requests for alternate work/hour arrangements. There are also proposals to expand coverage under the Family and Medical Leave Act (FMLA)

from businesses that employ 50 or more people to those that employ 25 or more people, to provide leave for elder care and victims of domestic violence, and to provide parents with up to 24 hours of annual leave to attend school-related activities. Expect strong efforts to make employers provide some period of paid FMLA leave.

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Summary

The landscape of labor and employment law stands to change significantly. Although the starting of the new Congress in January will reset the legislative process, and all of the bills cited above will have to be reintroduced, groundwork laid in the current Congress will significantly enhance the chance that these bills can be enacted quickly. Also, the incoming administration has demonstrated that it is keenly aware of the ability of regulatory actions to alter the legal landscape, including employer reporting requirements. The anticipated changes, however, are complex and cover a variety of labor and employment-related areas. Employers would be well-served to consult with their legal counsel and begin making preparations. ■

This article was co-authored by Jeffrey I. Pasek together with his colleagues Kimya S.P. Johnson and Andrew J. Rolfes.

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