A Timely Analysis of Legal Developments

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Workplace Policy Institute: How Will the 2012 Election Results Impact Labor, Employment and Benefits Policy?

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In the wake of President Obama's win over Governor Mitt Romney, employers can expect an acceleration of the Administration's effort to dramatically alter workplace policy. Republicans hold on to power in the House of Representatives, while Democrats will remain in control of the Senate. Senate Republicans not only fell short of their push to gain a majority in the upper chamber of Congress, but appear to have lost two of their current 47 seats. Will a closely-divided Congress lead to compromise or gridlock? With the balance of power in Washington effectively the same, the legislative logjam that characterized the 112th Congress is likely to continue during at least the next two years of the Obama Administration.

Controversial labor and employment legislation that stalled in the current Congress is expected to meet the same fate during the next Congress, leaving changes to workplace policy largely in the hands of the regulatory agencies. The Obama Administration is likely to continue to turn to the federal agencies to achieve its labor and employment agenda, albeit at an even more dramatic pace than during the president's first term. Accordingly, employers should prepare for a flurry of activity by the Department of Labor (DOL), National Labor Relations Board (NLRB), and Equal Employment Opportunity Commission (EEOC), with a continued focus on enforcement. Such efforts will certainly be met with a flurry of oversight activities by House Republicans who hold onto committee gavels and set the agenda. As in the current Congress, legislative attempts to control the Administration's regulatory hand are expected to falter in the Democrat-controlled Senate. The regulatory avalanche[1] is certainly upon us, and employers need to redouble their efforts to anticipate, understand and influence its impact.

Health Care Reform

The fate of the Patient Protection and Affordable Care Act (ACA), President Obama's signature legislative accomplishment during his first term, was among the most important issues at stake in the election. Governor Romney and many Republican candidates for Congress pledged to repeal the ACA. A Romney Administration would not have been able

1 *See* Gary Mathiason, Barry Hartstein, and Ilyse Schuman, *The Coming Regulatory Avalanche: Engineering Practical Employment and Labor Law Compliance Solutions*, Littler Report (Apr. 6, 2011).

to repeal the law outright if, as proved to be true, Democrats kept control of the Senate. However, Romney pledged that he would allow states to waive compliance with the law and would have forestalled implementation of the ACA administratively. President Obama's victory secures the political future of the ACA for at least the next four years and brings renewed focus on and urgency to employers' preparations for implementing the law.

2014 marks the pivotal year for implementation of the ACA as health insurance exchanges are scheduled to become operational and the requirement for most Americans to purchase health insurance or pay a "tax" becomes effective. 2014 also marks the beginning of the so-called Pay-or-Play provision imposed on applicable large employers. Employers with 50 or more full-time employees or equivalents will pay an excise tax if they do not offer health coverage to their full-time employees (and dependents) that is both "affordable" and provides "minimum value." With the effective date of the Pay-or-Play provision nearing, employers must carefully consider whether they will continue to provide health care coverage to employees, and, if so, to whom it will be offered and how it will be structured. The calculation involves much more than a simple comparison of the cost of health coverage versus the cost of the Pay-or-Play penalty. Those employers taking a broader and longer-term approach to this analysis will be better positioned. Furthermore, the absence of regulatory direction on key aspects of the Pay-or-Play penalty leaves many important questions unanswered at this time. The agencies are expected to issue a slew of ACA regulations in the wake of the election, hopefully giving much-needed clarity to employers' obligations under health care reform. We will provide updates and analysis as these developments unfold.

Opposition to the ACA is unlikely to abate in the Republican-controlled House. Although any efforts to repeal the health care reform law would stall in the Senate, oversight hearings and efforts to cut off funding will likely continue in the House. The battle over health care reform will not be limited to Washington. State challenges to implementation persist, with a number of states vowing not to implement state-run exchanges. However, the ACA appears to have withstood both its greatest legal and political challenge. The law's impact on employer-sponsored health care may well be the ultimate test for the sweeping law.

Labor Law

President Obama's election in 2008 with Democrat majorities in both Houses of Congress created high hopes among organized labor that it would accomplish its top legislative priority – passage of the Employee Free Choice Act (EFCA). Although organized labor failed to accomplish this goal during President Obama's first term in office, it found other means to achieve some of the same objectives as the stalled EFCA but without congressional action. The legislative death of the EFCA gave life to administrative efforts to make dramatic changes to labor law. Through rulemaking and NLRB decisions, employers have seen the carefully crafted balance in labor relations law shift precipitously in favor of organized labor. Employers can expect the pendulum to shift even further in the direction of organized labor during President Obama's second term. With a Republican-controlled House and closely-divided Senate in the next Congress, the Obama Administration will continue to use its rulemaking and administrative tools to pursue its labor agenda. Unfettered by reelection concerns and prompted by calls to reward labor's support in the tight 2012 election, the Administration is expected to take further action to try to increase union organizing and expand labor's reach.

During the past two years, the Obama NLRB has embarked on an aggressive rulemaking agenda. In December 2011, it issued a final rule making changes to union representation election procedures. In May 2012, the U.S. District Court for the District of Columbia found the expedited representation election rule invalid because the Board lacked a quorum when it issued the rule. Although the Board has suspended implementation of the controversial election rule pending outcome of the litigation, even more dramatic changes to union election procedures may be ahead. Board Chairman Mark Pearce has stated his desire to push the sweeping changes initially proposed that were not included in the final election rule. Although couched in terms of merely updating and streamlining the election process, the so-called "quickie" election rule would serve to facilitate union organizing by reducing the time period for an election and making other procedural changes to the election process. Such changes raise the same concerns as those posed by passage of the EFCA in that the lack of or limited election period would deprive employees of the chance to become familiar with the realities of unionization.

In August 2011, the NLRB also issued a final rule requiring employers to post a notice informing employees of their rights under the National Labor Relations Act in a "conspicuous place" readily seen by employees. The rule also includes a number of highly contested enforcement

provisions. Like the election rule, the notice-posting rule has also been challenged in court. A South Carolina federal court ruled that the National Labor Relations Board lacked the authority to promulgate its notice-posting rule, and the U.S. District Court for the District of Columbia struck down the enforcement provisions of the rule, but upheld the Board's authority to issue the rule. The legal fight over the notice-posting rule continues.

Legal challenges to the president's recess appointment of three Board members are also pending. Facing the impending loss of a necessary three-member quorum at the NLRB, on January 4, 2012, President Obama circumvented the Senate confirmation process to announce the recess appointments of Sharon Block (D), Richard Griffin (D), and Terence Flynn (R), who resigned his position in May. They joined Chairman Mark Pearce (D), whose term expires August 27, 2013, and Brian Hayes (R), whose term expires on December 12, 2012. Those contesting the recess appointments argue that, because the Senate was not technically in "recess," the president did not have the constitutional authority to make the "recess" appointments. If the validity of the recess appointments is upheld, Members Block and Griffin will serve through the end of the next session of Congress in 2013. Upon the expiration of Member Hayes' term next month, the Board will consist of three Democrat members only, leaving ample time and opportunity for the Board to advance its pro-labor agenda.

Recent Board decisions have paved the way for expanding labor's reach, and the trend is expected to continue. Its expansive view of Section 7 rights under the NLRA implicates non-union facilities as well. The Board and General Counsel's office scrutiny of handbooks and personnel policies and social media policies is expected to continue. The NLRB is likely to continue examining work rules and policies in both non-union and union facilities to determine whether they reasonably tend to interfere with Section 7 rights. In *Specialty Healthcare,* the Board adopted a new standard for determining appropriate bargaining units, requiring employers who argue that the unit should include additional employees to demonstrate that employees in a larger unit share an "overwhelming" community of interest with those in the petitioned-for unit. The Board may seek to build upon *Specialty Healthcare* and its likely proliferation of so-called micro-bargaining units. The NLRB has not limited its reach to unionized workplaces.

In addition to actions by the NLRB that would facilitate union organizing, the Department of Labor has issued a proposal that would further hinder the ability of employers to respond to a union organizing campaign. The proposed "persuader" regulations would greatly expand what types of employer activity and legal advice in conjunction with a union organizing campaign would trigger a requirement by the employer and the advisor to comply with expansive reporting requirements under the Labor-Management Reporting and Disclosure Act. The result would limit the ability of employers to obtain legal counsel during union organizing, essentially "chilling" the company's ability to communicate effectively with its employees about unionization without fear of violating the NLRA. The new rules would serve as a "gag" on employers – one of the hallmark objectives of the EFCA and organized labor. With the reelection of President Obama, issuance of the final "persuader" rule appears imminent.[2] The Department of Labor, in conjunction with the NLRB, is positioned to move labor law even further in a direction that Congress will not.

Equal Employment Opportunity Law

President Obama's first term began with passage of the Lilly Ledbetter Fair Pay Act. Although many expected that this would be the first of a number of employment-related bills that would become law under President Obama, it was, in fact, the last significant one. Legislation to create or expand employment laws remains stalled in Congress. With Republicans retaining control of the House and the Democrats still short of the 60-seat filibuster-proof majority in the Senate, controversial employment legislation, such as the Paycheck Fairness Act, is expected to remain stalled in the next Congress as well. As with labor policy, the Obama Administration will turn to the agencies to advance its employment agenda.

At the EEOC, employers can expect aggressive enforcement to continue.[3] The draft Strategic Enforcement Plan (SEP) reaffirms the Agency's focus on strategic enforcement. The SEP outlines nationwide priorities, including eliminating systemic barriers in recruitment and hiring. As part of the initiative, the EEOC will examine screening tools (*e.g.*, pre-employment tests, background screens, date of birth screens in online applications) that adversely impact groups protected under the law. The EEOC also plans to target disparate pay, job segregation, harassment,

2 *See* Michael Lotito, *Labor law change would threaten U.S. businesses*, The Hill, Oct. 19, 2012.

3 *See* Barry Hartsetin, *EEOC Seeks Feedback on Draft Strategic Enforcement Plan*, Washington D.C. Employment Law Update, Sept. 6, 2012.

trafficking, and discriminatory language policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them. Among the current emerging employment issues that the EEOC will target are: ADA Amendments Act issues; LGBT coverage under Title VII sex discrimination provisions, as they may apply; and accommodating pregnancy when women have been forced onto unpaid leave after being denied accommodations routinely provided to similarly situated employees.

Wage and Hour Laws

The 2012 elections signal rough waters for employers ahead, as the Department of Labor accelerates its efforts to implement its "Plan, Prevent, Protect" regulatory and enforcement strategy. The "Plan, Prevent, Protect" strategy requires employers to implement self-monitoring plans to identify and remedy law violations. As part of this "find and fix" approach, the DOL intends to propose a rule updating the recordkeeping requirements under the Fair Labor Standards Act (FLSA). The "right-to-know" proposal would require employers to provide notice about how pay is computed and perform a classification analysis for each worker excluded from FLSA coverage. Legislation targeting the misclassification of employees as independent contractors has languished in Congress. However, the DOL will likely place misclassification at the top of its priorities during the second term of the Obama Administration, including releasing the long-delayed "right-to-know" rule. In the wake of the election, the DOL is expected to publish the final rule revising the FLSA's companionship regulations, and the next four years could see additional rulemaking by the DOL's Wage and Hour Division. Employers can also expect aggressive enforcement of wage and hour violations during the next four years. With a DOL now undeterred by reelection concerns, we may have seen only the beginning of the extent to which the Department will enhance its wage and hour enforcement efforts.

Occupational Safety and Health Law

As with other areas of labor and employment, workplace safety policy has been driven by the executive branch rather than Congress during President Obama's first term. Although legislation to increase employer penalties for violations of the Occupational Safety and Health Act has not advanced in Congress, under the leadership of Assistant Secretary Dr. David Michaels the Occupational Safety and Health Administration (OSHA) has undergone a fundamental shift in focus towards enhanced enforcement of workplace safety and health violations. Notably, in 2010 OSHA implemented its Severe Violators Enforcement Program to target willful or repeat violators and also enhanced its penalty structure. With a closely divided Congress in the upcoming 113th Congress, workplace safety policy will continue to emanate from an agency committed to aggressive enforcement. Employers should also prepare for the Agency to complete an ambitious rulemaking agenda. The most sweeping anticipated rule is a proposal requiring employers to implement an injury and illness prevention program (I2P2). Although the details of the I2P2 proposal have not been released, the mandate to have such a written program could effectively create a catch-all safety and health standard which may conflict with voluntary programs already in place at a number of workplaces.

Whistleblower Protection

The statutory expansion of whistleblower protections in the Dodd-Frank Act and other recent legislation has been coupled with an elevation of whistleblower protection enforcement. This trend is expected to continue. OSHA, the agency charged with enforcing the whistleblower protection provisions of 21 statutes, has taken a number of steps to enhance its enforcement activities in the growing area. The DOL's proposed budget for fiscal year 2013 would allocate an additional $5 million over last year's OSHA funding to carry out its whistleblower programs. In addition, OSHA recently announced the formation of a Whistleblower Protection Advisory Committee. Although the composition of the committee and the final budget numbers are not yet known, this much is certain – enforcement of whistleblower protection will receive more resources and attention in the years ahead.

Federal Contractors

Over the past several years, the Office of Federal Contract Compliance Programs (OFCCP), under the direction of Patricia Shiu, has initiated a number of significant regulatory and enforcement changes. As Alissa Horvitz, Co-Chair of Littler's OFCCP Practice Group, testified before Congress, the contractor community has become "increasingly frustrated by the negative tenor of compliance reviews, the perception that

compliance officers approach audits with an eye towards finding a violation and citing the employer for noncompliance, and the increased willingness to take contractors into enforcement if they are unwilling to agree to the often harsh negotiation tactics the OFCCP may employ at the conclusion of these reviews."[4]

On the regulatory front, the OFCCP has embarked on an aggressive rulemaking agenda that could significantly increase government contractors' compliance obligations. In December 2011, the OFCCP issued a proposed rule to amend the nondiscrimination and affirmative action requirements regarding individuals with disabilities for federal contractors and subcontractors. Among the proposed changes is the imposition of a hiring goal of 7% for individuals with disabilities. Earlier that year the Agency issued a proposed rule that would broaden contractors' affirmative action obligations for veterans by imposing detailed data-tracking requirements and hiring benchmarks and mandating for the first time that contractors solicit information on the generic veteran status of all applicants, not just of applicants offered a job. The OFCCP has also issued an advance notice of proposed rulemaking to solicit public input on the Agency's development and implementation of a new compensation data collection tool. While these regulatory initiatives have been on hold this past year, President Obama's victory will prompt the OFCCP to move forward with its plans to finalize them. Accordingly, federal contractors can expect the cost of doing business with the U.S. government to become much more onerous and expensive.

Immigration

President Obama's reelection boosted the prospects for comprehensive immigration reform. With much of his political capital largely spent on health care reform and a faltering economy, the president failed to deliver on his promise to sign immigration reform legislation during his first term. While the chances of passing a comprehensive immigration bill are greater during the president's second term, these efforts will likely continue to face stiff opposition in Congress. The absence of a legislative focus on immigration does not mean that the Obama Administration has not been active on the regulatory and enforcement front. The Department of Homeland Security has targeted employers who hire undocumented workers. Audits have been a central theme of the Obama Administration's immigration enforcement strategy as immigration officials have shifted their focus from employee to employer noncompliance. Whether or not immigration reform legislation is realized during President Obama's second term, this trend to greater enforcement is certain to continue.

Fiscal Cliff

Before the 113th Congress even begins, the White House and current Congress must contend with the prospect of a "fiscal cliff" if a solution to certain federal budget issues cannot be reached by January 2, 2013. Failure to reach an agreement will result in a sequestration of funds under the Balanced Budget Emergency Deficit Control Act, requiring the president to cut discretionary defense spending and discretionary non-defense spending by uniform percentages, estimated to be approximately 10% and 8%, respectively. How Congress and the White House deal with the impending "fiscal cliff" will foretell much about the political climate in Washington in the next two years.

What This Means for Employers

The 2012 elections mean a status quo for the balance of power in Washington. While this may preclude federal labor and employment legislative action it does not mean a status quo for workplace policy. Employers should recognize that the Obama Administration, emboldened by reelection, will likely pursue its labor and employment agenda with even more vigor through administrative instead of legislative channels. Through rulemaking and enforcement activities, the Administration may well achieve even more dramatic changes to the workplace than Congress would.

Ilyse Schuman, a Shareholder in the Washington, D.C. office, and Michael Lotito, a Shareholder in the San Francisco office, are Co-Chairs of Littler Mendelson's Workplace Policy Institute (WPI). WPI is devoted to developing and influencing workplace legislative and regulatory developments at the federal and state levels. WPI provides the employer community with advocacy services, including litigation support. In addition, WPI closely monitors important labor, employment and benefits policy initiatives and provides clients, trade associations, and policymakers with timely and thoughtful analysis of the practical implications of such proposals. On November 15, Ms. Schuman and Mr. Lotito will host a webinar on the impact of the 2012 elections on labor, employment, and benefits law. For more information on the webinar, please contact Keith Upton at 415.399.8450 or kupton@littler.com. Ms. Schuman and Mr. Lotito, along with Barry Hartstein, a Shareholder in the Chicago office, will also lead a panel discussion at the National Law Journal's regulatory summit in Washington, D.C. on December 6, 2012. For more information on the summit, please contact Maritza Lumsden at mlumsden@littler.com.

4 *See* Ilyse Schuman, *Littler Shareholder Alissa Horvitz Testifies at House Subcomittee Hearing Examining OFCCP Initiatives*, Washington D.C. Employment Law Update, Apr. 18, 2012.