CHANGE YOU CAN BELIEVE IN

Labor and Employment Changes to Expect During the Obama Era

By Matthew D. Austin

Probably nowhere else will President Obama influence change more than in the labor and employment arena. With the help hundreds of millions of dollars from labor unions, Obama's agenda is riddled with labor-friendly laws. What follows is a list of many of those anticipated changes.

Employee Free Choice Act

Obama co-sponsored and is a strong advocate for the Employee Free Choice Act. The following are the elements of EFCA in its current form.

No More Elections: Unions need just 50% + 1 employees to sign union cards and a company is automatically unionized and must begin negotiating a collective bargaining agreement;

Mandatory Agreement: A company must automatically sign a 2-year agreement;

Arbitration Not Negotiation: If no agreement within 60 days of beginning negotiations, an arbitrator will decide the contents of the agreement;

Back Pay Penalty: Triple back pay for union supporting employees terminated because of the employer's union animus; and

Fines: Fines, up to $20,000, for "restraint or coercion" of a pro-union employee.

Expansion of Family Medical Leave Act

Although the Act recently underwent major changes, there are likely additional changes right around the corner. Next on the agenda is expanding FMLA to companies with just 25 employees, expanding the types of conditions that qualify for leave, expanding the classifications of employees who can take leave, and creating an insurance system to provide for paid family medical leave.

Patriot Employer Act

This Act would provide tax credits equal to 1% of taxable income to employers that:

Maintain or increase the number of full-time workers in America relative to the number of full-time workers outside of America;

Maintain corporate headquarters in America;

Pay hourly wages equal to or above an amount that would keep a family of three out of poverty;

Provide either a defined benefit plan or a defined contribution plan that fully matches at least 5% of worker contributions for every employee;

Provide health insurance and pay at least 60% of each worker's health care premiums;

Pay the difference between regular salary and military salary for all National Guard and Reserve employees who are called for active duty and continue their health insurance coverage for those members and their families; and

Maintain neutrality in labor organizing campaigns or face additional tax hikes.

Complying with this law will likely cost more than the 1% tax break, and this law essentially creates separate corporate tax rates for unionized and non-union companies – since unions win 87% of elections under neutrality agreements.

RESPECT Act

The "Re-Empowerment of Skilled and Professional Employees and Construction Trades-workers," will redefine who is a "supervisor" under the National Labor Relations Act.

Currently, a supervisor is defined as someone who 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. However, the RESPECT Act limits a supervisor to only those who spend a majority of their time actually hiring, firing, and disciplining employees.

Should the RESPECT Act pass, many supervisors will no longer be supervisors, but rather dues-paying members of a bargaining unit whose working conditions are governed by a collective bargaining agreement.

Working Families Flexibility Act

This Act is also called the "union of one" law because it requires negotiations between employers and a single employee requesting a change in schedule or location of work. This Act requires a meeting within 14 days of the request and within 14 days from the meeting, should the employee's request be denied, the employer must specify in writing:

The costs to the company in agreeing to the change;

The effect of the change on customer demand;

The overall financial resources involved in the decisions to deny the request; and

For employers with multiple facilities, the geographic separateness or administrative or fiscal relationship between the facilities.

Employees can then grieve the employer's decision, have an attorney or union representative sit in on the grievance, and the company must continue to justify its denial which could later be reviewed by the DOL. Penalties for violations include interference or retaliation against employees start at $1,000 per violation.

Ledbetter Fair Pay Act and Paycheck Fairness Act

Both of these Acts passed the House and the Senate will vote on these bills within the next several weeks.

The Paycheck Fairness Act supposedly protects against compensation discrimination. Currently, employers can avoid liability under the Equal Pay Act by proving that the alleged discriminatory compensation was a result of any factor other than sex. This Act limits that defense to situations where the factors other than sex are job-related or serve a legitimate business interest.

The Ledbetter Fair Pay Act obliterates the statute of limitations for employees bringing a discriminatory pay claim. Under this Act, a former employee – from many years ago – can bring a lawsuit against a company long after that employee moved on and no witnesses are left to testify. This Act restarts the statute of limitations period every time a paycheck is received. Thus, an employee who agrees to a certain pay in March 2008 and consistently receives that pay and steady increases, could sue in December 2028 (or later) for receiving less money than similarly situated male employees.

Minimum Wage Hikes

Obama's website states that "as

president, Obama will further raise the minimum wage to $9.50 an hour by 2011, index it to inflation, and increase the Earned Income Tax Credit..."

National Labor Relations Board

Currently, three of the five seats on the NLRB are vacant. Obama should not meet political resistance when he appoints a majority of the members to the Board. With Obama's appointees, the Board will be pro-union and its decisions will reflect the members' politics.

Minority Unions

In 2007 several unions filed a petition with the NLRB that would permit unions to demand that an employer bargain with a group of employees even when a majority of the workers have not elected union representation. For example, if a company has 100 hourly employees and 12 want to unionize, an Obama-appointed Board may require companies to recognize and negotiate a contract with that group, despite the fact that they would not comprise a majority of the bargaining unit.

Title VII Amendment

The Employment Non-Discrimination Act would prohibit discrimination based on one's sexual identity or orientation.

Healthy Families Act

This Act requires employers with 15 or more employees to provide seven days of paid sick leave each year to employees working more than 30 hours per week. Employees working less would receive a pro-rated amount of paid sick leave. This leave could be used to care for either the employee or a relative of the employee. A similar bill was introduced in Ohio, but withdrawn before voted on in part because of this federal bill on the same issue and because Governor Strickland recognized that it would make Ohio uncompetitive in trying to attract companies to Ohio.

As you can see, the Obama era will be full of controversy, legislation, and more than anything else, will change to our current labor and employment laws and corporate way of life.

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LONGTIME LONG TERM DISABILITY

What started as a fact driven ERISA disability case became nationally significant, as the outcome could impact insurers through out the country.

By Stanley L. Myers

Wanda Glenn filed suit in federal court challenging MetLife's termination of the long term disability benefits she had been receiving for two years. Glenn lost in the district court and prevailed in the Sixth Circuit. Until MetLife filed a Petition for Certiorari, I had no expectations I would be involved in a Supreme Court case and Certiorari, if granted would put Glenn at risk of an adverse decision. What started as a fact driven ERISA disability case became nationally significant, as the outcome could impact insurers through out the country. MetLife was represented by Winston & Strawn and by Gibson Dunn & Crutcher – big players with big Supreme Court practices. In an attempt to level the playing field, I brought in a law firm with a big Supreme Court practice.

Glenn's ERISA coverage was provided by Sears her employer. MetLife both insured the plan and determined if benefits would be paid. One of the questions certified by the Court was whether this dual role created a conflict that must be considered when the administrator's decision is challenged in Court.

Glenn's disability was due to a serious heart condition that took her off work and prevented her from returning to work. As permitted by its contract, MetLife required Glenn apply for social security disability benefits, which if granted, would be a dollar for dollar offset against MetLife's monthly contractual obligation to Glenn. MetLife advised Glenn on whom to use for legal representation; provided her attorney medical information to support her claim; took the position that Glenn was disabled and entitled to Social Security Disability and paid her attorney. When Glenn was awarded disability benefits, MetLife terminated long term disability, informing Glenn that it had determined she was no longer contractually disabled.

A split in the Circuits existed as to whether the courts must take into consideration the dual roles of plan administrators when reviewing an ERISA denial or termination of benefits. The Supreme Court requested the Solicitor General of the United States to provide the position of the United States, Department of Labor, as to whether the Court should accept the case. Both Glenn and MetLife then had the opportunity to "lobby" the Solicitor General in support of their positions. The Solicitor General requested the Court hear the case and Certiorari was granted on the issues of the dual role conflict and how the courts should consider the conflict.

Amicus briefs were filed on behalf of MetLife by the Blue Cross and Blue Shield Association; by the American Council of Life Insurers, by America's Health Insurance Plans and the Chamber of Commerce of the United States. Nine amicus briefs were filed on Glenn's behalf, including briefs filed by the Solicitor General of the United States, the National Association of Insurance Commissioners and the National Employment Lawyers Association. The case was argued April 23, 2008.

After the Court accepted the case, I learned a cousin was law clerk to Chief Justice Robert. The day following argument, my wife and I were given a private tour of the Supreme Court building.

Wanda Glenn prevailed. The Supreme Court, in a 6-3 decision, held that the dual role was a conflict and how that conflict must be considered. The decision has had a significant impact on ERISA litigation.

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