

Labor & Employment Law Alert

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*Practical and preventive information for managing
your workplace*

Post-Election Legal Alert

The November 4, 2008, election will not only be remembered as a significant election in the country's history, but also for its dramatic shift in power across party lines. With the election of Democrat Barack Obama, and the support of a now-influential Democratic party in Congress, the new administration has the potential to significantly change the landscape of the American workplace. In light of these developments, we highlight some of the employment-related initiatives and legislation proposed by President-Elect Barack Obama and the Democratic party during the campaign. Some of the initiatives will have little effect on an employer's day-to-day activities, while others may drastically change the way you operate your business. Consequently, as we move into the next four years, it will become important to stay apprised of legislative initiatives that may have human resources implications.

Employee Free Choice Act. The Employee Free Choice Act (EFCA) has been a focus of union supporters for many years. Before November 2006, however, the possibility of the EFCA being enacted was very low, due to a largely Republican Congress and President Bush's apparent intention to veto such legislation. In 2007, a Democratic Congress introduced the bill, co-sponsored by then-Senator Obama. The bill passed in the House, but was held up in the Senate.

In 2009, President-Elect Obama intends to promptly push the EFCA through Congress. If, and more likely when, it is enacted, the EFCA would affect labor relations for all private employers, not only those who are already

unionized. Specifically, the EFCA would make it easier for unions to organize by bypassing National Labor Relations Board (NLRB) supervised secret ballot elections and opting for the use of publicly signed cards. In other words, these "card-check" campaigns make it much easier for unions to organize workers because the EFCA allows for unsupervised, unregulated union card solicitations followed by *mandatory union recognition*, instead of secret ballot elections. Under this system, your employees essentially lose the right to vote.

The EFCA requires the NLRB to certify a union after a majority of a firm's workers (50 percent plus one) sign union cards, putting an end to almost all organizing elections. In other words, rather than direct an election when a majority of employees in a unit have signed valid authorizations, the NLRB would *automatically certify* the labor organization.

In addition, the EFCA requires companies and newly-certified unions to enter binding arbitration if they cannot reach agreement on an initial contract after 90 days of negotiations. Neither companies nor employees could appeal the arbitrator's ruling, and the contract would last for two years.

Finally, the EFCA would dramatically increase the penalties for unfair labor practices committed by employers, but not unions, during an organizing drive. For instance, the EFCA expands potential liability for violations by: (a) increasing potential damages for discharging or discriminating against an employee during the relevant period to back pay plus two times that amount as liquidated damages, and (b) expanding civil penalties up to \$20,000 per violation against employers

found to have willfully or repeatedly violated employees' rights in either a campaign or in relation to a first contract. Furthermore, if the NLRB has a "reason to believe" that the employer has discharged or threatened to discharge an employee because of his involvement in the organizing campaign, or engaged in other conduct that significantly interfered with employee rights during an organizing campaign or a first contract situation, the NLRB would be *required* to seek injunctive relief against the employer.

In short, passage of the EFCA would: (1) make it easier for unions to organize employees by allowing them to circumvent the "secret ballot" election process conducted by the NLRB; (2) significantly reduce employer bargaining power by giving arbitrators authority to set the terms for first-time contracts; (3) impose significantly harsher monetary penalties on employers that commit unfair labor practices during union organizing campaigns or negotiations for a first contract; and (4) continue to require secret elections for decertification.

Best Practices:

If the EFCA becomes law, employers need to be proactive with their approach to labor relations and union campaigns. The best way to accomplish this is to reassess the company's ability to withstand a union campaign. Because the EFCA essentially eliminates the election process, employers should consider proactive manager training, compliance efforts, and audits to prevent any surprise card-check campaigns. More importantly, if enacted, employers should educate their employees about the new process and the pitfalls of unionization before organizing occurs. In many ways, properly educated and satisfied employees become the best defense to unionization.

Ban Permanent Replacements. President-Elect Obama not only supports the right of workers to join unions, but also to strike. Obama intends to ban the permanent replacement of striking workers, "so workers can stand up for themselves without worrying about losing their livelihoods."

Expansion of Labor Law Protections. Obama has co-sponsored legislation to overturn the NLRB's *Kentucky River* decisions that classify nurses, construction, and professional workers as "supervisors" and therefore not protected by federal labor laws.

Expansion of the FMLA. The FMLA currently covers employers with 50 or more employees and requires such employers to provide eligible employees with 12 weeks of

unpaid leave to care for their own or a family member's serious health condition. The Obama administration proposes reducing the employer threshold from 50 or more employees to 25 or more. It also proposes to expand the FMLA to cover more purposes, such as "allowing workers to take leave for elder care needs; allowing parents up to 24 hours of leave each year to participate in their children's academic activities; and expanding FMLA to cover leave for employees to address domestic violence."

Encourage States to Adopt Paid Leave. Both Obama and the Democratic party support efforts to guarantee workers seven days of paid leave per year. While this process would be initiated at the state level, Obama pledges to provide a \$1.5 billion fund to assist states with start-up costs and to help states offset the costs for employees and employers.

Paid Sick Leave. Obama intends to take steps to ensure that every American worker is able to earn up to seven paid sick days to care for themselves or an ill family member. This time may be taken on an hourly basis.

Employment Non-Discrimination Act. Obama promises to pass the Employment Non-Discrimination Act, which prohibits discrimination on the basis of sexual orientation, gender identity, and gender expression. While Nebraska does not yet protect sexual orientation under its state laws, Iowa's laws already include such a protection.

Lily Ledbetter Fair Pay Act. Obama also plans to pass the Fair Pay Act, which essentially reverses the Supreme Court's 5-4 decision in *Ledbetter v. Goodyear Tire & Rubber Company*. In that case, Ledbetter presented evidence at trial that over her 19-year career, she was paid progressively less than the men in her same position. The Supreme Court held that because the later effects of past wage discrimination do not restart the clock for filing an EEOC charge, Ledbetter should have filed a discrimination charge within 180 or 300 days (depending on the state) after receiving each paycheck, and because she failed to do so, her claims were time-barred. The Fair Pay Act overturns this decision and would grant employees a reasonable time to file a pay discrimination claim after they discover any discriminatory compensation.

Automatic Workplace Pensions. The Obama-Biden retirement security plan would automatically enroll workers in a workplace pension plan. Under this plan, employers who do not currently offer a retirement plan would be required to enroll employees in a direct-deposit IRA account that is compatible to existing direct-deposit payroll systems.

Employees would be able to opt-out if they wanted to. Experts estimate that this program would increase the savings participation rate for low and middle-income workers from its current 15 percent level to around 80 percent.

Minimum Wage Increase. Obama proposes raising the minimum wage to \$9.50 per hour by 2011, index it to inflation, and increase the Earned Income Tax Credit “to make sure that full-time workers have a living wage.”

Reinstatement of Executive Order 13173. Prior to leaving office, President Clinton issued Executive Order 13173, which mandated that federal departments and agencies hire an additional 100,000 federal employees with disabilities in five years. Obama intends to reinstate this order upon taking office. While reinstating this order will not directly affect private employers, it represents a trend that may eventually expand to affect other private employers, specifically federal contractors.

Affirmative Action Plan Goals for Individuals with Disabilities. Section 503 of the Rehabilitation Act requires the federal government and employers who are federal contractors to “take affirmative action to employ and advance in employment qualified individuals with disabilities.” Obama proposes changing

the regulations implementing Section 503 so that they more closely resemble the affirmative action requirements of Executive Order 11246. For example, Obama proposes requiring contractors to create goals and timetables for individuals with disabilities like they are required to do under the affirmative action requirements for women and minorities.

Universal Health Care. Obama ran on a universal health care platform that guarantees eligibility for all individuals and requires children to have health insurance. Obama’s proposal requires employers to offer their employees meaningful coverage or contribute a percentage of the company’s payroll to offset the cost of providing coverage. The plan includes a reinsurance pool for employers. If employer health care costs exceed a certain amount, the federal government will pick up the tab, so long as the employer agrees to pass the savings on to its employees. The plan would provide tax credits to small employers that provide coverage to their employees.

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