



New President, New Labor Agenda

By Ed Foulke (Atlanta)

As Democrats take control of the Presidency and expand their control of Congress, employers await dramatic changes to labor and employment law. In the House and Senate, Democratic lawmakers are expected to introduce a host of controversial measures, from the now well-publicized Employee Free Choice Act (EFCA) to the lesser known Employment Non-Discrimination Act (ENDA).

While these laws could take months to pass, employers do not have the luxury of time. In a number of recent announcements, President Obama has stated his clear intention to use the full extent of his executive authority to “hit the ground running.” Starting with the inauguration, employers must therefore be prepared for change in the form of increased union influence, stricter workforce regulations, and greater government oversight.

Secretary Of Labor

On December 19, 2008, labor achieved its first key victory in changing the current employment landscape. Unions and employee rights groups alike applauded President Obama’s nomination of Rep. Hilda Solis (D-Calif.) as Secretary of Labor. Rep. Solis is considered instrumental in pushing the incoming administration’s goals of increased oversight and stricter regulation of the workplace.

As a board member of American Rights at Work, a non-profit group dedicated to furthering the labor agenda, and a co-sponsor of legislation calling for the elimination of the secret ballot election in union campaigns, Rep. Solis will also be a powerful voice in favor of the many decidedly pro-employee measures expected to come before the Democratic Congress in 2009. As President Obama has acknowledged, Rep. Solis’ nomination goes hand in hand with the expansion of union influence, “from organizing to collective bargaining, from keeping our workplaces safe to making our unions strong.”

Strict Enforcement Of Existing Laws

With Rep. Solis’ nomination, employers can also expect strict enforcement of existing labor law. Last month, the Center for American Progress Action Fund issued a lengthy, politically charged report detailing areas where the incoming administration could immediately impact the workplace. The report suggests that the Department of Labor could make significant changes simply through strict enforcement of existing labor laws, and specifically outlines key strategies for doing so at the administration’s disposal.

Most notably, the report encourages an Obama-led Department of Labor to pursue maximum penalties against employers thought to be in violation of the law. This includes holding *both* contractors and direct employers liable for wage-and-hour violations, imposing increased

penalties on employers who misclassify their employees as independent contractors, and revoking government contracts and blocking the shipment of goods produced by affected employers.

The report also suggests litigating any and all employer violations. That means employers should no longer count on settling disputed OSHA citations. Indeed, the report encourages the incoming administration to impose and then publicize steep penalties against employers in the hopes of deterring future bad conduct.

The report offers a number of additional suggestions – from devoting more funding to the Department of Labor to specifically targeting high risk industries – designed to draw attention to and impose penalties against workplace violations. While it remains to be seen to what extent the incoming administration will implement these suggestions, each one presents significant hurdles for employers. Clearly, you should begin to consider the impact that a more employee-friendly Department of Labor may have.



Executive Orders

The most likely device President Obama will employ is the executive order. John Podesta, chief of Obama’s transition team, announced that Obama has been reviewing President Bush’s Executive Orders to determine which will no longer have effect under an Obama presidency. “There’s a lot that the President can do using his executive authority without waiting for congressional action, and I think we’ll see the President do that,” Podesta said. “I think that he feels like he has a real mandate for change. We need to get off the course that the Bush administration has set.”

In the employment context, “change” will most likely occur through the repeal of certain Executive Orders signed by President Bush.

A. EO 13201

In February 2001, President Bush signed into law Executive Order 13201, which requires employers working on government contracts to advise their employees of the right to refrain from joining a union. The Order also requires employers to inform non-union employees of their right to withhold union dues not directly related to collective bargaining, contract administration, or grievance adjustment.

While the effects of the Order are largely speculative, some White House projections estimate that it saves non-union employees up to \$2.4 billion annually, or \$400 per employee. Of course, unions strongly contest these statistics and argue that the Order unfairly emphasizes the employee’s right to refrain from union activity while ignoring the employee’s right to join a union.

Executive Order 13201 is therefore a likely target for an incoming Democratic administration. Indeed, shortly after President

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New Pay Laws Will Lead To More Litigation

By Jonathan Zaifert (Tampa)

A new year, coupled with a new administration, means new legislation. Even though 2009 is barely a month old, the House of Representatives has already approved two bills which are significant to employers and their workforce. The Lilly Ledbetter Fair Pay Act and the Paycheck Fairness Act passed the House in January, and are aimed at reducing the discrepancy in employment compensation between women and men.

Supporters of these bills cite statistics that women, on average, are paid 77 cents for every dollar earned by men. Detractors argue that each piece of legislation will not have the remedial effect intended by Congress, and will only lead to increased litigation.

The Lilly Ledbetter Fair Pay Act

If enacted, the Ledbetter Fair Pay Act will amend Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act by re-defining the charge-filing and limitations periods in cases alleging discriminatory employment compensation.

Support for the Act began when its namesake, Lilly Ledbetter, sued her former employer claiming that she was paid less money than equally qualified, and in some cases less qualified, men over a span of almost twenty years. Although a jury found in favor of Ms. Ledbetter, the case was appealed to the U.S. Supreme Court which ruled that the claims were time barred. Time limits for filing a discrimination charge began to run when the employer made the allegedly discriminatory compensation decision, not, as Ms. Ledbetter argued, every time she received a lesser paycheck. In other words, the Court concluded that Ms. Ledbetter needed to bring her claim twenty years ago.

In response to the Supreme Court's decision, sponsors drafted the Ledbetter Fair Pay Act, which states that an unlawful employment practice occurs not only when the employer makes the initial allegedly discriminatory classification (most commonly upon hiring), but also upon "the application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid." In short, every time an employee receives an allegedly discriminatory paycheck, the limitations period starts anew.

The Act also expands the remedies available to aggrieved parties, and allows complainants to seek back pay for a period of two years predating their charges, as long as the past violations are "similar or related" to those that occurred during the charge period. By its express terms the Ledbetter Act amends Title VII, ADA, the Rehabilitation Act, and ADEA and will therefore affect compensation claims based on age, race, disability, and other statutorily protected classes.

The Paycheck Fairness Act

While the Ledbetter Act makes it easier for employees to proceed with their claims, the Paycheck Fairness Act makes those claims more attractive to potential plaintiffs by amending the Equal Pay Act to allow class action suits, and for recovery of compensatory, and in some cases punitive damages in addition to the traditional remedies of back pay and injunctive relief.

The Act also contains a comprehensive anti-retaliation provision, which prohibits retaliating against an employee who discussed or disclosed their own wages, or the wages of a co-worker. The Act also authorizes programs to provide training for women to improve their negotiating skills, rewards employers who comply with the Act's provisions, and increases the EEOC's enforcement power. Unlike the Ledbetter Act, the scope of the Paycheck Fairness Act is essentially confined to sex discrimination.

These laws do not require that all employees be paid equally. The current law prohibits unlawful discrimination in compensation decisions, and neither of these bills changes that fact. Most employers are likely already in compliance with their legal obligations relating to employment compensation. But as these laws gain publicity, employees (and their attorneys) will be scrutinizing your compensation policies, so it's a good idea that you do the same.

We recommend that you not only revisit your compensation policies, but also make sure that employee files are properly documented and maintained. With a little foresight and a regular review of your policies, you can rest assured that you are in compliance with all of your obligations under the law.

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Clinton took office in 2003, he repealed an Order signed by President H.W. Bush that was nearly identical to Executive Order 13201. Employers can expect similar action from President Obama in 2009.

B. EO 13202

Executive Order 13202 is also subject to repeal. This Order prohibits federal agencies from requiring government contractors to enter into agreements with unions.

While the Order does not prevent unionized employers from obtaining government contracts, it has been heavily criticized by a labor movement which had grown accustomed to eight years under President Clinton in which government contracts could only be awarded to unionized employers. Given unions' resurgent influence in Washington, expect a strong push from organized labor for President Obama to repeal Executive Order 13202 and return to Clinton administration policy requiring awards of government contracts to unionized employers.

C. EO 12989

On June 9, 2008, President Bush amended Executive Order 12989 to require all government contractors to electronically verify the immigration status of their employees. While President Obama expressed his support for "e-verify" during the presidential campaign, many within the Democratic Party have vigorously opposed the system. The extent to which President Obama will continue Bush administration policies with regards to immigration is therefore still very much in the air.

Others

The Executive Orders listed above are just a few examples of where an incoming Obama administration might diverge from the labor and employment policies of President Bush. In the public sector, President Obama will likely repeal the recent Bush amendments to Executive Order 12171, in which the Departments of Energy, Homeland Security, Justice, Transportation, and Treasury were exempted from the Federal Labor-Management Relations Act.

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Immigration 2009 – What Every Employer Needs To Know

By Kim K. Thompson and Jessica T. Cook (Atlanta)

This year is shaping up to be one of dramatic changes in employment law. The stage is set for significant developments in immigration law once the new administration gets settled into office. What follows is some important information to keep in mind for the new year, and also a brief overview of what we expect to see on the immigration horizon.

New Form I-9 Regulation

Beginning February 2, 2009, employers are required to use a revised Form I-9 to verify the employment authorization and identity of employees. The new Form I-9 carries with it some new requirements, including a prohibition against accepting expired documents (for example, an expired U.S. Passport will no longer be acceptable as a List A document) and changes to the list of documents that are acceptable for the I-9 verification process.

The current edition of the I-9 form (dated 06/05/2007) will only be valid for use until the U.S. Citizenship and Immigration Services (USCIS) issues the revised form. Once the USCIS issues the revised I-9 form (which we expect to happen by the time this article goes to press), employers should use only the new form for new hires or reverifications. Please check our website (www.laborlawyers.com) for developments and a copy of the new Form I-9 and handbook as soon as it is available.

H-1B Deadline for New Petitions

On April 1, 2009, the USCIS will open the one-week filing window for new H-1B visa petitions with anticipated start dates of October 1, 2009.

The H-1B visa category is the most common temporary work visa option for companies wishing to hire a foreign worker to fill a “professional” or “specialty occupation” position (defined as requiring at least a bachelor’s degree or equivalent for entry into the position). Each fiscal year, there is a “cap” on the number of new H-1B visas available – 65,000 visas for individuals holding bachelor’s degrees or the equivalent experience and an additional 20,000 visas for foreign nationals with a master’s or higher degree awarded by a U.S. college or university.

In 2008, USCIS received nearly 163,000 H-1B petitions during the filing period of April 1-7, 2008 and at the close of the filing period, conducted a computer-generated random selection process to determine which petitions would be processed under the H-1B cap. We anticipate that the procedure for selection will be the same as last year, that the number of H-1B petitions will again far exceed the cap, and that approximately one third of the submitted petitions will actually result in an approval.

Part of the H-1B petition process involves the certification of the Labor Condition Applications (LCA) by the U.S. Labor Department (DOL). The DOL announced that it plans to increase its scrutiny of the LCA process and this will result in a longer processing time for certification. Given the expected increase in processing times for the LCA and the tight H-1B filing window, we recommend that you start evaluating your company’s need for H-1B workers now and be ready to finalize the H-1B petition paperwork in early March. Possible candidates for H-1B visas are current employees or potential new hires now working in F-1/OPT, J-1, L-1 and TN categories whose employment authorizations will expire before October 2008.

No-Match Letter Rule Litigation

In August, 2007, the Department of Homeland Security (DHS), in response to what it believed was confusion on the part of employers on

how to proceed when faced with a mis-match letter from the Social Security Administration (SSA), issued a rule entitled *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter* (“No-Match Rule”). A judge in the Northern District of California blocked implementation of the rule after a group of businesses filed a lawsuit challenging it.

Since the injunction, the DHS has issued two rounds of supplements to the rule and seeks to have the injunction lifted. If and when the injunction is lifted, the SSA will resume sending out No-Match letters and employers will be required to follow the No-Match Rule procedures or risk being fined for continuing to employ an individual without authorization to work in the U.S. A decision on the injunction will most likely not occur until March, 2009. In the meantime, we recommend that you become familiar with the safe harbor procedures and requirements of the rule and be ready to implement a policy for resolving No-Match letter discrepancies.

Federal Contractors Required to Use E-Verify

In 2008, Former President Bush signed an Executive Order requiring federal contractors and subcontractors to enroll in E-Verify when they are awarded a federal contract or subcontract that includes the E-Verify requirement, or when an existing contract is amended to include the require E-Verify. Employers covered by this new rule will be required to verify the work authorization of all new hires and existing employees assigned to work on the federal contract. Originally, this rule was due to take effect on January 15, 2009 but the U.S. Chamber of Commerce, along with other business groups, filed a lawsuit on December 23, 2008, challenging the legality of this law. An agreement was reached, in light of the pending litigation, to suspend applicability of the rule until February 20, 2009.

The new rule covers prime federal contracts with a value of at least \$100,000 and a period of performance of 120 days or longer. A contract is not covered by this rule if the work will be performed only outside the U.S., includes only commercially available off-the-shelf (COTS) items (or but for minor modifications would be COTS items), or is for food and agricultural products shipped as bulk cargo and which would otherwise be classified as COTS items. Subcontractors are covered only if the prime contract includes a clause covering the subcontract and only for services or construction with a value of \$3,000 or more.

Covered employers who are not currently enrolled in E-Verify must enroll within 30 calendar days of the award of the contract that requires E-Verify participation and must begin using the system to verify new employees within 90 days of enrollment. Covered employers who have been enrolled in E-Verify for more than 90 days are required to continue to submit verification queries to E-Verify within the required three business days of the newly-hired employee’s start date but must start using E-Verify for existing employees assigned to perform work on the contract 90 days from the contract award date. Those enrolled in E-Verify for less than 90 calendar days are allowed 90 calendar days from the date of enrollment in the system to initiate verification of newly-hired employees.

We recommend that you review any current federal contracts, any bids or solicitations for future federal contracts, and the scope of any applicable contracts (in particular which current employees are working or will be assigned to work on those contracts) to determine whether the requirements of this rule will need to be implemented. Once you determine which current employees will need to be processed through E-Verify, audit the I-9 forms for those employees to ensure that they meet the requirements for E-Verify.

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Conclusion

It is clear that labor's goals for 2009 are ambitious. You must be prepared not only for the possibility of new laws affecting the workplace, but also the strict enforcement of existing laws. Since the incoming administration intends to "hit the ground running," you need to do the same. Our advice is to start considering your employment practices – sooner, rather than later.

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State Immigration-Related Laws

Across the country, states continue to enact their own employment-related immigration legislation, including legislation requiring certain employers to use E-Verify to electronically verify the employment eligibility of their newly hired employees. The National Conference for State Legislatures reported that in 2008 states have enacted a total of 19 immigration laws relating solely to workplace issues and another three laws including employment-related provisions.

In Missouri, for example, effective January 1, 2009, employers of unauthorized workers face potential loss of state contracts or tax breaks, suspension or even revocation of their right to do business in the state, and possibly a civil trial in Missouri state court. The law requires any Missouri employer to enroll in E-Verify if it: has any state contract or grant worth more than \$5,000; or receives any state-administered or subsidized tax credit, tax abatement, or loan.

For a complete list of all states that have enacted employment-related immigration legislation visit our website at www.laborlawyers.com.

Immigration Expectations And The Obama Administration

As the Obama Administration takes office, Americans are anxious to see what change the new administration will bring. Although comprehensive immigration reform is not expected within the next two years, there are some areas in which we may see immediate change.

Within President Obama's first year, we anticipate that the administration will raise the current cap on H-1B visas for highly skilled workers in the science, technology, engineering, and mathematics (STEM) fields. In recent years, the demand for H-1B visas has severely exceeded the numerical cap allowed and has prevented many companies from adding needed highly-skilled professional workers to its workforce. The crunch in the availability of H-1B visas has especially affected the high-tech industry and this industry is leading the push to increase the H-1B cap for holders of STEM degrees.

We also expect to see the government recapture unused immigrant (permanent residence) visa numbers. The law imposes annual numerical limits on the number of foreign nationals who may receive immigrant visas each year per country. At the end of each fiscal year, unused visa numbers are "lost" if not used. Recapturing these unused immigrant visa numbers would reduce the current visa backlog for foreign nationals seeking to become permanent residents.

By the end of Obama's first term in 2013, we may also see comprehensive immigration reform, with a focus on securing the borders, family unification, and perhaps even an amnesty. Although, we do not expect to see a continuation of the level of work-site enforcement raids under the Obama administration as with the Bush administration, Obama has emphasized the importance of a legal workforce. Even if a reduction in worksite raids occurs, it is likely that we will see an increase in the applicability of E-Verify and possibly the requirement that it be used universally just as the Form I-9 is required now.

Keeping up-to-date on changes in immigration law will continue to be an important component in protecting your business and employees. Contact one of the attorneys in the Fisher & Phillips Global Immigration Practice Group with any questions you may have.

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