

# ALERT

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## LABOR AND EMPLOYMENT

News Concerning  
Recent Labor and Employment Issues



## **A Second Obama Administration's Impact on Labor and Employment Issues**

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With the re-election of Barack Obama and the prospect of continued political gridlock at the congressional level, the administration will likely turn to regulatory and administrative avenues in an effort to pursue workplace policy goals. The landscape is very different than it was just four short years ago.

### **Union Organizing**

President Obama devoted almost no political capital to organized labor's top legislative priority four years ago, which was passage of the Employee Free Choice Act (EFCA). The main thrust of EFCA was to enable unions to be certified as a bargaining representative without a secret ballot based on a check of signed authorization cards from a majority of eligible employees. EFCA would also have imposed deadlines for the negotiation of an initial collective bargaining agreement and required arbitration of initial contract terms if the parties did not reach agreement. The Republican conquest of the House of Representatives in 2010 doomed EFCA and it stands no chance of being passed in the incoming Congress.

What labor unions cannot obtain through legislation they are now attempting to achieve through administrative regulation or case adjudication. In June 2011, the National Labor Relations Board (NLRB or the Board) issued a proposed rule aimed at streamlining union elections. The rule is currently in limbo after being overturned by a District of Columbia district court judge on the grounds that the NLRB adopted the rule without the required quorum. Because the court rejected the rule on procedural grounds, there is nothing to prevent the NLRB from adopting an even stronger rule with a proper quorum. Expect a revitalized rule to resurface early in the second term to mandate the disclosure of information to employees, provide expedited election proceedings and delay litigation over voter-eligibility issues.

President Obama's appointments of pro-union members to the NLRB swung the political balance of the Board strongly in favor of organized labor. This has begun to be reflected in rulings that significantly expand employee rights and place

limits on employer efforts to oppose unionization. These decisions include one declaring it illegal to prohibit employees from discussing active investigations of employee misconduct; one that requires employers to post notices of employee's bargaining rights, regardless of whether any employees are represented by a union (which was later enjoined); and another rejecting an employment policy that precluded employees from pursuing class or collective actions against employers. Employers have been scrambling to keep their employment handbooks and policy statements up to date to avoid being subjected to unfair labor practice charges. They will need to pay close attention to the NLRB's rulings and continue to adjust to a landscape that is likely to tilt further against them.

### **Job Outsourcing**

During the campaign, President Obama repeatedly condemned provisions of the tax code allowing employers to take deductions for the expenses of dismantling plants to ship jobs overseas. Expect that to be a focus of the "fiscal cliff" negotiations to close corporate tax loopholes. Look for this to be coupled with a provision giving tax credit to employers who increase the number of full-time workers in the United States relative to those outside the United States. We anticipate this would mirror the proposed Patriot Employer Act (H.R. 5907, S. 1945) that President Obama co-sponsored while he was a senator.

### **LGBT Rights**

President Obama's reelection campaign received a major injection of money and boost in enthusiasm from the LGBT community once the president endorsed same-sex marriage. Expect the new administration to build on this support by aggressively pushing the Employment Non-Discrimination Act (ENDA) to prohibit workplace discrimination on the basis of sexual orientation or transgender status. Passage of ENDA during the president's first term was deferred so that all efforts could be concentrated on the Affordable Care Act. By the time the administration was prepared to push ENDA,

Republican control of the House of Representatives made passage impossible. In April 2011, President Obama refused to sign an executive order banning sexual orientation or gender identity discrimination by employers with federal contracts. As grounds for his refusal, he indicated that he preferred to focus on passing ENDA as a more comprehensive ban on sexual orientation and gender identity discrimination in any workplace.

If the Republican Party is serious about efforts to broaden its demographic base, it will be difficult for Speaker Boehner to prevent the bill from being voted upon. It will likely pass with the support of so-called Log Cabin Republican groups; but if not, expect the president to impose ENDA's obligations on federal contractors and subcontractors through an executive order. Enforcement would then be given to the Department of Labor Office of Federal Contract Compliance Programs where a vigorous effort could be mounted through a program of contractor audits and complaint investigations.

### **Pay Equity**

Four years ago we projected that employers could expect a new push for the Lilly Ledbetter Fair Pay Act (H.R. 2831, S. 1843), which had been introduced to overturn a 2007 Supreme Court decision that limited the time for filing pay discrimination claims. This turned out to be the first bill signed into law by President Obama, and he campaigned on it repeatedly, noting that he placed equal pay initiatives at the forefront of his presidency. For example, he declared April 12, 2011 to be "National Equal Pay Day." President Obama also created the National Equal Pay Enforcement Task Force, which is a coordinated effort among the Equal Employment Opportunity Commission, the Department of Justice, the Department of Labor, and the Office of Personnel Management to crack down on violations of equal pay laws. Some of the task force initiatives under the Obama administration include implementing a method by which the government can access employers' compensation data, as well as educating employees and employers regarding their rights and obligations regarding wage discrimination.

Expect to see much more on this front over the next four years, including resurgence of the Paycheck Fairness Act. The Paycheck Fairness Act originally surfaced within the first Obama administration, but was rejected before the House and Senate along party lines in June 2012. Among other things, this bill would amend the Equal Pay Act of 1963, which currently permits discrepancies in pay if they are based upon a factor "other than sex." The Paycheck Fairness Act would require that compensation discrepancies be based upon a factor other than sex that is also job-related and consistent with business necessity, a much more difficult standard for employers to

meet. The Paycheck Fairness Act would also permit employees to recover unlimited compensatory and, if applicable, punitive damages. Additionally, it would permit "opt-out" rather than "opt-in" class actions so employees would not have to affirmatively agree to be included in a class action to recover monetary damages.

Despite the Republican party's need to broaden its appeal to women voters, the Paycheck Fairness Act will likely result in a filibuster effort in the Senate or a refusal to allow it to come to the floor in the Republican-controlled House. If this occurs, watch for aggressive efforts by the president to implement the basic requirements of this legislation by imposing them through an executive order on federal contractors and subcontractors.

### **Additional Regulation of Federal Contractors**

Under the Obama administration the Office of Federal Contractor Compliance Programs (OFCCP) has been particularly aggressive in efforts to revamp affirmative action. The OFCCP recently proposed 10 major rule changes, including rules aimed at affirmative action hires of veterans and the disabled, and a revised audit policy that seeks more detailed data on employee compensation. Although a report questioning the feasibility of such a system likely delayed its implementation, expect it to come roaring back in the second term. Also, expect more aggressive audits of contractors and more efforts made to implement systemic reform and impose significant financial penalties.

If the Obama administration is successful in passing legislation to address infrastructure issues, you can expect executive agencies will continue to require the use of project labor agreements when they engage in large-scale construction projects. Such project labor agreements would require every contractor and subcontractor on a federal construction project to agree to negotiate with one or more appropriate labor organizations to establish the terms and conditions of employment.

### **Employee Classification**

The Department of Labor and the IRS have been stepping up their efforts to address the misclassification of employees as independent contractors. Cooperative arrangements have been made with some state enforcement agencies to bring further resources to this effort. Employers who misclassify employees do not pay social security or Medicare taxes on so-called independent contractors. In any "fiscal cliff" negotiations to reign in the cost of these entitlement programs, watch for the Obama administration to push hard for legislative reform that would impose additional financial penalties on employers for misclassifying their workers.

## OSHA

OSHA enforcement was stepped up in the first Obama administration from what it had been in the prior four years, with an increased emphasis on obtaining compliance through the coercive impact of larger fines and enhanced levels of citation. This should continue. In addition, OSHA has begun regulatory review in many areas setting the stage for new regulations. Expect OSHA to issue final rules updating exposure limits and requiring employers, including small businesses, to implement an injury and illness prevention program to find and correct hazards in their own workplaces.

## Health Care

The Affordable Care Act, widely known as Obamacare, survived Supreme Court review largely intact. Congressional Republicans realize they will not be able to repeal it now, despite 33 unsuccessful efforts to do so in the last Congress. Minor changes may be included during the budget reconciliation process, and the courts could strike down portions of the obligation for religious employers to include contraception benefits in their health plans, but for the most part employers need to ready themselves for the implementation of the law. Beginning January 1, 2014, tax credits for small business will increase, penalties will be leveled against employers who do not offer health care benefits to their full-time employees and a host of other changes will kick in. Many of these changes will be governed by regulations yet to be proposed. Employers can look forward to a host of new regulations in this area over the coming year and benefit consulting firms can expect a big boost in their business as employers attempt to comply.

## Immigration Reform

Almost all prognosticators anticipate that any effort at comprehensive immigration reform will be a major focus of the new Congress. Business groups are expected to press their Republican allies to ensure reform efforts at the federal level preempt state and local laws that can be a thorn in the side of business. The H1B visa process is likely to be revised so that highly skilled workers can be brought into the country more easily and those students graduating from American universities with advanced degrees in the STEM disciplines (science, technology, engineering and mathematics) can qualify for permanent residency and eventual citizenship.

## Summary

The landscape of labor and employment law continually changes through the actions of the legislature, the regulators and the courts. For the next two years, at least, we can expect that the focal point of change will shift to the regulatory arena. The president's regulatory authority is enhanced when dealing with federal contractors and subcontractors. All employers, but especially those who do business with the federal government, will need to keep a close watch on regulatory developments either in the form of formal rulemaking or in the form of case law decisions by administrative agencies.

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*To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:*

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