

Akin Gump Reports: The Obama Administration

The Impact
of the Obama
Administration
on Law, Policy
and Industry

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AKIN GUMP
STRAUSS HAUER & FELD LLP

Akin Gump Reports: The Obama Administration November 2008

The historic 2008 election of Democratic Sen. Barack Obama to the presidency, coupled with fortified Democratic majorities in both the House and the Senate, will introduce significant—not to mention “seismic”—changes not only to domestic business and politics in the United States, but also to our relations with allies, trading partners and adversaries abroad.

For over 60 years, Akin Gump Strauss Hauer & Feld LLP has practiced at the intersection of law, policy and industry. Although we have a worldwide reach, our roots are deeply planted in Washington, where we gain great satisfaction from serving clients from both sides of the aisle.

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In this premiere edition of *Akin Gump Reports: The Obama Administration*, we discuss and analyze the projected impact of the president-elect and his appointees on policy-making in the areas of climate change, international trade, and labor and employment. We also look back at the historic election held two weeks ago and provide additional inaugural-related information that may also be of interest

In the coming weeks, new installments of *Akin Gump Reports: The Obama Administration* will be distributed to our clients, focusing on related areas of interest. We invite your feedback on these articles and encourage you to share them with those who may be interested in issues surrounding the incoming administration.

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The Election

Always vote for a principle, though you vote alone, and you may cherish the sweet reflection that your vote is never lost.

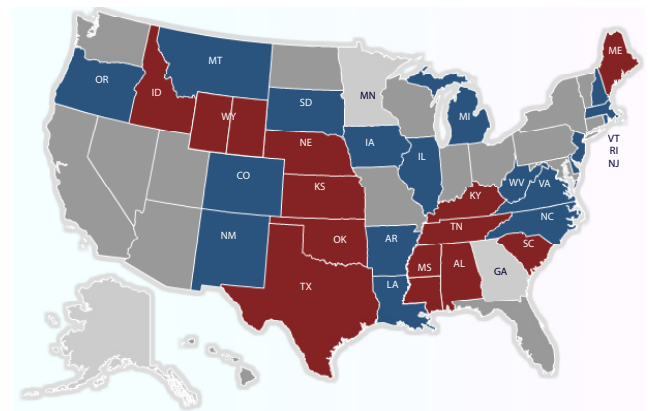
—John Quincy Adams

The 2008 election cycle will undoubtedly be remembered for its historic firsts. An African-American and a woman campaigning for the presidency on behalf of the Democratic Party. The first Republican woman nominated to run for the office of vice president of the United States. Three United States senators campaigning in a race that featured some of the highest voter registration numbers and one of the largest voter turnouts in U.S. history. Campaign contributions topping \$1.5 billion, including a record-breaking \$150 million raised in a single month by President-elect Barack Obama. With those milestones as a backdrop, we take a look back at the presidential, congressional and gubernatorial races, that have bolstered the Democratic majority in Congress, installed a Democrat in the Oval Office and increased the number of Democratic governors nationwide.

Key Senate Races

Significant changes are expected in Congress as a result of the aggregate Democratic majorities in both the House and the Senate, along with the retirements of several key GOP figures on the Hill, including Pete Domenici (R-NM), Larry Craig (R-ID), Wayne Allard (R-CO), John Warner (R-VA) and Chuck Hagel (R-NE).

In addition, Senate seats for Illinois and Delaware left vacant as a result of the Obama presidency and the vice presidency of Sen. Joe Biden will occasion additional changes, as both seats will be filled by Democratic Govs. Rod Blagojevich and Ruth Ann Miner, respectively.



Senate Results

The Election

Key Defeats

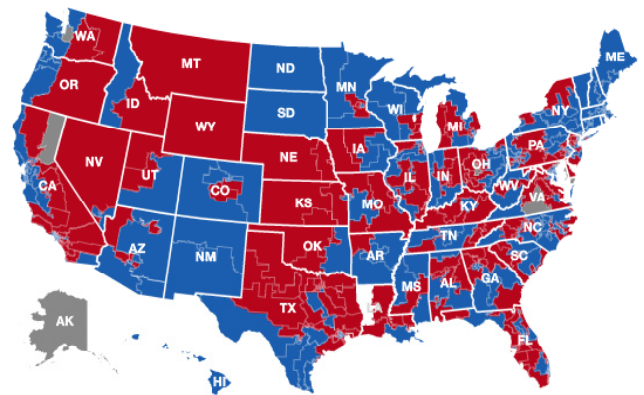
The election was not without notable defeats that will undoubtedly result in some shifting on key committees. Elizabeth Dole (R-NC), Gordon Smith (R-OR) and John Sununu (R-NH) all lost their Senate seats, while close races are still to be called in Georgia, Minnesota and Alaska, where Saxby Chambliss (R-GA), Norm Coleman (R-MN) and Ted Stevens (R-AK) await final results.

Democratic Majorities

Current congressional numbers reflect 56 Democratic senators, 39 Republican senators, two independents and two yet to be determined. In addition, the House of Representatives currently stands at 255 Democrats and 175 Republicans with five undetermined seats.

Gubernatorial Elections

At the state level, the 2008 election featured 11 gubernatorial races. The winners of those elections include Delaware (Markell-D), Indiana (Daniels-R), Missouri (Nixon-D), Montana (Schweitzer-D), New Hampshire (Lynch-D), North Carolina (Perdue-D), North Dakota (Hoeven-R), Utah (Huntsman-R), Vermont (Douglas-R), Washington (Gregoire-D) and West Virginia (Manchin-D). All told, there will be 29 Democratic governors and 21 Republican governors across the country.



House Results

The Election

The Presidential Election

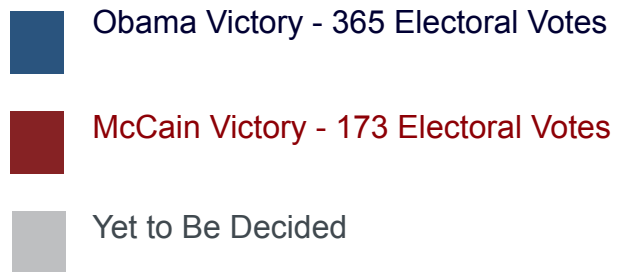
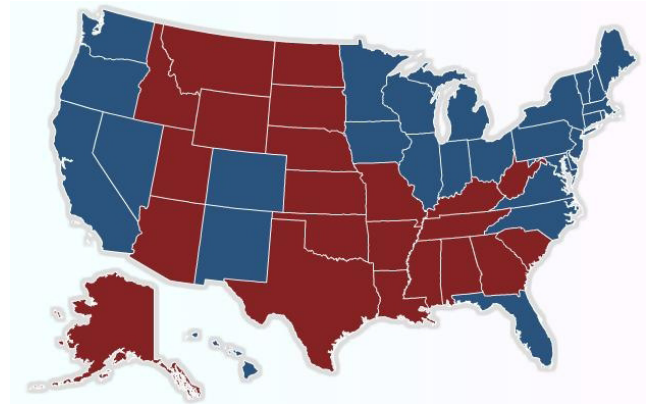
While returns are still being tallied in some states and final numbers may not become available for weeks, this election will reflect one of the highest voter turnout rates across the board, with over 125 million votes cast.

The Electorate

President-elect Obama received 66,882,230* popular votes representing 53 percent of the electorate. These totals earned him 365 electoral votes.

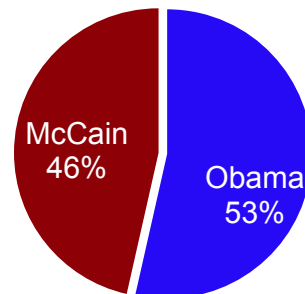
Senator McCain received 58,343,671* popular votes representing 46 percent of the electorate. These totals earned him 173 electoral votes.

*Results are still being tallied in some states.



Electoral Votes

Percentage of Popular Vote



Popular Votes

The Inaugural

There is nothing that solidifies and strengthens a nation like reading of the nation's own history, whether that history is recorded in books or embodied in customs, institutions and monuments.

—Joseph Anderson

Our nation's capital will play host to visitors from across the country when the 56th Inaugural Ceremony is held on January 20, 2009. Not surprisingly, the events surrounding the inauguration are regulated by many different rules. Whether making a donation to the Presidential Inaugural Committee, obtaining tickets to the inaugural ceremony at the Capitol, attending events sponsored by a state society or planning a corporate event, it is important to know which rules apply in each situation.

The Joint Congressional Committee on Inaugural Ceremonies (JCCIC) and the Presidential Inaugural Committee (PIC) are the two main entities involved in the planning and financing of the events surrounding the inauguration. The JCCIC is responsible for organizing the inaugural ceremonies held at the U.S. Capitol, including construction of the platform, the congressional luncheon and the swearing-in ceremony. The JCCIC does not accept donations from private individuals or other entities and is funded entirely with government funds.

The PIC organizes and directs the social events of the presidential inauguration, including pre-inaugural receptions and performances, the Inauguration Day parade, galas and inaugural balls. It also develops and markets souvenirs, including the official program and/or book and the official medal. The PIC may accept donations from private sources, with the exception of foreign nationals, who are prohibited from making donations to the PIC.

Political party committees, state society organizations and other organizations such as trade associations, corporations and other political committees will likely organize additional events in connection with the inauguration.

Congressional Gift Rules

There is no blanket exemption from the congressional gift rules for the events surrounding the inauguration. For organizations that employ or retain lobbyists, there is a zero dollar threshold for gifts. For other organizations, there is a \$50 gift limit. Therefore, it is important to carefully structure events to be in compliance with the gift rules. For example—

- Inaugural events sponsored by private parties may qualify as *widely attended* events such that members of Congress and their staffs may attend.
- Fundraising events sponsored by political organizations may also qualify for an exception under the gift rules.
- Charitable fundraising events may also be attended by members of Congress and staff.

The Inaugural

With each different kind of event, there are rules governing the ability of a member of Congress or a member of his or her staff to accept an invitation. Relevant factors include the structure of the event and the person or organization extending the invitation, as well as other considerations. Whether the event is a state society inaugural ball, a reception or dinner hosted by a corporation or other organization, or a political or charitable fundraiser, the congressional gift rules remain in effect.

Federal Campaign Finance Rules

Federal campaign finance rules prohibit the PIC from accepting donations from foreign nationals. Individuals and corporations may make donations, in any amount, to the PIC, and all donations received by the PIC will be publicly disclosed to the Federal Election Commission within 90 days after the inaugural ceremony. The PIC is required to disclose any donation of money or anything of value made to the committee from a donor in an aggregate amount equal to or greater than \$200. The name and address of each donor, the amount of the donation and the date of the donation will be disclosed. A donation would include the entire amount paid for any ticket for an inaugural event hosted by the PIC.

Links of Interest

Joint Congressional Committee on Inaugural Ceremonies
<http://inaugural.senate.gov>

Federal Election Commission
<http://www.fec.gov>

Inauguration Day Events January 20, 2009

- Morning Worship Service
- Procession to the Capitol
- Vice President's Swearing-In Ceremony
- President's Swearing-In Ceremony
- Inaugural Address
- Departure of the Outgoing President
- Inaugural Luncheon
- Inaugural Parade
- Inaugural Ball

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Climate Change/Energy/Environment

You can't escape the responsibility of tomorrow by evading it today.

—Abraham Lincoln

Press reports indicate that President-elect Barack Obama is considering a post-election “green summit.” While such a summit would provide some clarity to the incoming administration’s agenda with respect to energy and environmental issues, these issues—which are very much intertwined—have been a central component of the campaign, in part due to high gasoline prices. As the administration moves forward on these issues, it will do so under the broader rubric of job creation and climate change.

Economic Stimulus

The Obama plan proposed an investment of \$150 billion in clean energy over 10 years as a means of creating five million new jobs. As a result, we will likely see significant advancement in the next generation of biofuels and fuel infrastructure, accelerated by the commercialization of plug-in hybrids; the promotion and development of commercial-scale renewable energy; and investment in low-emissions coal plants that will lead to the beginning of a transition to a new digital electricity grid. A principal focus of this fund will be devoted to ensuring that technologies that are developed in the United States are rapidly commercialized in the United States and deployed around the globe. Notably, the Obama plan on climate change is postured as a job-creation mechanism. Some of the revenue generated by auctioning allowances will be used to support the development of clean energy, to invest in energy efficiency improvements and to address transition costs, including assistance for American workers affected by this economic transition. President-elect Obama also supports the completion of the Alaska Natural Gas Pipeline as a means of delivering a new clean fuel source to the United States and as a means of creating jobs.

Climate Change

Obama supports a cap-and-trade system designed to reduce carbon emissions levels 80 percent by 2050. Obama’s cap-and-trade system will require all pollution credits to be auctioned. A 100 percent auction ensures that all polluters pay for every ton of emissions they release, rather than “giving” these emission rights away to coal and oil companies. Obama may use regulatory proceedings to prompt congressional action. The U.S. Supreme Court, in April 2007, found that greenhouse gases are pollutants under the Clean Air Act. That leaves the U.S. Environmental Protection Agency (EPA) to decide whether or not the emissions pose a danger to the public and should be regulated. The EPA will have to make a finding, something Obama campaign policy officials have publicly stated could be used as a means to push Congress to take action.

Coal

Coal-fired power plants produce about half of the country’s electricity and account for about 40 percent of U.S. carbon-dioxide emissions. While Obama’s platform supports the development of clean coal technologies, such positions will be put to the test in light of his aggressive plan on climate change. His vow to keep coal part of the fuel mix should



For the latest news in climate change visit us online at www.climateintel.com

Climate Change/Energy/Environment

be viewed in the context of government forecasts that mandatory cuts in greenhouse-gas emissions would likely lead to the shuttering of scores of coal-fired power plants and reduce demand for coal. Further, according to recent media reports, Obama commented to the editorial board of the *San Francisco Chronicle* that his plan would impose such costs on coal-generated power that it would “bankrupt” utilities that choose coal as a feedstock. On the other hand, the Obama plan calls for incentives to accelerate private sector investment in commercial scale zero-carbon coal facilities and the development of five commercial-scale coal-fired plants with carbon capture and sequestration through a Department of Energy-led public private partnership.

Oil and Gas

Windfall Tax

The Obama plan calls for a windfall tax on major oil companies in order to pay for a \$500-\$1,000 energy “rebate” to individual taxpayers. Additionally, congressional Democrats earlier this year pushed legislation that would subject oil companies to a 25 percent tax on windfall profits related to the surge in crude oil prices.

Domestic Exploration & Production

Obama’s plan would promote domestic energy supply in the short term in a targeted manner. In an August 2008 speech, Obama stated his support for some expanded domestic exploration and production initiatives in the short term, including a “use-it-or-lose-it” requirement that would force companies to develop the 68 million acres for which they currently have leases but have yet to drill. He further called for efforts to speed up the process of recovering oil

and gas resources in shale formations in Montana, North Dakota, Texas and Arkansas, as well as in the western and central parts of the Gulf of Mexico. He supported selling 70 million barrels of oil from our Strategic Petroleum Reserve for less expensive crude and leasing more of the National Petroleum Reserve in Alaska for oil and gas production. Obama has called for tapping more of our substantial natural gas reserves and working with the Canadian government to build the Alaska Natural Gas Pipeline in order to deliver clean natural gas and create additional jobs in the process.

Renewable Sources Including Wind, Solar and Geothermal

Renewable Portfolio Standard (RPS)

Obama’s plan calls for 10 percent of electricity to come from renewable sources by 2012 and 25 percent by 2025. At least two dozen states have renewable-electricity requirements, although the president-elect would accelerate those mandates in some states and extend the requirements for the first time to parts of the Midwest and the Southeast. He also supports extension of the production tax credit to encourage the production of renewable energy such as wind, solar and geothermal.

Nuclear

During his presidential campaign, Obama said that the United States was unlikely to meet targets for greenhouse gas emissions reductions without nuclear power. However, he opposed the storage of nuclear waste at the proposed facility at Yucca Mountain. His plan involves more study of long-term disposal issues and envisions that, for now, waste would continue to be stored at extant locations around the country.

Climate Change/Energy/Environment

Other Clean Technologies

Biofuels/Renewable Fuel Standards

Obama's goals are that, by 2030, 60 billion gallons of U.S. motor fuel will come from sustainable, affordable biofuels and that the infrastructure to deliver that fuel be in place by that date. Obama has called for establishing a low-carbon fuel standard, under which vehicle fuel suppliers would have to steadily reduce the carbon in their fuels. The policy could have varying implications for biofuels makers, particularly biofuels with a higher carbon footprint.

Plug-In Hybrids

Obama's plan calls for the deployment of one million plug-in hybrid vehicles capable of achieving 150 miles per gallon within six years. His plan calls for greater investment in the research and development of those plug-in hybrids, specifically focusing on the battery technology, as well as for a \$7,000 consumer tax credit to buy these vehicles. While his plan initially called for \$4 billion in loans and tax credits to the auto industry, Congress recently funded a \$25 billion loan program that Obama and industry supporters in Congress have indicated they would like to increase.

Efficiency

Obama seeks to reduce the demand for electricity 15 percent by the end of the next decade. He estimates that it will save \$130 billion. "We will set a goal of making our new buildings 50 percent more efficient over the next four years and existing buildings 25 percent more efficient over the next ten years." (Lansing, Mich., August 4, 2008). The Obama plan would also seek to weatherize one million homes annually with the goal of cutting energy bills by 20-40 percent.



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International Trade

There is nothing so useful to man in general, or so beneficial to particular societies and individuals, as trade. This is that alma mater, at whose plentiful breast all mankind are nourished.

—Henry Fielding

There is little doubt that President-elect Barack Obama will break with his predecessor and seek to set a different course for U.S. trade policy. A centerpiece of his campaign was a tougher trade policy that emphasized security for U.S. workers and improved labor and environmental standards in trade agreements. He also will likely place greater emphasis on monitoring and enforcement of existing U.S. trade agreements. Other policy changes may include reform of worker adjustment assistance programs and the implementation of cargo security measures.

Obama has often been critical of current U.S. trade policy, maintaining that the impact of past U.S. trade policies has ranged from the offshoring of U.S. jobs to insufficient environmental protections. In fact, Obama has pledged a comprehensive assessment of all existing and pending U.S. trade agreements to ensure they adequately promote U.S. interests both at home and abroad.

Specifically, an Obama administration will likely seek to strengthen the labor and environment provisions of U.S. trade agreements. This might include changes to the North American Free Trade Agreement (NAFTA), as well as additional requirements in bilateral pacts such as the U.S.-Colombia Trade Promotion Agreement currently pending in Congress. Additional monitoring and enforcement mechanisms

For information pertaining to the congressional debates on the Food and Drug Import Safety Act of 2007, please visit www.akingump.com/communicationscenter.

are also possible, with particular respect to U.S. bilateral trade with China. These measures might include a more vigorous defense of intellectual property rights, new food and consumer safety import protections, and penalties for currency manipulation.

In addition to realigning priorities in international agreements, President-elect Obama will likely seek several domestic initiatives involving trade and commerce. In particular, reform of programs designed to assist U.S. workers displaced by foreign trade will be on the agenda. Many members of Congress have long held that programs such as Trade Adjustment Assistance (TAA) need to be changed to better reflect the changing workforce. The new administration will likely provide this opportunity. Obama will also likely renew supply chain and cargo security efforts, including the full implementation of the SAFE Port Act, which passed in 2006 and requires 100 percent screening of all cargo entering U.S. ports.

With stronger Democratic majorities in Congress, President-elect Obama will have more allies to help implement his trade reform agenda. However, there is a growing anti-trade faction on Capitol Hill, and, as a result, Obama will need to chart a delicate course that balances interests on both ends of Pennsylvania Avenue.

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Labor and Employment

Labor is discovered to be the grand conqueror, enriching and building up nations more surely than the proudest battles.

—William Ellery Channing

The 2008 elections are now in the record books. With the election of Sen. Obama to the presidency, and Democrats picking up as many as 20 seats in the House and at least five seats in the Senate, the new balance of power in Washington is likely to bring dramatic change in various areas of American life. One area that is certain to be especially active is legislation and regulation affecting the workplace. When Congress changed hands in 2006, a cascade of bills was introduced by Democrats on various labor and employment issues. Over the intervening two years, Democrats prodded the Bush administration—through hearings, investigations and reports—to enforce various workplace laws more aggressively.

The Employee Free Choice Act - Card-Check and Binding Arbitration for First Contracts

No single piece of labor and employment legislation has drawn as much attention in recent years as the Employee Free Choice Act (EFCA) (H.R. 800, S. 1041). Passed by the House in 2007, the legislation stalled in the Senate when supporters failed to garner the necessary 60 votes to invoke cloture. As a senator, President-elect Obama was one of the original supporters of the EFCA. The bill has the fervent support of organized labor and, with the strengthening of Democratic majorities in both the House and Senate, there is good reason to believe that it will be among the earliest priorities for the 111th Congress. The EFCA would fundamentally change the rules in labor-management relations in the United States in two critical ways. First, it would allow unions to bypass a secret-ballot election supervised by the National Labor Relations Board (NLRB) and instead become the certified bargaining representative of employees through a “card-check” recognition

Likely Legislative Priorities for the Obama Administration

- The Employee Free Choice Act
- Card-Check Certification
- Mandatory Arbitration
- Increased Fines and Damages
- The Lilly Ledbetter Fair Pay Act
- The Patriot Employer Act
- Arbitration Fairness Act
- Employment Non-Discrimination Act of 2007
- Protecting America’s Workers Act
- Expansion of Workplace Leave Policies
- Trade Liberalization
- National Labor Relations Board Issues

Washington
Labor & Employment Wire

We invite you to read the full five-part series on the impact of the Obama administration on labor and employment law. Please visit our blog at www.washlaborwire.com.

Labor and Employment

procedure. Second, if the parties to a new collective bargaining relationship could reach an agreement within a specified time, they would have to submit their disagreement to a federally appointed arbitration panel, who would then dictate the terms of the first collective bargaining agreement (CBA). The EFCA also would significantly increase the penalties on employers who violate provisions of the National Labor Relations Act in connection with union organizing efforts.

Card-Check Certification

Under current law, a union can become the certified bargaining representative of a group of employees only if it prevails in a secret-ballot election supervised by the NLRB, or if the employer agrees to recognize the union voluntarily after the union shows that it has support from more than 50 percent of the employees. Many employers insist on a secret-ballot election before they will recognize a union. Under the EFCA, a union would become the certified bargaining representative by demonstrating that it collected authorization cards from a majority of the employees. It would no longer need to seek an election or obtain the employer's consent to voluntary recognition. Unions typically gather authorization cards without the employer's knowledge. Giving unions the unilateral right to obtain certification without an election or employer consent would effectively deprive employees of the opportunity to hear the full range of arguments for and against unionization. In effect, unions would be able to gather signatures discreetly, giving employees a pro-union argument without an opportunity for rebuttal from the employer. The EFCA also would remove the range of protections that the NLRB has developed

over the past 50 years to ensure that employees are not subject to undue influence or interference in the selection of a bargaining representative. Unlike union elections, which must take place in "laboratory conditions," the EFCA contains no restrictions or limitations on what unions can do to persuade employees to sign an authorization card. Because authorization cards are valid for one year, it is conceivable that union organizers are already collecting cards in anticipation of passage of the EFCA.

Mandatory Arbitration

In addition to facilitating the certification process, the EFCA expedites the bargaining process for a first contract by creating a mediation and arbitration process to settle bargaining disputes over first collective bargaining agreements. The EFCA provides 90 days for an employer and union to negotiate a first-time collective bargaining agreement. If they are unsuccessful after 90 days, either party can demand mediation before the Federal Mediation and Conciliation Service. After 30 days of mediation, an FMCS-appointed arbitration panel shall render a decision resolving the dispute, with the decision binding upon the parties for a period of two years, unless amended by written consent of the parties during that period. This binding arbitration construct represents a fundamental shift in American labor policy. Currently, employers are required to bargain with a union but are not required to agree on any terms. Under the EFCA, a third party could decide the proper wages, benefits, and terms and conditions of employment.

Labor and Employment

Increased Fines and Damages

Finally, the EFCA would drastically increase an employer's potential liability for unfair labor practices. Currently, employers are generally only liable for back pay and reinstatement of any wrongfully terminated employees. Under the EFCA, for unfair labor practices committed during elections and first contract bargaining, an employer would be subject to treble damages through a liquidated damages provision that requires payment of twice the amount owed in back pay, as well as a civil penalty of up to \$20,000 for each violation. The EFCA has no corresponding increase in penalties for union violations.

The Road Ahead

The business community and the labor movement have girded for battle over the EFCA. As of election day, several hundred trade groups, unions and companies had registered to lobby in connection with the legislation. Web sites of many major unions feature significant sections devoted to EFCA. The business community has also formed coalitions to oppose the EFCA. The U.S. Chamber of Commerce and an umbrella group known as the "Coalition for a Democratic Workplace" have launched efforts to fight or limit the EFCA. The fight over the EFCA is likely to become pitched in early 2009. The EFCA passed the House in 2007 by a margin of 241-185. Supporters failed by just nine votes to obtain the necessary margin to obtain cloture in the Senate, and Sen. Tim Johnson, a co-sponsor of the legislation, missed the cloture vote due to illness. The only Republican who voted in favor of cloture was Sen.

Arlen Specter. However, in his floor statement, Sen. Specter made clear that, while he supported imposing cloture, he was not expressing a conclusion on the underlying merits of the bill, and voiced his support for a bipartisan compromise solution to the problems. Sen. Specter noted his concern over improper activities by both unions and employers in the organizing process, and expressed misgivings about the slow process to remedy violations. He cited favorably the Canadian procedure by which elections are held within five to 10 days after petitions are filed, as well as the major labor law reform legislation that failed to pass Congress in 1977, which included such a provision. The 2008 elections created an entirely new landscape that is substantially more favorable to supporters of EFCA. We expect that Democrats in Congress will reintroduce the legislation early in the 111th Congress and attempt to deliver a bill to the new president's desk soon after inauguration. At this time, there remains uncertainty in the Minnesota, Georgia and Alaska Senate races. In the event that the cloture vote is close, Sen. Specter might be able to play some compromise role in shaping a final bill that would pass the Senate.

The Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers (RESPECT) - Redefinition of Supervisor for Union Organizing

The EFCA is part of a broader agenda of organized labor to create a more favorable landscape for union organizing. Another important component of this agenda is the Re-Empowerment of Skilled and Professional Employees and Construction

Labor and Employment

Traders (RESPECT) Act (H.R. 1644, S. 969), which would effectively narrow the definition of a “supervisor” under the National Labor Relations Act. The net effect of the legislation, which then Sen. Obama co-sponsored, would be to both expand the number of employees eligible for unionization and limit management’s ability to use most front-line supervisors to communicate the company’s viewpoint on unionization. In 2006, in response to direction from the Supreme Court (*NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001)), the National Labor Relations Board issued three decisions that provided for a broad definition of who could qualify as a supervisor—and, therefore, be ineligible for participation in a union—under the NLRA. The cases held that an employee is a “supervisor” if he assigns other employees to overall duties, is held accountable for directing subordinates to undertake specific tasks and has the discretion to do so without close direction from management. See *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (Sept. 29, 2006); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (Sept. 29, 2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (Sept. 29, 2006). Democrats have criticized these three cases, arguing that they deny a class of workers the right to unionize, and Obama has repeatedly expressed his disagreement with them. The RESPECT Act would overturn this “Kentucky River trilogy” and its progeny by (1) amending the definition of “supervisor” so as not to include employees whose only supervisory duties involve “assigning” or “directing” other employees, and (2) requiring that supervisors spend the majority of the workday in a supervisory capacity. Even if the RESPECT Act does not pass, Obama-appointed

National Labor Relations Board members will likely narrow the definition of “supervisor” through subsequent NLRB decisions.

The Lilly Ledbetter Fair Pay Act - Continuing Violations for Discriminatory Pay Decisions

Significant legislative activity is expected in the area of employment discrimination. With the help of a larger Democratic majority in the Senate, President-elect Obama will likely push for early passage of the Lilly Ledbetter Fair Pay Act. The bill (H.R. 2831, S. 1843), named for the female plaintiff on the losing end of the controversial Supreme Court decision *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. ____ (May 29, 2007), would amend Title VII to allow claims brought within 180 days of receiving any paycheck affected by a discriminatory pay decision, no matter how far in the past an act of discrimination allegedly occurred. Previously, the Supreme Court read Title VII’s statute of limitations narrowly, requiring such a suit to be brought within 180 days of the actual discriminatory decision. This Supreme Court precedent rejected the “continuing violation” approach, which resets the limitations period each time a new paycheck is issued. President-elect Obama and congressional Democrats favor expanding the statute of limitations by including the continuing violation doctrine in Title VII. Currently, two approaches have been advanced by Democrats: (1) writing the continuing violation doctrine into Title VII by allowing claims brought within 180 days of receiving any paycheck affected by a discriminatory pay decision (H.R. 2831, S. 1843), and (2) extending the statute of limitations period, as proposed by

Labor and Employment

Rep. Ruppertsberger (D-MD) in H.R. 2660. The Republican approach—the Title VII Fairness Act (S. 3209)—would delay the start of the filing period until the plaintiff has or can be reasonably expected to have adequate information supporting a reasonable suspicion of discrimination, but would reject including the continuing violation doctrine in Title VII. Senate Democrats have rejected this approach. Republican leadership and business groups have opposed the legislation, warning that the proposed revisions would allow plaintiffs to sit on their claims for several years and accumulate massive potential damage awards. They also have warned that the bill encourages frivolous and vexatious litigation, potentially leading to windfall profits for trial lawyers. Senate Democrats, including president-elect Obama, failed to achieve the 60 votes necessary for cloture in the Senate on April 23, 2008, falling three votes short. Although the results of several Senate races are not final, it appears that Democrats have likely captured at least three additional votes in favor of cloture when the bill comes up for a vote in 2009. Thus, unless one or more moderate Republicans who voted for cloture changes his or her position, the Lilly Ledbetter Fair Pay Act should pass in the 111th Congress.

The Equal Remedies Act and the Civil Rights Act of 2008 -Expansion of Employer Liability and Employee Remedies

As a senator, Obama cosponsored the Equal Remedies Act (S. 1928) and the Civil Rights Act of 2008 (S.2554, H.R. 5129), both of which would remove the current \$300,000 cap on compensatory

damages and punitive damages for violations of Title VII and the Americans with Disabilities Act. In addition, this legislation would, inter alia, (1) expand disparate impact age discrimination liability by incorporating Title VII’s disparate impact standards into the Age Discrimination in Employment Act; (2) prohibit pre-dispute arbitration agreements unless there is a post-dispute waiver or consent or the agreement was part of a valid collective bargaining agreement; (3) replace the opt-in collective action procedures with traditional Rule 23 opt-out class procedures for Equal Pay Act claims; (4) authorize compensatory and punitive damages for FLSA retaliation claims; and (5) amend the Immigration and Nationality Act to prohibit denying backpay or other relief to undocumented workers, such as claimants in NLRB unfair labor practice proceedings. Representing a “wish list” for civil rights advocates and labor organizations, this bill would significantly increase employer liability and damages for a variety of employment practices.

Employment Non-Discrimination Act of 2007 - Sexual Orientation as a Protected Class

In the campaign, Obama pledged his support for the Employment Non-Discrimination Act (ENDA) and proposed legislation that would amend federal employment statutes to make it illegal for an employer to discriminate with respect to an individual’s actual or perceived sexual orientation. Under the legislation, employers would be liable for discriminatory decisions regarding hiring, firing, compensation and other terms, conditions or

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privileges of employment. The bill further prohibits employers from adversely limiting, segregating or classifying employees or applicants because of actual or perceived sexual orientation. It is expected that any bill passed by the 111th Congress would not prohibit discrimination based on actual or perceived gender identity, an additional protection sought by some supporters of the ENDA. As introduced in 2007, the legislation exempts religious employers and would only apply to employers with 15 or more employees. H.R. 3685, absent gender identity protections, passed in the House on November 7, 2007, but was not taken up by the Senate in the current Congress. The passage of the ENDA would create an additional protected class of employees and expand the universe of potential litigation faced by employers. In response to the passage of the legislation, employers will need to evaluate existing employment and human resources policies to avoid claims of discrimination on the basis of sexual orientation. However, many states and municipalities already forbid employment discrimination on the basis of sexual orientation, and companies in those jurisdictions may already be familiar with compliance with sexual orientation anti-discrimination laws.

Fair Pay Act of 2007 - Equal Pay for Equal Worth

President-elect Obama has also promised to pass the Fair Pay Act (H.R. 2019, S. 1087), a bill he cosponsored with Sen. Harkin (D-IA). The bill seeks to address pay disparities between equivalent jobs segregated by sex, race and national origin. The legislation sets up an “equal worth” system, rather than an “equal work” system. Under this system, employers must pay employees in a job dominated

by employees of a particular sex, race or national origin at the same wage rate at which the employer pays employees in another job that is dominated by employees of the opposite sex or a different race or national origin where the jobs are “equivalent.” Employers would still be able to differentiate in wage rates based on seniority systems, merit systems and systems that measure earnings by quantity or quality of production. Aggrieved employees would have the choice of filing a charge with the Equal Employment Opportunity Commission (EEOC) or proceeding directly to federal court. The bill would permit compensatory and punitive damages against non-government employers and allow plaintiffs to pursue Rule 23 class actions instead of the present opt-in collective action mechanism used for Equal Pay Act and Fair Labor Standards Act (FLSA) actions.

Protecting America’s Workers Act - Safety Regulation Expansion

President-elect Obama also co-sponsored the Protecting America’s Workers Act (S.1244) (PAWA), which would expand federal occupational safety regulation in four ways. First, the bill would expand occupational safety standards to include federal, state and local employees. Second, PAWA would increase whistleblower protections for those who report unsafe workplace conditions. Third, the bill would increase penalties against employers for repeated and willful violations of the law, including making felony charges available when an employer’s repeated and willful violation of the law leads to a worker’s death or serious injury. Finally, PAWA would strengthen an employer’s duty to provide safety equipment, such as goggles, gloves, respirators or other personal

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protective equipment, to its workers. On his campaign Web site, Obama expressed a desire for a more activist OSHA that more vigorously prosecutes employer violations. PAWA dovetails with this goal by giving OSHA a greater scope and authority to levy larger fines.

The Patriot Employer Act - Tax Credits for Voluntary Adoption of Favored Employment Policies

The Patriot Employer Act, a legislative initiative to encourage businesses to increase wages and benefits and adopt a position of neutrality in unionization drives, was a centerpiece of the campaign of Obama, who co-sponsored the Senate version of the Patriot Employer Act (S. 1945) in August 2007. The bill provides a one percent tax credit to qualifying “Patriot” employers, encouraging businesses to provide generous benefits to their employees.

To be designated a “Patriot” employer, a business must—

- maintain headquarters in the United States
- pay 60 percent or more of employee health care premiums
- observe a policy of neutrality in union drives
- preserve or increase full-time positions in the United States (relative to full-time positions in other countries)
- provide the difference in salary and benefits to employees in the National Guard and Reserve, who would otherwise lose pay when called to active duty
- provide a specified living wage and retirement benefit to employees.

Unlike the House of Representatives counterpart (H.R. 5907), the version of the bill Obama supported does not give government contracting preference to qualifying companies. In its current form, the Patriot Employer Act would only apply to businesses with an average of 50 or more employees per fiscal year. Compliance with the bill would be voluntary because the available tax credits would encourage, but not compel, employers to participate. Critics argue that the bill is protectionist, and they object to the union neutrality provision, which could strengthen national unions. They also assert that the bill would both limit participating employers’ ability to operate overseas and increase labor costs. Additionally, some have raised concerns that the provisions requiring employers to replace the lost salary and benefits of National Guard and Reserve employees could perversely lead employers to terminate and refuse to hire such employees. Obama’s past cosponsorship of the Patriot Employer Act is consistent with two key planks of his campaign: (1) his pledge to end tax breaks to companies who send jobs overseas and (2) the New American Jobs Tax Credit, which would provide American businesses with a \$3,000 tax credit for each new job created in the United States. The anti-offshoring provisions of the Patriot Employer Act provide a “carrot” instead of a “stick”; these provisions reward companies that do not send jobs overseas instead of terminating existing tax breaks. President-elect Obama has, however, repeatedly stated a desire to also provide a “stick” to offshoring his intention to end tax breaks for companies that send jobs out of the United States.

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Arbitration Fairness Act - Elimination of Pre-Dispute Arbitration Agreements

Although not a cosponsor of the Arbitration Fairness Act (H.R. 3010, S. 1782), President-elect Obama will likely support this dramatic overhaul of the Federal Arbitration Act (FAA) if it is reintroduced in the 111th Congress. The Arbitration Fairness Act would amend the FAA to invalidate any pre-dispute arbitration agreement requiring arbitration of an employment, consumer or franchise dispute, or any dispute arising under any statute “intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.” The 2007 bill also provides that the “validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.” The Arbitration Fairness Act reverses a series of recent Supreme Court cases, including *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006), which held that arbitrators, rather than state courts, determine the validity of arbitration provisions. As proposed in 2007, the legislation would apply to any dispute arising after the legislation’s enactment, regardless of the date of the pre-dispute arbitration agreement, but would not invalidate arbitration clauses in collective bargaining agreements. The Arbitration Fairness Act would represent a dramatic challenge to businesses who broadly utilize arbitration agreements, shifting numerous disputes from arbitrators to state courts. Explicitly intended to address the “power imbalance” between businesses and employees or consumers, the

legislation would inhibit employers from enforcing pre-arbitration agreements in contracts with their employees and consumers. This legislation would channel a flood of disputes, including frivolous complaints, into state court systems. Rather than arbitrating these disputes—many of which are routine in nature and without merit—companies would have to shoulder the burden of litigating disputes in the courts, tying up valuable time and resources.

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