

**The Potential Impact  
of the Obama Administration  
on the Labor and Employment  
Legal Landscape**

**November 2008**

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## ELECTION 2008: LABOR & EMPLOYMENT UPDATE

The Potential Impact of the Obama Administration on the Labor and Employment Legal Landscape

### Part I – Legislative Priorities

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.

In this five-part series, we share our thoughts on how the changes in the executive and legislative branches of government might impact U.S. labor and employment law and workplace regulation in the next few years. Based on the various legislative efforts by the Democrats over the past two years and the many promises and pledges that President-elect Obama and others made on the campaign trail, we estimate what the next two years may hold for employers in terms of legislation, regulation and enforcement priorities affecting the workplace. Our first installment focuses on probable legislative priorities in the workplace for the fortified Democratic Congress.

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

“We're ready to take the offense for organized labor. It's time we have a President who didn't choke saying the word 'union.' We need to strengthen our unions by letting them do what they do best --- organize our workers. If a majority of workers want a union, they should get a union. It's that simple. We need to stand up to the business lobby that's been getting their friends in Congress and in the White House to block card check. That's why I was one of the leaders fighting to pass the Employee Free Choice Act. That's why I'm fighting for it in the Senate. And that's why we'll make it the law of the land when I'm President.”

*Barack Obama, Dubuque, Iowa, Nov. 13, 2007*

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 111<sup>th</sup> 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 procedure. Second, if the parties to a new collective bargaining relationship cannot agree on an agreement within a specified time, they must submit their disagreement to a federally appointed arbitration panel, who will 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 only 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.

## ***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, more than 900 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 9 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 ten 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, Oregon 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 Tradeworkers (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 President-elect Obama co-sponsored in the Senate, 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 President-elect 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 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 have also warned that the bill encourages frivolous and vexatious litigation, potentially leading to windfall profits for trial lawyers.

Senate Democrats, including Sen. 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 111<sup>th</sup> Congress.

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## **The Equal Remedies Act and the Civil Rights Act of 2008 – Expansion of Employer Liability and Employee Remedies**

As a senator, President-elect 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 back pay 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, President-elect 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 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 111<sup>th</sup> 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 protective equipment, to their workers.

On his campaign Web site, President-elect 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 President-elect 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 President-elect 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.

President-elect 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 who 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 who send jobs out of the United States.



## 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 111<sup>th</sup> 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.

In our next installment, we will focus on various Democratic legislative initiatives that seek to expand workplace leave policies.

## ELECTION 2008: LABOR & EMPLOYMENT UPDATE

### The Potential Impact of the Obama Administration on the Labor and Employment Legal Landscape

## Part II – Workplace Leave Policies and Regulation

In February 1993, the Family and Medical Leave Act (FMLA) became one of the first bills signed into law by President Clinton. Under the FMLA, eligible employees may take up to 12 weeks of unpaid leave in a 12-month period as a result of their own serious health condition; to care for a parent, spouse or child with a serious health condition; or for the birth or adoption of a child. Since its enactment, the FMLA has become a popular source of employee benefits in the workplace, but one that imposes significant administrative burden and cost on employers. The strengthened Democratic majorities in the House and Senate, with the support of the Obama administration, will likely expand further the scope and cost of various family leave policies.

The various bills introduced in the recent Democratic Congress provide a guide for likely legislative activity in the 111th Congress. These bills generally increase the pool of employees eligible for employee leave and the types and duration of leave. Additionally, on his Web site, President-elect Obama expressed support for mandating paid sick days, as well as support for efforts to encourage states to adopt paid leave programs, both of which would increase labor costs to employers. President-elect Obama also supports legislation providing tax breaks to companies that implement flex time arrangements for their employees.

### Military Leave Legislation

The Obama administration will likely support extensions of the FMLA in ways that would benefit military personnel and their families. Such legislation, although noble in intent and politically popular, would nonetheless impose new administrative and labor costs on employers.

In July 2007, President-elect Obama introduced the Military Family Job Protection Act in the Senate (S. 1885, H.R. 3993), a bill that amends the FMLA to provide up to a full year of job protection, including protection from denial of any employment benefit or promotion, for any family member caring for a recovering service member at a military medical facility.

A variety of other bills (S. 1898, H.R. 3391, S. 1894, S. 1975, H.R. 3481, H.R. 5090) were also introduced in this Congress to extend FMLA benefits to the families of military personnel who care for wounded veterans. For example, S. 1898 and S. 1975 would extend the FMLA's provision of 12 weeks of unpaid leave to up to six months of unpaid leave for spouses, children and parents of soldiers injured in combat. H.R. 3481 would include primary caregivers as well. S. 1894 would extend the FMLA to up to 26 work weeks for primary caregivers of service



members with combat-related injuries, and H.R. 3391 would extend the FMLA to up to 26 work weeks for spouses, children and parents. H.R. 5090 provides FMLA coverage to qualifying part-time workers, lowering the qualifying 12-month work requirement for veterans' spouses, parents, or children from 1,250 hours to 625 hours when that individual takes leave to care for the covered service member employees.

Given President-elect Obama's sponsorship of the Military Family Job Protection Act, it is very likely that the 111th Congress will expand FMLA protections to military families.

## **Expansion of the FMLA**

The Obama administration will likely seek to expand the reach of the FMLA, covering employers with as few as 25 employees (down from the current 50-employee threshold), an approach pursued in H.R. 1369. On his campaign Web site, President-elect Obama has also supported expanding the FMLA to cover additional situations, including elder care, parental participation in school activities and leave for victims of domestic violence and sexual assault. These expanded leave policies, in addition to their applicability to a new category of small businesses, could increase labor costs.

Additionally, the Obama administration may pursue additional Democratic initiatives concerning expanded *paid* FMLA benefits. One such bill, the Family Leave Insurance Act (S. 1681, H.R. 5873), would create a federal insurance fund, similar to the federal unemployment insurance scheme, to provide eight weeks of pay for employees taking FMLA leave. Employees would contribute 0.2 percent of their annual earnings, and employers would match employee payments. Benefit amounts would be tiered progressively according to income level and indexed for inflation under the Social Security wage index. The bill would allow employers with an equivalent or better paid-leave plan to opt out of participating in the insurance fund. If enacted with employer matching requirements, the 0.2 percent matching requirement could be costly to employers of qualifying employees.

## **Mandatory Paid Sick Leave**

President-elect Obama cosponsored the Healthy Families Act (H.R. 1542, S. 910), which requires employers with at least 15 employees who work at least 30 hours a week to provide seven days of paid sick leave and pro-rated leave for part-time employees. The leave could be used to care for an illness, injury or medical condition, or to obtain medical diagnosis or preventative care for "a child, a parent, a spouse, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship." Again, these policies lead to increased labor costs for employers, who often must scramble to find substitutes for employees away on leave.



## Flexible Work Schedules

In late 2007, President-elect Obama cosponsored the Working Families Flexibility Act (H.R. 4301, S. 2419), a broad-based proposed reform of working conditions and employee rights that would have a dramatic impact on the workplace. With the support of the Obama administration, the 111th Congress may take up this legislation, which provides employees with the statutory right to request flexible work terms and conditions. The Working Families Flexibility Act provides for a detailed interactive process between employees and requires employers to meet with a requesting employee and a designated representative of his or her choosing, justify any denial in writing and then meet again with any dissatisfied employee. Employees, in turn, would possess the right to make a complaint to the Department of Labor (DOL), seek an administrative hearing and appeal the administrative hearing result to a federal court of appeals. In addition, the Secretary of Labor may file a civil action for injunctive relief in District Court.

The bill, which exempts small businesses, would transfer significant authority over working conditions away from employers by giving employers a larger say in determining their schedules and locations of work. While some employers may benefit from this cooperative approach to working conditions through increased worker satisfaction and productivity, some employers may bristle at these changes, which would likely place additional strain on human resources departments tasked with complying with DOL regulations, evaluating employee requests, documenting their decisions and engaging in the interactive process prescribed by the bill. Additionally, employers will be burdened by the administrative and legal processes available to dissatisfied employees.

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In our next installment, we will focus on the implications of the 2008 elections for the key agencies that enforce labor and employment law and regulate the workplace.

## ELECTION 2008: LABOR & EMPLOYMENT UPDATE

The Potential Impact of the Obama Administration on the Labor and Employment Legal Landscape

### Part III – Federal Workplace Regulation

This is the third installment in our series on potential changes ahead in the labor and employment area as a result of the 2008 election. In addition to pursuing the legislative priorities described in Parts I and II, President-elect Obama has expressed a desire to increase the enforcement and inspection roles of various labor-related agencies with responsibility for regulating the workplace, including the Occupational Safety and Health Administration, the Wage and Hour Division of the Department of Labor and the Equal Employment Opportunity Commission. Today, we examine the possible agendas of these three key agencies.

#### Occupational Safety and Health Administration

The Occupational Safety and Health Administration (OSHA) is the main federal agency responsible for providing employees with a safe and healthy workplace. With an expansive legislative mandate from the Occupational Safety and Health Act (“OSH Act”), OSHA promulgates and enforces detailed health and safety regulations for nearly all working men and women.

Since Democrats took control of Congress in 2006, both the House and the Senate have pressured OSHA to become more aggressive in its enforcement activities. Congress has held hearings and introduced legislation intended to encourage OSHA to issue more stringent citations and penalties on employers for violations of safety rules.

We expect that President-elect Obama will continue this trend during his administration. In an April 2008 statement issued to the International Brotherhood of Boilermakers, then-Sen. Obama declared that “Congress must play a greater role in improving workplace health and safety.” In addition, President-elect Obama supported increased funding levels for OSHA to improve the agency’s ability to reduce workplace injuries and fatalities. President-elect Obama has also endorsed a number of substantive and procedural changes to OSHA policy that will materially increase the steps an employer must take to comply with federal health and safety laws.

#### *A New Ergonomics Rule*

President-elect Obama has promised to issue a new ergonomics regulation. This regulation is likely to provide the same stringent requirements and broad scope of the controversial

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ergonomics standard that was issued near the end of the Clinton administration and then repealed almost immediately by President Bush and the Republican Congress.

After a long, protracted debate, on November 14, 2000, OSHA issued its Ergonomics Program Standard, which became effective on January 14, 2001. This standard attempted to minimize musculoskeletal disorders engendered by low-impact, repetitive movements. It broadly defined a “musculoskeletal disorder” as a disorder of the muscles, nerves, tendons, ligaments, joints, cartilage, blood vessels or spinal discs that affect the neck, shoulder, elbow, forearm, wrist, hand, abdomen, back, knee, ankle and foot. In addition, the standard provided that musculoskeletal disorder injuries could be manifested by diagnoses including, but not limited to, carpal tunnel syndrome, rotator cuff syndrome, lower back pain, trigger fingers, tarsal tunnel syndrome, sciatica, tendonitis and herniated spinal discs.

On March 20, 2001, President Bush signed a congressional resolution that repealed the ergonomic regulations because of the substantial costs and compliance challenges it imposed on employers. Businesses estimated that compliance with the new regulations would have cost as much as \$100 billion.

Because the vote enacting the resolution fell along party lines during a period in which the Republicans controlled Congress, it is likely that President-elect Obama, with a Democratic Congress, will successfully issue a new ergonomics regulation.

### ***Increased Civil Penalties***

President-elect Obama supports increasing the level of penalties OSHA can impose on employers who violate its regulations. In his April 2008 statement to the International Brotherhood of Boilermakers, President-elect Obama stated “OSHA systematically imposes small fines on employers, even in cases where safety violations led to a worker’s death. And it almost immediately discounts a fine if the employer contests it.” Instead, President-elect Obama wants to reduce an employer’s ability to challenge the most severe penalties. For example, he supports codifying OSHA’s egregious penalty policy, pursuant to which OSHA issues a penalty for each instance of noncompliance, instead of combining all instances into one citation, in situations where an employer flagrantly disregards its responsibilities to provide a safe and healthy workplace. Currently, employers often successfully argue that the egregious penalty policy exceeds OSHA’s authority because neither the OSH Act nor any of the OSHA’s regulations mentions the policy. Codification of this policy would hamstring employers’ ability to challenge OSHA’s enforcement efforts in cases where OSHA has used the egregious penalty policy.

In addition, President-elect Obama cosponsored the Protecting America’s Workers Act (S.1244), which would increase the limits on employer fines from \$70,000 to \$100,000 for “repeat” and “willful” violations. Under the bill, the fines for “serious” and “other than serious” violations would increase from \$7,000 to \$10,000.



## ***Enhanced Criminal Penalties***

President-elect Obama would like to amend the OSH Act to strengthen OSHA's criminal penalties in order "to enable the Department of Justice to prosecute a felony when an employer willfully causes death or serious bodily injury to a worker." Currently, the OSH Act allows for companies' management employees to be imprisoned for up to six months for a "willful" violation that results in the death of an employee. President-elect Obama supports a drastic increase to the maximum prison term for such violations. For example, the pending Protecting America's Workers Act would increase the term of imprisonment for these violations to ten years.

## ***Increase in Workplace Inspections***

President-elect Obama also wants to improve OSHA's process of inspecting workplaces. He will encourage Congress to provide OSHA with funding to hire additional enforcement personnel to increase the number of workplace inspections, including inspections against repeat offenders under the Enhanced Enforcement Program, which OSHA uses to target its enforcement activities on employers with prior citations that have arisen out of inspections involving workplace accidents or fatalities.

## **Wage and Hour Division**

The Department of Labor's Wage and Hour Division (WHD) is responsible for enforcing federal law on minimum wage, overtime pay, recordkeeping, family and medical leave and child labor. Under the Obama administration, the WHD would likely be more aggressive in its enforcement actions.

In a July 27, 2008 letter to the Department of Labor, President-elect Obama set forth his vision for a WHD that listens to worker advocacy organizations and more actively initiates its own investigations. President-elect Obama also indicated his desire to expand the scope of WHD's activities, criticizing the Bush administration's emphasis on only four industries (agriculture, accommodation and food services, manufacturing, and health care and social services). He also indicated his desire to increase funding for the WHD in order to actualize the enhanced role he envisioned for it. With the support of a Democratic Congress, the Obama administration could make this vision a reality.

In addition to increasing the role of WHD, President-elect Obama will also likely push for two wage and hour-related legislative initiatives: increasing the minimum wage and instituting paid sick leave.

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## ***Minimum Wage Increase***

President-elect Obama has written that “[e]ven though the minimum wage will rise to \$7.25 an hour by 2009, the minimum wage’s real purchasing power will still be below what it was in 1968.” Consequently, he wants to further raise the minimum wage to \$9.50 an hour by 2011. In addition to raising the minimum wage, President-elect Obama endorses a “living wage” where the minimum wage would be indexed to inflation. Under a “living wage” paradigm, the minimum wage could then rise without subsequent Congressional action.

## ***Paid Sick Days***

Under the Family Medical Leave Act, employers are required to give employees up to 12 weeks of unpaid leave to deal with serious health conditions. As a senator, President-elect Obama cosponsored the Healthy Families Act (H.R. 1542, S. 910), which would amend the FMLA to require employers to provide 7 days of paid sick leave for full-time employees (30 hours or more) and pro-rated paid sickleave for part-time employees.

## **Equal Employment Opportunity Commission**

Under the Obama administration, the Equal Employment Opportunity Commission (EEOC) may affect employers in at least four ways: (1) increasing employer recordkeeping obligations, (2) adopting employee-friendly policies through interpretive guidance or litigation positions, (3) engaging in agency rulemaking and (4) increasing the focus on its “Systemic Initiative” for developing high-impact cases that identify systemic discrimination.

## ***Expansion of Recordkeeping Obligations***

Most employers are required to submit an Employer Information Report (EEO-1) to the EEOC on an annual basis. The EEOC uses the data to support civil rights enforcement and to analyze employment patterns, such as the representation of female and minority workers within companies, industries or regions. In 2003, the EEOC proposed revisions to the racial and ethnic reporting requirements, including expansion from five to seven identification categories. Approved by the Office of Management and Budget (OMB) and made effective with the September 2007 reporting cycle, the EEO-1 form now requires an employer to provide race and ethnic information for the following categories: White (not Hispanic or Latino), Hispanic or Latino, Black or African-American (not Hispanic or Latino), Native Hawaiian or other Pacific Islander (not Hispanic or Latino), Asian (not Hispanic or Latino), American Indian or Alaska Native (not Hispanic or Latino); and Two or More Races (not Hispanic or Latino).

The Two or More Races category, however, does not conform to OMB’s 1997 Standards for the Classification of Federal Data on Race and Ethnicity, which states that multirace responses should take the form of multiple responses rather than a multiracial category. The EEOC may revisit the multiracial category issue in the coming months, as the EEO-1 form is scheduled for



reauthorization by OMB in January 2010. In addition, it is possible that OMB and the EEOC may seek to include additional ethnic categories. Any change in the EEO-1 form or information collection processes would likely increase the recordkeeping burden on employers, who only recently adapted to the revised EEO-1 form.

The recordkeeping requirements with regard to Internet job applicants is another area where the burden on employers may be increased during the Obama administration. The EEOC's current guidance on employer obligations to retain applicant flow data and validation studies is contained in the Uniform Guidelines on Employee Selection Processes (UGESP), a 30-year old rule jointly issued with several other agencies, including the Office of Federal Contract Compliance (OFCCP), Department of Justice, and Office of Personnel Management. In 2001, these agencies began considering whether additional recordkeeping guidance was needed in light of the growth of the Internet as a job search mechanism. Although the agencies published a joint proposal in 2004 consisting of five draft questions and answers, the proposal was never finalized due to lack of consensus among the agencies. In 2005, the OFCCP on its own published a final rule that addressed recordkeeping by federal contractors and subcontractors about the Internet hiring process and the solicitation of race, gender and ethnicity information from Internet applicants.

In March 2008, the EEOC took steps to ensure that the UGESP remained in effect through 2011. However, Democratic Commissioners Stuart Ishimaru and Christine Griffin have both indicated their interest in having the EEOC address the Internet applicant issue on its own in the near future and expressed that the standards adopted by the OFCCP may not suffice for EEOC's purposes, potentially putting employers in the difficult position—in which they are now with the Family and Medical Leave Act and the Americans with Disabilities Act—of having to comply with two overlapping standards that are either conflicting, inconsistent or, at least, inconsistently interpreted by different enforcement agencies. As an example of the gap between agency rules, while the OFCCP rule addresses mining of databases (*e.g.*, that of monster.com) for candidates, the UGESP rule probably does not reach so far.

### ***Adoption of Employee-Friendly Policies and Litigation Positions***

The EEOC has responsibility for interpreting and enforcing Title VII, the Americans with Disabilities Act, and certain other employee rights statutes. In this role, the EEOC offers subregulatory guidance in such forms as the Compliance Manual, Enforcement Guidance and Policy Guidance documents, and takes policy positions in litigation through amicus briefs. During the Bush administration, the EEOC has taken some aggressive positions in litigation, such as challenging releases as *per se* retaliatory, filing a pattern or practice suit for a retaliation claim, and espousing a new theory of “anticipatory retaliation” in the arbitration and retaliation context. Under the Obama administration, the agency may expand litigation against employers who conduct pre-hire background investigations. In addition, the EEOC may pursue more



expansive retaliation claims, such as attacking no-rehire clauses as *per se* retaliatory. Furthermore, in a more aggressive EEOC, the field offices may be subject to less oversight on their litigation decisions.

We have identified at least three specific areas that may be of interest to employers during the Obama administration: (1) discrimination based on caregiver status, (2) consideration of conviction records, and (3) use of credit checks.

In May 2007, the EEOC issued Enforcement Guidance regarding the circumstances under which discrimination against individuals with caregiving responsibilities for children, the elderly and individuals with disabilities might constitute unlawful disparate treatment. The EEOC noted that caregiving responsibilities for children and the elderly disproportionately affect working women, and that their effects may be even more pronounced among some women of color. The EEOC advised that employment decisions based on sex-based stereotyping about caregiving responsibilities violated Title VII.

On May 2, 2008, in *Chadwick v. Wellpoint, Inc.*, No. 07-70-P-H (D. Maine), a District Court granted summary judgment to an employer who had allegedly denied a woman a promotion in favor of another lesser qualified woman based on the plaintiff's parental caregiving obligations. The court concluded that the plaintiff did not have sufficient evidence from which a jury could conclude that her supervisors considered her caregiving role as a *female* in their decision not to promote her. Under the Obama administration, the EEOC may take the litigation position that, because women are overwhelmingly the primary caregivers for children, a decision with respect to a woman based on her caregiving status is evidence of unlawful sex stereotyping sufficient to defeat summary judgment.

The EEOC is presently examining two issues of importance to employers during the hiring process. Employee advocates have challenged the use of conviction records and credit checks during the hiring process on the theory that such practices have a disparate impact upon minorities. The EEOC has long taken the position that an employer may only disqualify an applicant or employee based on previous convictions if it takes into account the nature and gravity of the offenses, the time that has passed since the convictions or completion of the sentence and the nature of the job sought or held. However, in *El v. Southeast Pennsylvania Transport Authority*, 479 F. 3d 232 (3d Cir. 2007), the Third Circuit declined to give the EEOC's guidance deference because it had not substantively analyzed the statute in issuing its guidance and then found that the employer's bright line policy did not violate Title VII. During the Obama administration, the EEOC may issue guidance that makes it more difficult to use conviction records and credit checks as screening devices in employment decisions.

## **Rulemaking**

In its rulemaking capacity, the EEOC can impact how an employer must implement new employment laws. For instance, the recently passed ADA Amendments Act and the Genetic Non-Discrimination Act both require the EEOC to issue implementing regulations.

The ADA Amendments Act, which becomes effective on January 1, 2009, altered the definition of “disability” by rejecting certain Supreme Court decisions and portions of the EEOC’s ADA regulation. While the legislation retains the basic definition of a disability as an impairment that substantially limits one or major life activities, the statute expressly directs the EEOC to revise the portion of regulations that defines “substantially limits.” Although one would reasonably expect that the EEOC will issue some regulation by the end of the year to avoid having no position on the new definition, this definition may be further revised once the Democrats control the Commission. Congress also directed the EEOC to issue, by May 2009, a final rule implementing the Genetic Information Non-Discrimination Act, which becomes effective in November 2009.

In March 2008, the EEOC published a notice of proposed rulemaking to address issues related to the Supreme Court’s ruling that disparate impact claims are cognizable under the Age Discrimination in Employment Act (ADEA). That liability is precluded, however, when the impact is attributable to a “reasonable factor other than age,” a different and lower standard than the job-relatedness and business necessity test used in, for example, Title VII cases. In its notice, the EEOC invited comments on whether it should issue regulations to provide more information on the meaning of “reasonable factors other than age.” The EEOC has not issued any guidance, but in *Meacham v. Knolls Atomic Power Laboratory*, a case decided by the Supreme Court in June 2008, the EEOC took the position in an amicus brief that the “reasonable factor other than age” standard should be that “the challenged employment practice was reasonably designed to further or achieve an important and legitimate business purpose and was administered in a way that reasonably advances that purpose.” Although the EEOC acknowledged that the reasonable factors test provides “narrower” disparate impact coverage for claims based on age than Title VII provides for claims based on race or sex, it nevertheless contended that its proposed reasonable factors standard is similar to the articulation of the business necessity standard in *Wards Cove Packing Co. v. Atonio*.

Finally, a Democrat-controlled EEOC may also revisit its December 2007 final rule under which it exempted from coverage of the ADEA the practice of altering, reducing or eliminating employer-sponsored retiree health benefits when retirees become eligible for Medicare or comparable state retiree health benefits. Commissioner Ishimaru voted against the rule.



### ***Expansion of the Systemic Initiative***

In 2005, the EEOC established its Systemic Task Force, which was charged with reassessing how the EEOC addresses systemic discrimination. Systemic cases were defined as “pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location.” Although the EEOC reiterated its belief in the value of the Systemic Initiative earlier this year, the scope of the initiative is limited in part by the funding of the agency. If the Democratic Congress expands the commission’s resources as part of its overall agenda to expand and enforce the nation’s anti-discrimination employment laws, there will likely be an increased emphasis on the Systemic Initiative.

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In our next installment, we will focus on changes in traditional labor law which may occur at the agency level in the Obama administration, either through new DOL regulation or NLRB decisions.

## ELECTION 2008: LABOR & EMPLOYMENT UPDATE

The Potential Impact of the Obama Administration on the Labor and Employment Legal Landscape

### Part IV – Changing National Labor Policy through Executive Branch Action

In this fourth installment of our examination of the effect of the changing political landscape on federal labor and employment law, we review the potential changes that might be in store for National Labor Relations Board precedent and administration policy affecting labor-management relations.

In the 2008 elections, press reports suggest that organized labor expended a huge amount of cash and deployed its foot soldiers in support of President-elect Obama and Democrat congressional candidates. Some estimates put labor's total spending at nearly \$400 million and suggest that unions mobilized nearly half a million members in voter-turnout efforts. The combination of a president-elect who has been overtly supportive of unions with more significant Democrat majorities in both the House and Senate indicates that there are likely to be a number of changes in both law and policy affecting labor-management relations in the United States.

The National Labor Relations Board is the primary adjudicative body that shapes the interpretation and application of the country's main labor law affecting private-sector employers—the National Labor Relations Act (NLRA). Because the five-member Board consists of two Democrats, two Republicans, and a chairman selected from the president's party, Board decisions and legal interpretations on important issues tend to shift with the political winds. Since 2001, the Board has issued a number of decisions that have drawn the ire of labor unions and Democrats. Frustration peaked in September 2007, when the Board issued a number of controversial decisions that were collectively described by organized labor as the "September massacre."

In response to these and other Board decisions, the Senate and House held a joint hearing in December 2007 to examine the impact of these decisions on workers' rights. At the hearing, current Board member Wilma Liebman testified that "virtually every recent policy choice by the Board impedes collective bargaining, creates obstacles to union representation or favors employer interests." AFL-CIO general counsel Jonathan Hiatt accused the Board of "embark[ing] on a systematic and insidious effort to radically overhaul [] federal labor law" by "narrowing [the NLRA's] coverage, withdrawing its protections, and weakening its already ineffective remedies."

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Although the Board's membership has been equally divided in its political affiliation since December 2007, that stalemate is expected to break early in President-elect Obama's administration with the appointment and Senate confirmation of at least one additional Democrat. Once this deadlock is broken, the Board will undoubtedly chart a new course for national labor policy. Among the areas where change is most likely are (1) organizing and recognition; (2) employee coverage; (3) employee rights; (4) striker protection; (5) remedies; and (6) organizing campaign regulation.

## Organizing and Recognition

On his campaign Web site, President-elect Obama promised "to strengthen the ability of workers to organize." While the Employee Free Choice Act discussed in Part I of this series is one way that President-elect Obama can deliver on this campaign promise, reversal of some key recent Board decisions involving organizing and recognition will also further his stated goal. In a reconfigured NLRB, the precedents discussed below are at significant risk of reversal.

### **Salting**

In labor relations parlance, "salting" is a practice where union members (salts) apply for employment with a non-union employer for the primary purpose of organizing that employer's workplace. Whether salts enjoy the same rights under the NLRA as other employees has been the topic of a number of hotly contested decisions in recent years. In *Toering Electric Co.*, 351 NLRB No. 18 (2007), the Board altered the standard for applicants claiming discrimination based on union status to establish hiring discrimination claims. The decision eliminated the Board's presumption under the framework announced in *FES*, 331 NLRB 9 (2000), *supplemented* 333 NLRB 66 (2001), *enf'd*, 301 F.3d 83 (3d Cir. 2002), that *all* applicants (including salts) were bona fide employees under the statute and, instead, placed the burden on the NLRB General Counsel (who prosecutes violations of the NLRA) to show that (1) there was an application for employment and (2) the applicant maintained a "genuine interest in employment" with the employer. *Toering Electric* potentially limits "salting" by allowing employers to refuse employment to applicants who do not have a bona fide interest in working for the company. In dissent, Board member Liebman claimed that the Board's decision was "impossible to reconcile with the National Labor Relations Act, its policies, and with Supreme Court precedent," and that "without the benefit of briefs, oral argument, or even a request to reconsider precedent, it legalizes hiring discrimination in some, perhaps many, cases involving salts."

In 2007, the Board also altered the burden of proof in backpay cases in which an employer was found to have discriminated against an employee or applicant on the basis of that individual's union affiliation. *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007). Prior to *Oil Capitol*, the General Counsel was entitled, under *Dean General Contractors*, 285 NLRB 573 (1987), to a

rebuttable presumption that a salt would have remained indefinitely employed with the employer. *Oil Capitol* changed this framework, requiring instead that the General Counsel show how long a salt would have stayed on the job to establish the amount of backpay to which a claimant would be entitled. Thus, the *Oil Capitol* decision made it easier for employers to limit costly backpay awards in cases in which the employer either terminated or refused to hire a suspected salt. As she did in *Toering Electric*, Member Liebman filed a vigorous dissent, arguing that the Board had “overturn[ed] Board precedent endorsed by two appellate courts and rejected by none . . . , without any party having raised the issue, without the benefit of briefing, and without a sound legal or empirical basis.”

### **Recognition-Bar**

In *Dana Corp.*, 351 NLRB No. 28 (2007), the Board modified the “recognition-bar” doctrine in situations where the employer recognized the union through a voluntary card-check procedure. The recognition bar precludes challenges to a union’s majority status for a specified period of time. In *Dana Corp.*, the Board held that employees should have a 45–day period, following the issuance of notice of a voluntary recognition, to file a petition for an election or decertification, before the recognition-bar would take effect.

Reversing NLRB policy dating back to *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), which held that a union’s status as the recognized collective bargaining representative could not be challenged for a reasonable period of time after gaining recognition through demonstrating majority support via card-check, the Board in *Dana* adopted a rule providing that any voluntary recognition of a union will be vulnerable to challenge by a petition for decertification or election of a rival union for up to at least 45 days following the voluntary recognition. However, in that 45-day period, the employer must still bargain with the voluntarily-recognized union, that union has the right to represent employees and pursue grievances and the union and employer may even execute a collective bargaining agreement, although all will be done with the risk that the union could lose its recognized status if an employee files a successful petition for decertification or for recognition of a rival union.

Employees seeking to file such a post-recognition petition can do so under the prior rule that they demonstrate that at least 30 percent of the bargaining unit seeks decertification or representation by a rival union. The 30 percent showing may be based on signatures gained before and after notice of the voluntary recognition of the union.

Member Liebman argued in dissent that the Board’s decision radically departs from “well-settled, judicially approved precedent” and “subjects the will of the majority to that of a 30 percent minority, and destabilizes nascent bargaining relationships.” Indeed, the Board itself held that, because the decision marked a “significant departure from preexisting law,” and in

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order to avoid disruption of established bargaining relationships, the new rule applied only prospectively.

### ***Withdrawal of Recognition***

A union that is recognized as the collective bargaining representative of a group of employees receives a presumption that it enjoys the support of a majority of those employees. In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board held that an employer may voluntarily withdraw recognition only where a union has “actually lost the support of the majority of the bargaining unit employees.” *Levitz* reversed prior Board precedent that had allowed an employer to voluntarily withdraw recognition based on a *good faith doubt* as to the union’s majority status, even if the union actually still enjoyed majority support. Under *Levitz*, the Board held that an employer bore the burden of showing, through objective evidence, the union’s actual loss of majority status at the time recognition was withdrawn.

In 2007, the Board applied *Levitz* in two cases that eased the evidentiary burden on employer withdrawal of recognition. In *Wurtland Nursing & Rehabilitation Center*, 351 NLRB No. 50 (2007), the Board accepted a petition signed by a majority of workers seeking a “vote to remove the union” as proof of a loss of majority status, without requiring a decertification election. In *Shaw’s Supermarkets*, 350 NLRB No. 55 (2007), the Board permitted an employer to withdraw recognition of the union, following the third year of a five-year collective bargaining agreement, after receiving signed slips from a majority of bargaining unit members stating that they did not wish to be represented any longer by the union, without requiring an election on a pending decertification petition. In her *Shaw’s Supermarkets* dissent, Board member Liebman stated that the Board had “arbitrarily depart[ed] from longstanding precedent and procedure—and reach[ed] a result that serves neither of the [NLRA’s] goals” of protecting the right of employees to self-determination and promoting the interests of labor stability.

As part of their frustration with the September 2007 Board decisions, labor groups noted that, on the same day that the Board decided *Dana*, which made it more difficult for unions to achieve voluntary recognition based on employee signatures without having to face an election, it also decided *Wurtland*, which eliminated the requirement of such an election for employers who sought to withdraw recognition of a union based solely on employee signatures.

### ***Prohibitions on Use of Employer E-mail***

In *Register-Guard*, 351 NLRB No. 70 (2007), the last decision by the Board when its membership consisted of a majority of Bush appointees, the Board held that employers could legally prohibit employees from using company e-mail systems for personal and other non-job-related reasons, including union solicitations, as long as the restriction or its enforcement is not discriminatory.



By reaching this conclusion, the Board declined to evaluate e-mail communication the same way it does face-to-face communication between employees. As a result, the Board did not apply its well-established body of law that generally prohibits any restrictions on solicitations not occurring during work time and, instead, evaluated the issue the same way it had in situations dealing with employee use of employer-provided equipment, such as bulletin boards, telephones and televisions. Under this body of law, the Board has found that employees have no inherent right under the Act to use equipment provided by an employer for union-related communications, and therefore employer restrictions on the use of its equipment are lawful as long as they are not discriminatory. Because Register-Guard prohibited the use of its e-mail system for all solicitations that were not business related and was therefore not facially discriminatory against union-related solicitations, the Board held that the employer's policy was lawful.

In addition, the Board also held that the employer's enforcement of a policy against union solicitations was not discriminatory, even though it had allowed other personal use of its e-mail system, because the employer had not allowed any other e-mail solicitations for outside organizations, except for an employer-sponsored solicitation on behalf of the United Way. The Board therefore suggested that an employer could lawfully permit certain types of solicitations based on their content (i.e., charitable solicitations) while prohibiting other types (i.e., noncharitable or commercial solicitations), so long as the distinction made is not based on any activity protected under section 7 of the NLRA.

Once again, Member Liebman, along with Member Walsh, dissented in the decision, stating that the ruling "confirms that the NLRB has become the Rip Van Winkle of administrative agencies." Member Liebman argued that "[o]nly a Board that has been asleep for the past 20 years could fail to recognize that email has revolutionized communication both within and outside the workplace" and that, as a result, "[i]n 2007, one cannot reasonably contend, as the majority does, that an email system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones and pieces of scrap paper."

### ***Notice of Beck Rights under Executive Order 13201***

In February 2001, President Bush issued Executive Order 13201, which requires nonexempt federal contractors to post a notice informing employees of their "*Beck* rights," including that they (1) cannot be required to join a union or maintain membership in a union to keep their jobs; (2) can be required under certain conditions to pay uniform periodic dues and initiation fees to unions as a result of union-employer security agreements; and (3) can object to use of their payments for certain purposes and can only be required to pay the portion of dues and fees used to support collective bargaining, contract administration or grievance adjustment. The decision represented the Bush administration's effort to inform workers of their rights to not join a union or pay certain fees and dues unrelated to collective bargaining, as enunciated by the Supreme Court in *Beck v. Communication Workers of America*, 487 U.S. 735 (1988). In February 1993,



President Clinton revoked a similar executive order issued by President George H.W. Bush in April 1992. It is reasonable to assume that President-elect Obama will likely follow President Clinton's example early in his administration.

## Employee Coverage

As a cosponsor of the Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers (RESPECT) Act (H.R. 1644, S. 969) (see Part I of this series), President-elect Obama has supported reversing the “*Kentucky River* trilogy,” a series of 2006 Board 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. See *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006) (charge nurses); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006) (charge nurses); *Croft Metals, Inc.*, 348 NLRB No. 38 (2006) (lead persons).

Even if the RESPECT Act does not become law, the Obama Board will be positioned to abandon the *Kentucky River* trilogy in favor of a more restrictive definition of “supervisor.” Indeed, current Democrat Board member Wilma Liebman noted in dissent to *Oakwood Healthcare* that the majority’s decision “reflect[ed] an unfortunate failure to engage in the sort of reasoned decision-making that Congress expected from the Board.”

The Obama Board may also revisit coverage principles applied in other recent Board decisions that characterized workers as “non-employees,” “managers” or “independent contractors,” thus excluding them from coverage under the NLRA. See, e.g., *LeMoyne-Owen College*, 345 NLRB No. 93 (2005) (faculty members); *St. Joseph News-Press*, 345 NLRB No. 31 (2005) (newspaper carriers and haulers); *Pennsylvania Academy of Fine Arts*, 343 NLRB 846 (2004) (artists’ models); *Brevard Achievement Center*, 342 NLRB 982 (2004) (disabled individuals working as janitors); *Brown University*, 342 NLRB 483 (2004) (teaching assistants).

## Employee Rights

At the joint congressional hearing, the AFL-CIO’s general counsel complained that the Board during the Bush administration had diminished employees’ rights through its decisions, with those rights being “forced to yield [] to employer property interests, however miniscule, to employer discretion, to national security, to deferral to arbitration, and to other statutes.” It is foreseeable that the Obama Board will strike a different balance of these various interests in its decision-making, tilting back in favor of greater protection of employee conduct.

The Board’s vacillations in the last 25 years on the issue of “*Weingarten* rights” for non-union employees provide another illustration of the influence of the political slant of the Board on national labor policy. In 1975, the Supreme Court recognized, in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, that unionized employees had a right to representation at investigatory interviews that could result in disciplinary action. In the 1980s, the Board first extended *Weingarten* rights

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to non-union employees and then, three years later, reversed itself. In *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 92 (2000), the Clinton Board finally restored *Weingarten* rights to non-union employees. However, in *IBM Corp.*, 341 NLRB No. 148 (2004), the Bush Board overruled *Epilepsy Foundation*.

## **Striker Protection**

### ***Permanent Replacements***

On his campaign Web site, President-elect Obama promised to “work to ban the permanent replacement of striking workers, so workers can stand up for themselves without worrying about losing their livelihood.” In *Jones Plastic & Engineering*, 351 NLRB No. 50 (2007), a Republican Board majority found that striker replacements whose job applications said they were at-will employees could be considered permanent replacements who would block the reinstatement of workers seeking to return to work after an economic strike. This decision overruled the Clinton-era rule in *Target Rock*, 324 NLRB 373 (1997), which stated that at-will disclaimers undermined an employer’s attempt to show that the replacements were permanent.

### ***Partial Lockouts***

In 2004, the Bush Board issued two decisions that permitted employers to lock out some workers while permitting others to continue working. See *Midwest Generation*, 343 NLRB 69 (2004), *rev’d and remanded sub nom.* Local 15, IBEW v. NLRB, 429 F.3d 651 (7th Cir. 2005); *Bunting Bearings Corp.*, 343 NLRB 479 (2004), *remanded*, 179 LRRM (BNA) 2896 (D.C. Cir. 2006). In the view of organized labor, these decisions undermined the right to strike. However, in both cases, the courts of appeal refused to enforce the Board decisions.

In *Midwest Generation*, the Board allowed an employer to lock out strikers who had unconditionally offered to return to work, while it allowed those who had crossed the picket line to continue working. In reversing the Board, the Seventh Circuit found that there was no proof that the partial lockout was justified by operational needs, and that the partial lockout was not justified as a lawful means of putting economic pressure on holdouts.

In *Bunting Bearings Corp.*, the Board permitted an employer to lock out only non-probationary employees (all of whom were union members), while allowing its probationary employees (all of whom were non-union) to continue working. The Board justified the partial lockout on the basis that the non-probationary employees had more of an interest in the outcome of contract negotiations. Because there was a perfect correlation between union membership and lockout status, the D.C. Circuit remanded to the Board for the employer to demonstrate that the partial lockout was motivated by legitimate objectives. On remand, the Board found that the partial lockout tainted the decertification petition later circulated by a majority of employees and issued an affirmative bargaining order.

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## Remedies

### ***Backpay***

In 2007, the Board issued several decisions that either limited backpay relief or made proof of such relief more difficult for claimants. For example, as discussed above, *Oil Capitol* eliminated the presumption of continuing employment for salts.

In *St. George Warehouse*, 351 NLRB No. 42 (2007), a Republican Board majority held that the General Counsel bears the burden of production on the issue of whether an illegally discharged employee took reasonable steps to apply for available jobs in order to mitigate damages. The Board reasoned that the General Counsel, as advocate for the former employee, was more likely to have information regarding the former employee's job search efforts. In dissent, the Democratic Board members noted that the majority had departed from 45 years of precedent in relieving the wrongdoer-employer of its burden of production on this issue.

In *Grosvenor Resort*, 350 NLRB No. 86 (2007), the Board held that employees who wait more than two weeks to seek interim employment will be denied backpay for that period because such delay was unreasonable and would "reward idleness." In his dissent, Member Walsh complained that the majority had only paid "lip service" to well-established Board principles and created "bad policy" that produced inadequate remedies and would "embolden others to commit violations that would otherwise result in more substantial backpay obligations."

### *Bargaining Orders, Injunctive Relief, and Other Extraordinary Remedies*

At the December 2007 joint congressional hearing, the AFL-CIO's general counsel asserted that the Board's past efforts to craft effective remedies beyond backpay and notice posting have "virtually disappeared under the Bush Board." He further argued that under the Bush administration the Board "virtually eliminated the bargaining order as a remedial tool," and that section 10(j) injunctive relief has also "all but disappeared." Under the Obama Board, employers are likely to see a renewed emphasis on special and extraordinary remedies, including an increased use of bargaining orders and authorization of section 10(j) injunctive relief proceedings.

## Employer Regulation During Organizing Campaigns

The Obama administration may also reinstitute Department of Labor regulations that would drastically expand the Labor Management Reporting Disclosure Act (LMRDA) to require consultants and attorneys to register under the LMRDA and file reports if they prepare a speech, handout, letter or video for use by the employer during a union organizing campaign.

The LMRDA currently requires all entities acting as "persuaders" in the context of a union organizing campaign to register with the federal government. Entities who enter into agreements



with employers to provide persuader services are also required to file reports within 30 days detailing the amount paid by the employer and containing “a detailed statement of the terms and conditions” of the arrangement or planned services to be provided. There is an exemption in section 203(c) of the LMRDA that exempts from the reporting requirements the services of “such person by reason of his giving or agreeing to give advice to such employer.” This “advice” exemption to the reporting requirements of the LMRDA historically has included persuasive material prepared by consultants or attorneys for use by the employer.

In January 2001, at the tail end of the Clinton administration, a regulation was introduced that would have altered the longstanding interpretation of “advice” under the section 203(v) of the LMRDA. Under the new regulation, lawyers and consultants who simply review and revise persuasive material prepared by the employer would not have to report that activity. However, the regulation stated that if a “consultant or lawyer or their agent communicates directly with employees in an effort to persuade them,” then the “advice” exemption would not apply, and there would be a reporting requirement. The regulation further provided that the duty to report would be triggered even without direct contact between the consultant or lawyer and employees, as long as persuading employees was a direct or indirect object of the activity by the consultant or attorney.

In April 2001, the Bush administration rescinded the new LMDRA regulation promulgated by the Clinton administration. The Obama administration’s Department of Labor will likely reinstitute the Clinton administration regulation. Such a regulation, particularly coupled with the passage of the Employee Free Choice Act, may limit the ability of employers to successfully oppose a union organizing campaign.

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In the final chapter of our five-part series, we will explore expected changes in national trade policy under the Obama administration.

## ELECTION 2008: LABOR & EMPLOYMENT UPDATE

The Potential Impact of the Obama Administration on the Labor and Employment Legal Landscape

### Part V – The “Fair Trade” Approach to International Trade Agreements

In the fifth and final installment of our examination of the potential impact of the Obama administration on the labor and employment legal landscape, we review changes that might be in store in trade agreements.

Throughout the presidential campaign, President-elect Obama frequently criticized various aspects of U.S. trade policy. The president-elect repeatedly promised to change course from the Bush administration and pursue “fair trade” agreements. While the precise definition of “fair trade” may prove to be somewhat malleable, likely provisions would include stronger enforcement regimes, particularly in the areas of labor and environment standards. Obama trade policy will almost certainly include major reform of adjustment assistance programs as well—programs that aid workers displaced by foreign trade. There is little doubt that the pursuit of expanding foreign markets will continue, but, compared to his predecessor, the pace and priorities of President-elect Obama’s trade policy are certain to reflect the concerns of a different constituency.

During the primaries, President-elect Obama said that renegotiating the labor provisions of the North American Free Trade Agreement (NAFTA) would be a high priority in his administration. President-elect Obama has also condemned the Central American Free Trade Agreement (CAFTA), which passed in 2005, arguing that parties to the CAFTA have failed to live up to their obligations. President-elect Obama has expressed concerns with the free trade agreements (FTAs) currently pending before Congress—FTAs with Colombia, Panama, and South Korea. With respect to Colombia, President-elect Obama continues to call on the Colombian government to better protect its labor leaders from threats of physical violence and to better respect the rights of its workers to organize. These actions are generally seen as a prerequisite in order for Congress to favorably consider the U.S.-Colombia FTA.

Despite the campaign rhetoric, the Obama administration will almost certainly pursue the continued expansion of trade liberalization, though it is widely expected that there will be an increased emphasis on labor and environment standards. The extent of these changes remains unknown, but President-elect Obama voted in favor of the U.S.-Peru FTA last year. The Peru deal incorporated enforceable, “state-of-the-art” labor and environment protections that obligate Peru to (1) practice the fundamental labor rights set forth in the 1998 International Labor



Organization (ILO) Declaration on Fundamental Principles and Rights at Work, (2) enforce existing domestic labor laws, (3) adopt tougher standards for the protection of intellectual property, (4) enforce existing domestic environmental laws and (5) meet internationally recognized environmental standards. It remains to be seen whether this approach will become the new standard in future agreements, or whether it would be the U.S. negotiating position with respect to agreements already in force. Nevertheless, current and potential trading partners should expect more stringent labor and environment policies.

Other trade policy priorities for President-elect Obama will likely include a major overhaul of worker assistance programs. These programs, most notably Trade Adjustment Assistance (TAA), provide for worker training, health care benefits and other resources to help workers who have been displaced by trade deals. Many reform proposals have already been circulated in Congress. Possible changes include the extension of benefits to service workers displaced by trade, as well as an increase in funding for retraining programs and an expansion of the maximum allowance for job search and relocation expenses. President-elect Obama has also pledged a tougher stance towards China. In particular, U.S. trade policy will likely examine China's currency valuation system, the protection of intellectual property and its consumer safety standards.

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