THE LITTLER REPORT

TRANSITION TO A NEW (WORK)DAY:

An Initial Look at Workplace Change in the Obama Era

November 2008

AUTHORS

Jay Sumner, Esq.
Robert J. Battista, Esq.
Tammy D. McCutchen, Esq.
David C. Whitlock, Esq.
H. Tor Christensen, Esq.
Alyson J. Guyan, Esq.
Katherine L. Hoekman, Esq.
Steven E. Kaplan, Esq.
Jennifer L. Mora, Esq.
Jeremy W. Stewart, Esq.

Littler
Employment & Labor Law Solutions Worldwide

IMPORTANT NOTICE

We hope that you will find the information in this Littler Report useful in understanding the issues raised by legislative changes that are likely to occur when President-elect Obama and his administration take office in January. This Report is not a substitute for the advice of legal counsel and does not provide legal advice or attempt to address the numerous factual and legal issues that may arise in any labor and employment law matter.

Table of Contents

TRANSITION TO A NEW (WORK)DAY: An Initial Look at Workplace Change in the Obama Era

I. INTRODUCTION

The decisive election of Barack Obama as the 44th President of the United States supported by strong Democratic majorities in the House and Senate has set the stage for unprecedented legislative and regulatory change in employment and labor laws. A unique combination of forces promises to make the magnitude of these changes a once-in-a-generation occurrence. The single thread potentially moderating the coming tsunami is the composition of the U.S. Senate. The closer the Democratic majority is to the magic number of 60 (a filibuster-proof Senate majority), the greater is the ability to deliver on a perceived mandate for employment and labor law change.

This is a time entirely different from 1993 when then newly elected President Clinton had a two-year window with a similar legislative majority. The following forces have combined to form a near perfect storm. First, organized labor has for more than four years planned for a federal government under Democratic control. Rather than dividing their efforts with a long list of proposed changes as occurred under President Clinton, they have focused on one universal goal, the Employee Free Choice Act. This bill when first introduced in 2003 had more individual sponsors than any prior legislative proposal. The litmus test for organized labor's total support of the Obama presidency was his full support for this legislation, which would grow union membership without traditional secret ballot elections. President-elect Obama responded by pledging unqualified support with an enthusiasm rarely seen in American politics. Organized labor contributed over $200 million dollars to Obama's campaign and provided thousands of union workers to help the campaign with its "get out the vote" effort. Organized labor, recognizing that their membership in the private sector has dropped to 7.5% (a 100-year low), mortgaged its future on the promise of this legislation and this President. It is difficult to conceive that President-elect Obama will backtrack on his promises or diminish his support. Changes to the National Labor Relations Act are coming and the only question is whether the opposition can find sufficient support in the Senate to stop the pro-labor agenda or negotiate compromises.

With the political power of organized labor reaching a new height, a second force is showing its resolve. The civil rights movement that led to Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act has reached a new threshold and momentum with the election of the first African American president. Proudly, we as a country see President-elect Obama confidently assuming the role of the most powerful leader in the world, while we are simultaneously experiencing the destruction of a glass ceiling from the 18 million cracks made by Sen. Hillary Clinton. A new generation of Americans has arrived with role models and an expectation that all of opportunity's doors are open regardless of gender, race, or other protected category.

This powerful force promises to translate into a legislative agenda on civil rights that first addresses battles lost in the Supreme Court (such as the statute of limitations restriction of the Equal Pay Act) and then targets perceived limitations to the enforcement of these cherished values. The effort in the 110th Congress to remove the caps on Title VII damages will find new life in the Age of Obama. But this national civil rights movement touches much more than statute of limitations restrictions and damage caps. Increasingly, gay rights have been identified as civil rights as applied to employment and conditions in the workplace. A meaningful number of states have long provided protections. Now, it seems certain that strong forces will work through Congress and the new president to bring national change. While it is highly unlikely that Congress will recognize gay marriage in the near term, the classic compromise would be a full set of workplace rights including changes in the tax code to recognize domestic partnerships.

Contributing to the perfect storm bringing change, organized labor and the expanded civil rights movement have found common support in the new government. Under normal conditions, this combined force would mandate immigration reform. Two-thirds of the Hispanic vote was for President-elect Obama, and "rights" for undocumented workers is being cast in the language of "civil rights." Organized labor has been highly supportive of recognizing that economically the nation cannot function without the

estimated 14 million undocumented workers and that they are prime targets for unionization. But these are not normal times. Immigration reform may be delayed, given the current economic conditions, by the concern about the loss of jobs and the growing numbers of unemployed. Nonetheless, the forces for change are strong, and it is very likely that the demand for national security will find it intolerable to have 14 million unidentified people within the country's borders. Any second terrorist event would command an immediate registration process and open the door to a work registration program. With any form of legalized worker status, organized labor is poised to unleash a nationwide membership drive.

While the above forces are formidable and empowered, the strongest contributing force for employment and labor law change comes from the meltdown of the economy. This has been a lifetime event resulting not just in economic contraction but true fear and anger reaching Main Street America. This concern and rage is not confined by national borders. It is a global earthquake being felt by employers worldwide. One's first reaction might be to assume that government will be so focused on economic stimulus packages and fiscal policy that employment and labor law reform would take a backseat. Any such assumption fails to recognize that, right or wrong, there has been a monumental loss of trust in established institutions including corporate America. Needed bailouts, perceived corporate excesses, bankruptcies, conflicts of interest, and even criminal prosecutions are associated with the crisis. To put a face on this "monster" one of the popular cable news programs has been identifying "Culprits of the Collapse." Clearly, such a myopic view is wrong and, overwhelmingly, employers have acted as responsible citizens, but this is not the popular perception. Trust has been lost and it will take time for it to be regained. During the interim, regulation and government oversight are almost certain to follow. This means serious review of a long agenda of possible new employment and labor laws and regulations. Dozens of bills introduced to die in the 110th Congress have the promise of life in the 111th Congress, even with the current economic conditions. Job protection bills, privacy rights, medical care, paid leave proposals, anti-arbitration measures, green energy initiatives, workplace flexibility protections and OSHA reform are just some of the topics covered in this report.

Aside from the legislative agenda, the Obama transition team has had in place for weeks a group looking at changes that can be made soon after taking office through the use of Executive Orders and the regulatory process. This group is focusing on resurrecting Clinton-era policies and reversing many of the initiatives of the Bush Administration. Businesses are likely to see change through new regulations and Executive Orders before feeling any impact from any new legislation enacted by Congress and President Obama.

Employers should be careful not to focus solely on legislation when trying to determine what changes they may face in the coming weeks, months, and years. Every indication is that President-elect Obama intends to staff his administration with individuals intent on restoring the regulatory oversight of American business that declined substantially under the Bush Administration. Aside from providing increased funding for the Department of Labor (DOL) and its various branches including the Wage and Hour Division and the Office of Federal Contract Compliance Programs, as well as the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), and Immigrations and Customs Enforcement (ICE), employers should expect to see an increase in new and revised regulations to protect workers and provide greater oversight and enforcement of employee rights. Who the new administration appoints to run the DOL and other agencies will provide great insight as to what to expect over at least the next four years.

Despite his support for the Democratic workplace agenda and the actions of his transition team to date, much remains to be seen as to how President-elect Obama intends to govern once sworn into office. Certainly, the state of the economy and the final composition of Congress will factor greatly into both his legislative and regulatory agenda and into what becomes a priority both in the first 100 days and during his first year in office. It is certain the laws and regulations governing the workplace will change under the Obama Administration. What is less certain is whether those changes will be dramatic or more subtle; and whether the changes will come quickly or over time.

The authors of this Report believe that strong forces for employment and labor law change will be active over at least the next two years. No judgment is made about the merits of individual proposals or regulations except to recognize that making the national laws of the United States more like Europe or even California will impact jobs and the worldwide competitive marketplace. With technology making distance nearly meaningless, workplaces throughout the world are more

connected than ever before. Global supply chains, outsourcing, virtual work environments, a growing skill and education shortage, and the constant flow of information at the speed of light challenge the United States to be competitive. Even well-intended legislation and regulation will make competition more difficult.

In order to begin to educate employers as to what may be coming, this Report examines in detail the legislative agenda President-elect Obama promised to pursue once in office along with potential nonlegislative changes as a starting point for understanding what the Obama era will mean for employers. To continue the educational process, Littler will maintain a federal Legislative and Regulatory Blog to keep employers apprised of the Obama Administration's key appointments and its ability to implement his agenda for the workplace; as well as that agenda's evolution as it winds its way through the legislative and regulatory processes in Washington, D.C.

While Littler is committed to providing employers with the earliest possible notice of pending legislative and regulatory changes, this is the least of our mission. When appointments are made to key government agencies such as the EEOC and the NLRB, as well as the passage of new legislation, our goal is compliance innovation allowing employers to succeed. In this Report, we outline the Obama agenda and the coming potential changes. We provide employers with ten practical steps that can be taken now to be in a positive competitive position when, and if these changes are experienced. Littler can play an important role as subject matter experts testifying before Congress and regulatory agencies on proposed changes; however, it is not our role to merely complain about the coming changes. We seek to anticipate and prepare employers to maintain a work environment of mutual respect, while continuing to achieve business objectives. For example, in 2008 Littler launched its Total Wage and Hour Compliance Initiative responding to the epidemic of wage and hour class actions. Innovative assessments, policy and practice corrections, affirmative defenses, and state of the art live and e-training solutions were suggested. It is in this spirit that we hope to partner with business to find employment and labor law solutions both nationally and worldwide.

II. WHO'S WHO IN THE 111th CONGRESS AND THE NEW ADMINISTRATION

Congressional Leadership

Although this presidential election has unquestionably brought about "change," the leadership of key congressional committees with authority over labor, employee, and immigration matters in Congress will likely remain the same when the 111th Congress convenes in January 2009. As discussed in the introduction, the Democratic Party gained at least seven seats in the Senate and at least 23 seats in the House, meaning that they may pick up seats on these key committees. This is important because while the moderates will control the fate and ultimate shape of any labor and employment-related legislation that is reported out of committee, it is the committees that will determine the congressional labor and employment agenda.

In the Senate, Sen. Ted Kennedy (D-MA), who was not up for reelection, will retain control of the Health, Education, Labor, and Pensions (HELP) Committee. Senator Kennedy has proven a strong supporter of organized labor over his career and a champion of laws that favor the worker. He has a strong influence over his committee and the shape of the legislation that emerges from it. All major labor and employment law legislation will pass through this committee, meaning that it will be critical to watch what happens in the HELP Committee as the battle over some fundamental labor and employment law changes unfold. Sen. Max Baucus (D-MT) will continue to control the Senate Finance Committee, which has jurisdiction over health care, tax, and pension issues. The third committee to watch closely is the Judiciary Committee, which will be led by Sen. Patrick Leahy (D-VT) as chair. The Judiciary Committee oversees confirmation of Supreme Court justices as well as immigration reform legislation.

In the House, Rep. George Miller (D-CA) will return to chair the House Education and Labor Committee. Like Sen. Kennedy, Rep. Miller is a long-time Capitol Hill veteran and a strong supporter of organized labor and the American worker. He retains strong control over his committee and introduced in the House most of the major labor and employment legislation in the 110th Congress. He will again take the lead on pushing labor and employment reforms through the House. Rep. Dale Kildee (D-MI) will chair the very important Health, Education, Labor and Pensions Subcommittee where the majority of labor and employment legislation initiates. Rep. Charlie Rangel (D-NY) will return to chair the House Ways and Means Committee, which is responsible for tax policy, employee benefits, and health care reform. Chairing the Judiciary Committee, responsible for oversight of the federal judiciary and immigration reform legislation, will be Rep. John Conyers (D-MI).

Depending on the direction received from the new administration, the fact that the players on the key labor and employment-related committees will remain the same means that most, if not all, of the agenda items reviewed below will likely be reintroduced in the same or similar form and considered at the committee level. With the enhanced Democratic control of the committees in both houses, congressional Democrats will have no problem moving through committee and to the floor of both houses any piece of their labor and employment agenda. If any of the items discussed in this Report are to be modified from their current form, that will most likely occur after the legislation is out of committee and up for vote in either the House or Senate. There, given the composition of both Houses, moderate and "Blue Dog" (fiscally conservative) Democrats along with moderate Republicans will have a great deal of leverage that can be used to help shape compromise legislation on many of these issues or block passage in the Senate if an acceptable compromise cannot be reached. It is also at this level that the new administration will have its voice heard on what parts of the labor and employment agenda are enacted into law, and in what form.

So, as the new administration and Congress commence work on shaping the future of labor and employment law in the United States, interested observers must keep a close eye on what the key players at the Committee level focus on as they set their priorities for the coming year.

Agency Changes

The Obama transition team already has named the Agency Review Team Leads who are tasked with heading up teams that will review how key government agencies are operating, determine the direction the new administration will want that agency to take, and identify the appropriate individuals capable of carrying out the Obama agenda at the agency level to receive presidential appointments. The key teams to watch will be the Education and Labor team and the Justice and Civil Rights team. The leads for both of these teams are filled with former Clinton Administration officials, signaling that it is very likely that from an agency and regulatory perspective, the new administration may pursue many of the same objectives that were last seen during the Clinton Administration.

Most observers will focus on the key vacancies that President-elect Obama will have an opportunity to fill immediately:

- Two vacant commissioner openings on the Equal Employment Opportunity Commission
- Three vacant seats, including the Chair, on the National Labor Relations Board
- Secretary of the Department of Labor
- Leaders of the following divisions of the Department of Labor:
  - Employment Standards Administration
  - Wage and Hour Division
  - Office of Federal Contract Compliance Programs
  - Occupational Health and Safety Administration

However, just as critical as the leadership in these agencies is who is selected at the next level of presidential appointment tasked with the job of implementing the new administration's labor and employment agenda. While the shape of that agenda is not completely known as of yet, and will depend to a large degree on who is selected to work in those agencies, it is a certainty that the Obama Administration will work to reverse the sharp decline in regulation and oversight of businesses under the Bush Administration. Companies can expect increased funding for the key agencies tasked with addressing employment issues and protecting employees. With increased funding will come the ability for those agencies to proactively police employers for compliance with employment laws and regulations, as well as the ability to enhance the myriad of regulations with which companies are forced to comply. Therefore, who will be selected to lead and work in these agencies is a crucial issue that bears close observation.

III. THE LEGISLATIVE WORKPLACE AGENDA

Labor-Management Relations

Organized labor's fervent support of President-elect Obama during his run for the White House is well documented. During his campaign, President-elect Obama emphasized his desire to strengthen the labor movement, primarily through legislation aimed at enhancing labor's ability to organize workers. With the current state of the economy causing the incoming administration and Congress to assess their immediate legislative priorities, the new administration's labor agenda may not receive the attention organized labor believes it deserves. However, it is a near-certainty that the 111th Congress and President Obama will focus on labor law reform in 2009.

During the campaign, the Obama-Biden campaign characterized the new administration's labor agenda as follows: Obama and Biden will strengthen the ability of workers to organize unions. [Obama] will fight for passage of the Employee Free Choice Act. Obama and Biden will ensure that [Obama's] labor appointees support workers' rights and will work to ban the permanent replacement of striking workers. Obama and Biden will also increase the minimum wage and index it to inflation to ensure it rises every year.[1]

To that end, President-elect Obama supported the labor legislation below during the most recent congressional year.

Organizing Workers

In February, 2007, the **Employee Free Choice Act** (EFCA) (H.R. 800, S. 1041) was introduced in the 110th Congress by Rep. George Miller (D-CA) and Sen. Ted Kennedy (D-MA), after several versions failed to emerge from committee in prior Congresses. The EFCA was passed in the House of Representatives in March 2007, but stalled in the Senate after its supporters lost a cloture vote 51-49, thereby failing to end a filibuster of the legislation by the opposition. President-elect Obama, while in the Senate, was one of the co-sponsors of the EFCA. The EFCA, if enacted in its current format in the 111th Congress, would result in sweeping changes to the National Labor Relations Act (NLRA), rivaling those created by the original Wagner Act that was passed in 1935. Specifically, it would amend the NLRA to:

1. Require the NLRB to certify a labor union as the exclusive bargaining representative of employees through submission by the union of authorization cards signed by a majority of employees ("card check"), without the benefit of a government-supervised, secret ballot election, if requested by the organizing union;
2. Permit binding interest arbitration if an employer and a newly certified union are unable to reach a first contract within a specified number of days (90 days in the version of the EFCA passed by the House in 2008); and
3. Expand the NLRB's remedial power for employer unfair labor practices during union organizing campaigns and during bargaining for first labor contracts, including the authority to award civil penalties.

The EFCA is organized labor's top priority for 2009. In fact, organized labor plans to strongly advocate consideration and passage of the EFCA in the first 100 days of the new administration. President-elect Obama included the EFCA in his campaign platform, and has repeatedly stated that he will sign the law if passed after he becomes president. However, it is unclear what the EFCA will look like at that point. It is likely that it will be reintroduced in the same form as in 2007, but the ultimate composition of the Senate will determine whether it passes and in what form. Depending on how close the EFCA's supporters are to being able to invoke cloture, thereby preventing a filibuster by opponents of the EFCA, the proposal may meet the same fate it did in the 110th Congress and die in the Senate; or it may be substantially altered by a bipartisan coalition in a manner that enhances labor's ability to organize but possibly without aspects of the controversial card check and arbitration provisions.

Legislation Prohibiting Right to Work Laws

In many collective bargaining agreements between employers and unions, it is common for the parties to agree to a "union security" clause, which requires workers to pay union dues or their equivalent in order to work for the company. However, Section 14(b) of the Taft-Hartley Act permits states to enact legislation that prohibit that type of agreement. Twenty-two states[2] have enacted this type of legislation – known as "Right to Work" laws – which prohibit unions and employers (as part of a collective bargaining agreement) from agreeing to make an employee's membership in the union a condition of employment. Historically, due in large part to these Right to Work laws, businesses in these states are not as heavily unionized as companies in states where union membership can be compelled for all of a company's employees. Accordingly, one measure being pushed by organized labor, supported by President-elect Obama, is a proposal to repeal Section 14(b) that would overturn the Right to Work laws throughout the country. The bill was introduced on July 10, 2008, by Rep. Brad Sherman (D-CA) as H.R. 6477 and remained at the committee level. The result of a repeal would be a substantial increase in dues from Right to Work states, as unions begin to insist that all unionized employees pay union dues or their equivalent, instead of payment being voluntary in those states as it stands today. In recent years, numerous bills have been introduced that would repeal Section 14(b), but none have had any success in making it to a vote. With the support of President Obama, the repeal of Section 14(b) could get a more serious hearing in the 111th Congress.

Notably, the last time a serious attempt was made to repeal Section 14(b) was in the Johnson Administration, which was also the last time a Democratic candidate for President won election with as large a percentage of the popular vote as did President-elect Obama in 2008. A bill to repeal Section 14(b) passed the U.S. House in July 1965, and despite the support of a majority of senators, failed to overcome a filibuster. However, the issue created the country's first nationwide debate over compulsory unionism, and resulted in re-election problems for some supporters of the repeal. Thirty-nine House members who had voted to repeal Section 14(b) were defeated in primaries or the general election the following year, and not one supporter of Section 14(b) was defeated by a supporter of the repeal.

Reclassification of Supervisors

The Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers (RESPECT) Act was introduced into the Senate and House of Representatives on March 22, 2007, by Sen. Christopher Dodd (D-CT) and Reps. Robert Andrews (D-NJ) and Don Young (R-AK) (S. 969; H.R. 1644). The bills were referred to committee and never made it to the floor for a vote. The purpose of the proposed legislation was to reclassify, under the NLRA, tens or thousands (or more) of supervisors as rank and file employees, who would then be subject to union organizing. The RESPECT Act would do this by changing the 60-year old definition of *supervisor* contained in Section 2(11) of the NLRA to one that would include many of the employees who are currently considered supervisors.

Prior to 2006, the NLRB had a long history of inconsistently applying its definition of a supervisor. That inconsistency led several courts of appeals to question the deference to which the NLRB's decisions on this issue were entitled, and caused the Supreme Court twice to reject NLRB interpretations of the definition of a supervisor. Under current law, in order to be considered a supervisor, an individual must spend a majority of his or her time performing any one of a list of supervisory functions defined in the NLRA:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Most supervisors fall into that category by qualifying under the terms "assign," "responsibly to direct" and/or "independent judgment." Late in 2007, the NLRB issued three decisions concerning supervisory status in which the NLRB clarified the meaning of those three key terms, known as the "*Oakwood*" line of decisions. These cases expanded the scope of those terms and, accordingly, the number of individuals classified as supervisors for the purpose of the NLRA.

The RESPECT Act is a direct response to the *Oakwood* decisions. It would eliminate "assign" and "responsibly to direct" from the list, which would move tens of thousands of front line and low-level supervisors within the protection of the NLRA. As a consequence, these supervisors could be forcibly included in, or "accreted" into, bargaining units. In reality, the essential role of a supervisor is managing and directing other employees' work. Very few supervisors actually spend a majority of their time hiring, firing, rewarding, or disciplining employees. They spend part of their time managing the employment status of their workers, but the majority of their time is spent directing those employees' work.

In short, the RESPECT Act goes beyond a simple reversal of the *Oakwood* line of cases and represents a fundamental change to who can be organized by labor. Along with the EFCA, this bill is a top priority of organized labor. With some level of bipartisan support, the bill will get a fair hearing and may eventually be enacted in some form, perhaps as part of a larger attempt to modify the NLRA in order to fix what some critics see as flaws within the law.

Patriot Employers Act

The **Patriot Employers Act** was introduced in the Senate in August 2007 by Sen. Richard Durbin (D-IL) (S. 1945) and co-sponsored by President-elect Obama. A companion bill was introduced by Republicans in the House entitled the **Eagle Employers Act**. Both bills are designed to use the tax code as a carrot to encourage U.S. companies to create jobs within the U.S. that meet specified standards. A company that elects to be designated as a "Patriot Employer" would receive a 1% tax credit if it:

1. Maintains its headquarters in the United States;

2. Pays at least 60% of the health care premiums of its employees;
3. Observes a policy requiring neutrality in employee organizing drives;
4. Maintains or increases the number of its full-time workers in the United States relative to its full-time workers outside of the United States;
5. Provides full differential salary and insurance benefits for all National Guard and Reserve employees called to active duty; and
6. Provides its employees with a certain higher levels of compensation and retirement benefits.

Employers would not be required to become Patriot Employers – the program is completely optional. To finance the loss of tax revenue from Patriot Employers, the legislation provides that American companies with subsidiaries abroad would have to pay the U.S. corporate tax on profits earned abroad, rather than the corporate tax of the host country where the profits are earned. Since the U.S. corporate tax rate is currently 35%, and many of the countries around the world have lower tax rates for businesses, this would result in a significant tax increase on earnings earned abroad for companies with foreign subsidiaries. House Republicans have introduced a similar bill, the **Eagle Employers Act**, which has identical provisions, except that the Eagle Employers Act does not include the policy requiring neutrality in employee organizing drives.

During the recent campaign, President-elect Obama spoke often about job creation in the United States and stopping the outsourcing of jobs to other countries. With apparent bipartisan support, it is likely the Patriot Employers Act will be re-introduced and considered early in 2009. Because being a Patriot Employer would be voluntary, the bill has appeal to many in Congress; although the tax increases on earnings abroad may prove to be a roadblock to enactment.

Banning of Permanent Replacement Workers

While no significant legislation has been considered recently, the prohibition on the use of permanent replacement workers by employers being struck is something high on organized labor's agenda and championed by President-elect Obama. Currently, when a union engages in an economic strike, a company can hire "permanent replacement" workers to take the place of striking employees. When the strike is over, the permanent replacements can lawfully remain in their positions. The employees they replaced are not terminated, but cannot immediately return to work absent openings for which they are qualified. Otherwise, they go on a re-hire list and in some cases do not return for some length of time, if ever. The use of permanent replacements is a significant tool for employers to blunt the effectiveness of a strike and gives the employer substantial leverage in labor negotiations.

For obvious reasons, organized labor would like to see this tool taken away from employers. Accordingly, the banning of permanent replacements is part of the labor agenda just as it was in the 1980's when labor pushed for overall change in labor law.

National Labor Relations Board

Currently, three of the five seats on the NLRB remain vacant, including the important position of Chair. Traditionally, the party that controls the White House has three seats on the NLRB and the other party gets one or two seats (independents also can be seated). Under the Bush Administration, the Republican-controlled NLRB issued several key rulings that organized labor and some Democrats in Congress are determined to reverse. President-elect Obama was supportive of these reversals during his campaign and while in the Senate. As discussed in this Report, some of these rulings are already the subject of legislation such as the RESPECT Act. Others may be overturned either through legislation or through new NLRB rulings. These key cases were:

- ***IBM Corp.***[3] which limited Weingarten rights to unionized employees (Weingarten rights are an employee's right to be accompanied by another employee/representative at a meeting which the employee reasonably believes could lead to discipline);
- ***Register Guard,***[4] holding that employers can prohibit employees from using the Company's email system to send union-related email);
- ***Dana/Metaldyne,***[5] which provided for a secret ballot election when a union wins a voluntary card check election, provided 30 percent of the bargaining unit requests it within 45 days of the card check election;
- ***BE&K Construction,***[6] which made it easier for companies to sue unions for disruptive litigation;

- **The 'Salting' Cases,**[7] which (1) required that an employee have a genuine interest in doing the job (and not in organizing the employees) in refusal-to-hire cases; and (2) reduced back-pay remedies for terminating a union "salt"; and
- ***Brown University*,**[8] which held that graduate assistants are not employees and therefore not protected by the NLRA, including the right to join a union.
- ***H.S. Care L.L.C.*,**[9] which held that temporary employees, who are jointly employed by a personnel staffing agency and the employer, are not members of the bargaining unit unless both employers consent.

Aside from these changes, look for a new Obama-appointed NLRB to be active in enforcing the NLRA and in seeking opportunities to enhance employee and union rights at the expense of management. If the EFCA passes in any form, the Obama NLRB will have the regulatory opportunity to shape how the new law will operate in practice in a way favorable to organized labor.

Work-Family Balance

The federal government has not been actively involved in the discussion over work-life balance since 1993 when the Family and Medical Leave Act (FMLA) was passed. However, both presidential candidates made work-life flexibility part of their economic platforms during the 2008 election. Therefore, even though for the past fifteen years all policies to assist employees in the struggle between their work life and their home life have come from the private sector or the states, changes are a near certainty during the Obama Administration with some level of bipartisan support. In fact, with the political and economic landscape similar in many ways to when President Clinton took office in 1993, and passed the original FMLA within two weeks of taking office, the new administration and Congress may make passage of work-family balance legislation their first labor and employment law priority when the 111th Congress convenes in early 2009.

President-elect Obama supports expanding federal mandates for both paid and unpaid leave for employees. He supports: (1) a move to require employers to provide seven paid sick days a year for employees; (2) expanding the FMLA; (3) expanding allowable purposes for family leave; and (4) establishing formal processes for employees to petition their employers for flexible hours. In the 110th Congress, President-elect Obama supported the legislation in the below areas.

Expansion of the Family and Medical Leave Act

In recent years, a myriad of bills were introduced to expand the reach of the FMLA. Rep. Carolyn Maloney (D-NY), introduced two bills, the **Family and Medical Leave Expansion Act** (H.R. 1369) on March 7, 2007 and the **Family and Medical Leave Expansion Act** (H.R. 1369) on September 29, 2008. Both bills: (1) lower the threshold for companies subject to the FMLA from 50 to 25 or more employees; and (2) provide up to 24 hours of unpaid leave for parent-teacher conferences or to take family members to the doctor for a regular medical or dental appointment. The 2007 version of the bill also included a grant program for states to provide replacement income for new parents and would have added domestic violence as a cause for taking FMLA leave. Rep. Lynn Woolsey (D-CA) introduced a bill on May 17, 2007, the **Balancing Act of 2007** (H.R. 2392), which also contained the concept of five-year grants to state or local governments. In that bill, the grants would be for projects that assist families by providing wage replacement for individuals engaged in family caregiving needs including but beyond those related to the birth of a child. This bill also would have permitted part-time employees to be eligible for FMLA leave. These bills all were referred to committee.

Similar bills have also been introduced in the past few years. The **Family and Medical Leave Expansion Act**, introduced in the Senate on February 3, 2005 (S. 282) included sections entitled the Federal Employees Paid Parental Leave Act and the Time for Schools Act. The **Federal Employees Paid Parental Leave Act of 2005** would have permitted the Office of Personnel Management to contract with one or more employing agencies to conduct a demonstration project that would have provided paid leave for eligible individuals who were responding to caregiving needs resulting from the birth or adoption of a son or daughter or other family caregiving needs. The **Time for Schools Act of 2005** would have amended the FMLA to allow employees covered by the Act to take up to 24 hours, during any 12-month period, of eligible school involvement leave. Additionally, the Federal Employees Paid Parental Leave Act was reintroduced in the House of Representatives in 2006, 2007 and 2008 (H.R. 3158, 3799 and 5718, respectively) and in the Senate in 2008 (S. 3140). This Act would have provided a portion of the 12 weeks of

parental leave available to a federal employee to be paid and to be used for other purposes.

In the Senate and House of Representatives Sens. Chris Dodd (D-CT) and Ted Stevens (R-AK) also recently introduced two versions of the **Family Leave Insurance Act** (S. 1681, H.R. 5873), on June 21, 2007, and April 22, 2008, respectively, which would have required a Family and Medical Leave Insurance program for covered employers. Employees and employers would pay shared premiums into an insurance fund that would finance paid family and medical leave for workers. This program would have entitled eligible employees to family and medical leave insurance benefits for a total of eight workweeks of leave taken under the FMLA or other authority during any 12-month period for any of the following reasons: (1) the birth of a son or daughter; (2) the placement of a son or daughter with the employee for adoption or foster care; (3) to care for the spouse, son, daughter or parent of the employee with a serious medical condition; or (4) to care for one's own serious health condition.

In one form or another, as a whole, these bills are designed to: (1) expand the coverage of the FMLA to smaller employers and permit use of FMLA leave for more purposes; and (2) provide for paid FMLA leave. Given the bipartisan nature of the bills, expansion of the FMLA to smaller employers and for additional circumstances is very likely during the Obama Administration. However, while Congress will certainly reconsider some type of paid FMLA as well, that change is less certain as the Obama Administration may work toward funding a series of pilot initiatives at the state level prior to pushing for federally-mandated paid FMLA leave nationwide. The idea of the five-year grant programs will be resurrected and stands a good chance of being enacted.

Expansion of Paid Sick Days

In order to ensure that all working Americans can address their own health needs and the health needs of their families, the Obama Administration will likely seek to require all employers to provide paid sick days to their employees. By seeking early and routine medical care for themselves and their family members, it is believed that the costs of public and private health care could be diminished. One way to assist employees in seeking regular care would be to require employers to provide paid time off. Currently, such policies have been left up to the individual private employer or the states to enact. Recently, the City of San Francisco (effective February 5, 2007), the District of Columbia (effective November 13, 2008) and the City of Milwaukee (effective February 2009) have enacted laws requiring paid sick days.

The Healthy Families Act was first introduced in both the Senate and House of Representatives in 2005 (S. 1085, S. 932, and H.R. 1902) and was reintroduced in 2007 (S. 910, H.R. 1542) by Sen. Ted Kennedy (D-MA) and Rep. Rosa DeLauro (D-CT) with President-elect Obama as a sponsor in the Senate. The Senate version of the 2007 bill required employers with 15 or more employees to provide a minimum paid sick leave of seven days annually for those who work at least 30 hours per week and a prorated annual amount for those who work less than 30, but at least 20, hours a week. Under this Act, employees would have been allowed to use such leave to meet their own medical needs or to care for the medical needs of certain family members, and accrued sick leave would have carried over from year to year. Additionally, this Act would have required employers to post notice of the requirements under the Act. If notice was not posted, employers would have been subject to civil penalties for the violation. Employees would also have had a right of action to recover damages or receive equitable relief in federal or state court. This law would have provided a two-year statute of limitations, with a third year added for a willful violation.

With the additional burden the imposition of paid sick leave would put on businesses in today's economy, passage of a renewed version of the Healthy Families Act in 2009 is not probable. However, another option that President-elect Obama has discussed is testing the idea on a state level with grants and/or pilot programs. Alternatively, some type of paid sick leave, with fewer days, might become part of an omnibus work/family balance piece of legislation in conjunction with paid FMLA leave.

Another alternative introduced by Rep. Cathy McMorris-Rodgers (R-WA) is the **Family-Friendly Workplace Act** (H.R. 6025). Introduced on May 13, 2008, this bill would permit the use of "comp time" in the private sector. Employers would be permitted to offer employees the option of taking paid time off in lieu of cash wages for overtime hours worked, at the employee's discretion. This option is currently available to federal workers (and is very popular), but unlawful in the private sector. A compromise on paid sick leave might include this type of approach.

Expansion of Flexible Work Arrangements

Currently, it is an individual employer's independent decision whether to offer flexible work arrangements, such as alternative work schedules and/or telecommuting programs to their employees. While many businesses can benefit from providing such flexibility to their employees, these arrangements do not fit all business environments. Congress will likely reintroduce legislation mandating flexibility in the workplace and the new Obama Administration will seek to make the federal government a model employer in terms of adopting flexible work schedules and permitting employees to petition to request flexible arrangements.

The **Working Families Flexibility Act** was first introduced in December 2007 in the House of Representatives by Rep. Carolyn Maloney (D-NY) and in the Senate by Sen. Ted Kennedy (D-MA) (S. 2419, H.R. 4301), with President-elect Obama as co-sponsor of the Senate legislation. As drafted in 2007, this Act would give working Americans the right to request flexible work options to balance the demands of their jobs and home life. This legislation was patterned after similar laws in Europe.

The Senate bill would have authorized an employee to request from an employer a change in the terms or conditions of the employee's employment if the request relates to: (1) the number of hours the employee is required to work; (2) the times when the employee is required to work; or (3) where the employee is required to work. Additionally, it set forth certain duties for the employer with respect to such requests. Upon receiving such a request, an employer was required to hold a meeting with the employee to discuss his or her application and provide a written decision regarding the application. If the application was rejected, the employer was required to provide a reason for the denial. Under the 2007 bill, the employee had a right to request reconsideration of the employer's decision, and the employer and employee were required to once again meet on the reconsideration. The employer's final decision had to be in writing, and, if reconsideration was denied, the employer was required to state the grounds for denial in writing. This bill would have authorized an employee to file a complaint with the Administrator of the Wage and Hour Division of the Employment Standards Administration of the DOL for any violations of the rights granted under the Act. Additionally, the Administrator could investigate and assess civil penalties or award equitable relief such as employment, reinstatement, promotion, back pay and a change in the terms or conditions of employment.

Out of all the work/family balance legislation that has been introduced to date, this legislation is seen as the least harmful to employers, or at least has less direct economic costs. But President-elect Obama has hinted that his administration may use the federal government employees as test cases to understand the benefits and pitfalls of this type of change in the workplace before making it applicable to the private sector.

Discrimination in the Workplace

Discrimination Litigation Reform

In January 2008, Democrats in both chambers introduced the **Civil Rights Act of 2008**, (S. 2554, H.R. 5129) intended to "restore, reaffirm, and reconcile legal rights and remedies under civil rights statutes." Introduced by Sen. Ted Kennedy (D-MA) and Rep. John Lewis (D-GA), the legislation broadens remedies for aggrieved employees, including undocumented workers, limits defenses to employers, expands definitions in favor of employees, and enlarges the pool of employees who may sue in court. The legislation was referred to the appropriate committees and never made it to the floor of either chamber.

The legislation eliminated caps on compensatory damages (now $300,000) and added the availability of punitive damages for violations of Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. In addition, employers found to have violated the Fair Labor Standards Act would also be liable for compensatory and punitive damages, in conjunction with the plethora of remedies already available to aggrieved employees.

The legislation affects how employers litigate and defend against certain claims. Employers defending against Equal Pay Act claims would not rely solely on the "bona fide factor other than sex" affirmative defense, and it would be more difficult for employers to use the familiar *Farragher/Ellerth* affirmative defense in harassment claims. Currently, if an employer has exercised reasonable care to prevent and correct promptly any harassing behavior, and the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise, a harassment claim fails. To prevail in lawsuits, under the proposed legislation, an employer must demonstrate established and adequately publicized effective

and "comprehensive" harassment prevention policies and complaint procedures and show that it undertook "prompt, thorough, and impartial investigations." This represents a much higher standard for employers to meet. Further, a plaintiff who succeeds only on some of his/her claims will be entitled to a larger award of attorneys' fees and will be permitted to recover expert witness fees.

Legislation proposed would also amend the Federal Arbitration Act, making pre-dispute agreements to arbitrate employment and civil rights disputes unenforceable; meaning that employers will no longer be allowed to have arbitration agreements in employment applications, employee contracts, or in handbooks.

This legislation is certain to be reintroduced in some fashion during the 111th Congress but will be very controversial given the adverse impact it may have on business. While the new administration and Congress will have higher labor-and employment-related priorities, expect this legislation to receive serious consideration at some point during the next four years.

Prohibiting Sexual Orientation Discrimination

On November 11, 2007, the House passed the **Employment Nondiscrimination Act** (H.R. 3685), 235-184 (including 34 Republicans), which was introduced by Rep. Barney Frank (D-MA) and prohibits discrimination against any employee with respect to his or her terms or conditions of employment based upon actual or perceived sexual orientation. On November 13, 2007, this bill was placed on the Senate legislative calendar, but the Senate has yet to take any action.

The term *sexual orientation* is defined as homosexuality, heterosexuality, or bisexuality. However, this bill does not require employers to provide the same benefits to unmarried couples as they do married couples, with *marriage* defined as a legal union between one man and one woman as husband and wife. The legislation also expressly prohibits employees from alleging that certain policies create a disparate impact on their protected class.

The passage of this legislation is likely, given that many states have already passed similar legislation. In addition, many employers already prohibit discrimination on the basis of sexual orientation in their employee handbooks and policies. Accordingly, there is likely to be bipartisan support for passage.

Statute of Limitations

On July 31, 2007, the House passed the **Lilly Ledbetter Fair Pay Act** (H.R. 2831), by a vote of 225 to 199, which was introduced by Rep. George Miller (D-CA) and would amend many federal civil rights statutes, including the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act, by imposing the "paycheck rule." Used by some courts for years, the "paycheck rule" resets the statute of limitations each time an employee receives a paycheck that is based on past compensation decisions if the employee proves that those past decisions were discriminatory. Essentially, the paycheck rule abolishes the statute of limitations for many discrimination claims affecting compensation by permitting plaintiffs to bring claims years after the alleged discriminatory acts occurred. The legislation was proposed in response to the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*[10] wherein the Court rejected the "paycheck rule."

A companion bill was introduced in the Senate by Sen. Ted Kennedy (D-MA) on July 20, 2007 (S. 1843), which failed to garner enough support to invoke cloture and end a filibuster by opponents. There were several Republican attempts to address the statute of limitations issue raised by the *Ledbetter* case by way of compromise, which may serve as the basis for modified legislation that could pass into law if the supporters of the Ledbetter Fair Pay Act cannot muster enough support to invoke cloture in the Senate when the bill is resurrected in the 111th Congress. The compromise legislation might include a "knew or should have known" standard for when the statute of limitations takes effect.

Pay Equality

There have been many efforts in Congress in recent years to address equal pay for women workers, and it is a near certainty that the issue will rise again and most likely reach some type of resolution during the 111th Congress.

On April 11, 2007, Sen. Thomas Harkin (D-IA) introduced the **Fair Pay Act** (S. 1087), which would amend the Fair Labor Standards Act's (FLSA) provisions regarding the discriminatory payment of wages based on, among other things, race, sex, and national origin. The bill would also require employers to provide the same pay for jobs that involve comparable skill, effort, responsibility, and working conditions, even if the positions were not actually equal. In addition, it would: (1) prohibit employers from reducing

other employees' wages to achieve wage equality; and (2) require disclosure of classifications and pay rates by employers.

On March 6, 2007, Sen. Hillary Clinton (D-NY) introduced the **Paycheck Fairness Act** (S. 766), the purpose of which is to amend the FLSA to allow victims of compensation discrimination to potentially recover more remedies than those currently provided for in the FLSA. On July 31, 2008, the House passed a similar bill, the **Paycheck Fairness Act** (H.R. 1338), by a vote of 247 to 178. These bills would cause a shift from the Equal Pay Act's original concept of "equal pay for equal work" to a new concept of equal pay for work that is comparable in value albeit unequal. Enactment also would make it unlawful for employers to reduce other employees' wages in order to achieve pay equity and would require employers to disclose job categories and pay scales as needed to enforce the law. In addition, the DOL would be required to establish "guidelines" for employers to use in setting compensation.

Under the legislation, employers would no longer be able to rely on the "factor other than sex" affirmative defense, thereby making it extremely difficult for employers to defend against these types of claims. Instead, in rebutting any presumption of wage discrimination, employers will be faced with having to establish that the factor responsible for the wage difference not only is based on something other than gender, but also that the factor on which the employer relies meets the new standard of "job relatedness" or "legitimate business purpose." Further, even if an employer can make this showing, the employee can still prevail if there is an "alternative employment practice" that would serve the same business purpose that the employer hoped to achieve. Finally, employees who are successful in bringing such claims may be entitled to unlimited punitive and compensatory damages, regardless of whether the discriminatory acts were intentional or not.

There was even an effort underway to revive the Equal Rights Amendment from the 1970's. Introduced in the Senate and House on March 27, 2007, by Sen. Ted Kennedy (D-MA) (S.J. Res. 10) and Rep. Carolyn Maloney (D-NY) (H.J. Resolution 40), the proposed amendment would result in subjecting sex discrimination claims to the same level of scrutiny as race discrimination claims. The Amendment was referred to committee in both houses and may be revived in the 111th Congress.

Religion in the Workplace

On March 9, 2007, Rep. Carolyn McCarthy (D-NY) introduced the Workplace Religious Freedom Act (H.R. 1431), which would amend Title VII's provisions governing religious accommodations in the workplace. A substantially similar bill was introduced in the Senate by Sen. John Kerry (D-MA) entitled the Workplace Religious Freedom Act of 2008 (S. 3628). Currently, Title VII makes it unlawful for employers to discriminate against employees based on religious beliefs and requires employers to accommodate an employee's religious beliefs unless doing so would pose an undue hardship on the employer. Under the legislation, the concept of "undue hardship" changes by requiring the employer to show that the proposed accommodation would require significant difficulty or expense.

Moreover, the amendment would increase the types of religious practices that employers will be required to accommodate and would make it especially difficult for employers to deny any request for days off for religious observation and to enforce dress and appearance codes. Finally, the amendment could create more conflict in the workplace by requiring employers to accommodate religious practices that may offend other workers, potentially creating a hostile work environment. Given that the concept of religion is very broad and may encompass beliefs that many would find offensive, this will prove particularly challenging for employers. Both bills were referred to committee and will be revisited in the next Congress. Given the other priorities on the labor and employment legislative front and given the burdens that this legislation would place on companies, this legislation may take a backburner to more urgent initiatives.

Wage and Hour

The Department of Labor's Wage and Hour Division (WHD) initiatives for 2009 under the new administration will likely remain the same as the initiatives under the Bush Administration. However, with increased funding for enforcement of wage and hour laws and new leadership within the WHD, these initiatives could affect substantially more employers than previously anticipated. The initiatives include:

- Child Labor – the WHD will focus attention on the use of bailers and compactors in retail stores, malls, and grocery stores;

- Recidivism – each of the five regions of the WHD will likely conduct a statistically valid survey of employers who have been previously investigated and found in violation in an effort to determine if the strategies implemented in previous years have been successful at reducing recidivism;
- Low Wage Industries – the WHD will continue to emphasize improving compliance in low wage industries such as janitorial/maintenance, restaurants, hotels/motels, security guard services, car washes, and the garment industry; and
- Agriculture – the WHD will concentrate enforcement and compliance assistance efforts on agricultural employment as it relates to transportation, housing, field sanitation, wages and disclosure requirements.

Potential Changes in FLSA Regulations

Once the leadership is in place, the WHD will likely pay special attention to long-term healthcare workers, protecting day laborers, combating human trafficking for labor and any potential violation of wage and hour laws that occurs during a union campaign of a large company. Further, the WHD will likely seek to make several regulatory changes in the first two years of the new administration. First, the WHD will likely try to reinstate the proposed regulations regarding health companion services to allow such workers to receive overtime. These regulations were revoked by the Bush Administration because it was feared the allowance of overtime would further strain Medicaid. Second, the WHD will likely enhance current regulations regarding child labor and change many of the recently enacted FMLA regulations and proposed FLSA regulations.

Increase in the Minimum Wage

A centerpiece to President-elect Obama's campaign platform was his proposal to increase the federal minimum wage to $9.50 an hour by 2011. Many in Congress, on both sides of the aisle, oppose such a sharp increase in the minimum wage coming on the heels of an increase to $7.25 scheduled for July 2009. Additionally, no state has a minimum wage that surpasses $9.50 per hour. Although President-elect Obama's proposal to increase the minimum wage to $9.50 will not pass at that level, it is likely that before July 24, 2009, when the $7.25 increase is scheduled to take place, there will be a legislative initiative to increase the minimum wage to a rate higher than the $7.25 per hour figure and to index it to allow for annual adjustments.

Workplace Safety

In 2007, nonfatal workplace injuries and illnesses among private employers occurred at a rate of 4.2 cases per 100 full-time or equivalent workers, or about four million cases per year.[11] According to the Occupation Safety and Health Administration (OSHA), employers pay an estimated $1 billion per week for direct workers' compensation costs alone.[12] Employers and employees alike agree about the importance of a safe workplace; however, safety comes at a cost, and that cost can and likely will grow under the Obama Administration. Next to labor and work/family balance, workplace safety is very high on the new administration's agenda and will be a top priority for both the Obama Administration and Congress.

There were several industry-specific workplace safety laws that were introduced during the 110th Congress and supported by President-elect Obama, including the **Nurse and Patient Safety & Protection Act**; the **Popcorn Workers Lung Disease Prevention Act**; and the **Supplemental Mine Improvement and New Emergency Response Act**, which, along with the more major initiatives discussed below, provide insight into the new administration's potential workplace safety agenda. Workplace safety initiatives will likely have the following characteristics: (1) allowance of interim rulemaking without the benefit of the traditional employer comment phase; (2) stiffer civil and/or criminal penalties for workplace safety violations; (3) more and stricter standards and regulations governing practices and procedures in workplaces; (4) more government involvement and oversight in the promulgation and oversight of safety in the workplace; and (5) higher costs to employers in providing safer workplaces, such as providing employees with additional or upgraded personal protective equipment, installing or improving safeguards and measures to prevent accidents and exposure to workplace hazards.

Increased Penalties for Workplace Safety Violations

The **Protecting America's Workers Act** (PAWA) was introduced in the House of Representatives during the 109th Congress and again during the 110th Congress (H.R. 2049) by Reps. George Miller (D-CA) and Lynn Woolsey (D-CA). In the Senate, PAWA was introduced during the 110th Congress (S. 1244) by Sen. Ted Kennedy (D•MA) and was co-sponsored by

President-elect Obama. The bills remained in committee for a series of hearings but never made it to either chamber floor for a vote. Passage of this legislation in the next Congress is likely to be a high priority for the new administration.

PAWA would amend several provisions of the Occupational Safety and Health Act of 1970 (OSH Act) as it relates to government and private employers. PAWA would increase the civil penalties provided for by the OSH Act. For example, the minimum civil penalty for willful violations would increase from $5,000 to $7,000, and the maximum penalty would increase from $70,000 to $100,000. This legislation would also create a new penalty structure that would range from a minimum of $50,000 to a maximum of $250,000 for a worker's death caused by a willful violation. In addition, PAWA would remove the requirement for a workplace death to occur before criminal penalties attach and provide for felony charges for an employer's repeated and willful violations that result in a worker's death or serious injury. Criminal penalties would increase from a minimum of six months to a minimum of 10 years for a first offense and from a maximum of one year to a maximum of 20 years for repeated offenses.

Under PAWA, the Secretary of Labor would be ordered to revise regulations and promulgate OSHA standards to require employers to provide personal protective equipment (PPE) to employees at no cost to employees. OSHA issued a final rule on November 15, 2007, requiring employers to pay for PPE, but exempting certain types of PPE from the requirement. It is unclear if PAWA would require OSHA to implement stricter requirements or if the final rule would comply with PAWA's mandates.

Other noteworthy provisions relate to: increased protection for whistleblowers under the OSH Act, additional posting requirements regarding employee rights, increased investigations of fatalities and serious injuries, prohibition of unclassified citations, rights to contest citations and penalties, and objections to modifications of citations.

PAWA should not face substantial challenges from the 111th Congress. It is unlikely that PAWA will change much from its present form, and, if passed, PAWA could have an immediate impact on the American workforce, specifically because of the increased employee rights, including a private cause of action, a stiffening of penalties, and requirements regarding PPE.

Worker Protection Against Combustible Dust Explosions and Fires Act of 2008

The Worker Protection Against Combustible Dust Explosions and Fires Act of 2008 (CDEFA) would require the Secretary of Labor to promulgate an interim final standard within 90 days and a final rule within 18 months regulating combustible dusts. Introduced by Reps. George Miller (D-CA) and John Barrow (D-GA) (H.R. 5522), this Act would apply to manufacturing, processing, blending, conveying, repackaging, and handling of combustible particulate solids and their duties, but not to processes already covered by OSHA's standard on grain facilities. The Senate held a hearing on workplace dust hazards but did not discuss the House bill; and no Senate version has been introduced.

The standard would set forth many requirements, including the following: (1) hazard assessments; (2) a written program that includes provisions for hazardous dust inspection, testing, hot work, ignition control, and housekeeping, including the frequency and methods used to minimize accumulations of combustible dust on ledges, floors, equipment, and other exposed surfaces; (3) engineering controls and procedures to control fugitive dust emissions, and sealing of areas inaccessible to housekeeping; (4) employee participation in hazard assessment; and (5) providing safety and health information and annual training to employees.

The Congressional Budget Office estimates that CDEFA will increase OSHA's enforcement workload by about five percent per year at a cost of approximately $10 million a year. If this bill is enacted into law, it will likely have an impact on a broad spectrum of industries, the costs of which are unknown because there is likely a great variance from employer to employer how compliant they are with pre-existing standards and how up-to-date they are in the procedures and controls that are already in place. However, unless the bill finds support in the Senate, how this particular workplace hazard is regulated will remain within the province of OSHA and its existing rulemaking processes.

Re-introduction of Clinton Era Ergonomics Regulations

One of the first orders of business when Congress was sworn in after President Bush won the 2000 election was repeal of the highly controversial ergonomics regulations issued by OSHA under the Clinton Administration. Under the Congressional Review Act, Congress was able to rescind the regulations, and

OSHA is not permitted to issue new ones without Congressional approval. Accordingly, Rep. John Conyers (D-MI) introduced the **Nurse and Patient Safety Protection Act of 2007** (H.R. 378), directing OSHA to issue new ergonomics regulations for the health care industry. The bill was referred to committee. Ergonomics is still high on the Democratic workplace safety agenda, and, since OSHA cannot enact new regulations without Congressional approval, there will be an effort in Congress to expand this 2007 House initiative to a broader array of workplaces. Moreover, unlike during the Clinton Administration, because any ergonomic initiative must now go through the legislative process, opponents will have the opportunity to block any bill directing OSHA to issue new regulations in the Senate. However, given highly negative reaction from business and the repeal of Clinton's ergonomic regulations along party lines, the likelihood of reintroduction and enactment of the regulations is uncertain.

Occupational Health and Safety Administration

As stated earlier in this Report, much of what happens at the agency level depends on who is selected to lead. For OSHA, the key selections to watch are the persons appointed as Secretary of Labor and OSHA Administrator. That notwithstanding, one of President-elect Obama's stated goals during the campaign is reinvigoration of OSHA, and he has already indicated his willingness to use the Executive Order to implement his agenda quickly. For example, he has promised to issue an ergonomics regulation aimed at reducing ergonomic-related injuries, such as carpel tunnel syndrome. So even before Congress has a chance to act on workplace safety matters, and perhaps before President-elect Obama has appointed and had confirmed the individuals tasked with the responsibility to accomplish the new administration's goals, it is possible that the new administration will act by Executive Order to achieve workplace safety goals that OSHA will be responsible for enforcing.

Business Restructuring

The Expansion of Employee Notice of Layoffs

As the DOL's monthly jobs report continues to show a decline in the number of jobs and an increase in the unemployment rate, President-elect Obama continues to discuss rebuilding the middle-class and creating millions of new jobs. Approximately 240,000 jobs were lost in October 2008 bringing the year's total job loss to 1.2 million. Additionally, the unemployment rate rose to a fourteen-year high of 6.5 percent.

Facing the prospect of additional layoffs, the new administration will likely reintroduce the **Federal Oversight, Reform, and Enforcement of the WARN Act (FOREWARN Act)**, which was first introduced in both the Senate and the House of Representatives in 2007 (S. 1792, H.R. 3662). The legislation requires more and smaller employers to notify workers of mass firings or plant closings and adds tools to enforce the federal Worker Adjustment and Retraining Notification (WARN) Act. President-elect Obama was a co-sponsor of the Senate Bill.

If legislation similar to the FOREWARN Act is enacted, it will increase the burden on employers to foresee lay-offs and reductions in force. This Act, as drafted in 2007, would have amended the WARN Act to revise the definitions of *employer*, *plant closing*, and *mass layoff*. *Employer* would cover employers with as few as 50 employees, down from the current 100-employee threshold; *plant closing* would cover situations where 25 employees experienced an employment loss, down from the current 50-employee threshold; a *mass layoff* would cover a reduction in force resulting in the employment loss of 100 employees, down from the current 500-employee threshold. In addition, the Act would have required an employer to: (1) give 90-day written notice, (up from the current 60-day notice requirement) to employees and appropriate state and local governments before ordering a plant closing or mass layoff; and (2) notify the Secretary of Labor within 60 days of such closing or layoff.

Under the 2007 bill, penalties and enforcement would have been increased as well. Employers who violated the notice requirements would have been liable to employees for double back pay (under the current law, an employer is only liable for back pay) for each day of the violation for up to 90 days (under the current law, an employer is liable for up to 60 days). The Secretary of Labor would have been authorized to bring a civil action on behalf of one or more employees for certain relief under the Act. In the current economic environment, with the number of companies closing facilities and/or laying off large numbers of employees, it is very likely that this legislation will be reintroduced in some form and could well be passed, probably in conjunction with a package designed to provide support in the form of unemployment benefits and job training to workers who have lost their jobs.

Employee Benefits

401(k) plans and IRAs

In response to the current economic crisis, President-elect Obama proposes penalty-free withdrawals of fifteen percent of 401(k) and IRA account balances, up to $10,000, in 2008 (applying retroactively) and 2009 for any reason at all. Currently, early withdrawals from 401(k) and IRA accounts are subject to a ten percent early withdrawal penalty for people younger than 59 ½ and must meet certain hardship criteria laid out by the Internal Revenue Service. Under President-elect Obama's proposal, the withdrawals would only be subject to normal income taxes.

For older participants, President-elect Obama has also proposed a temporary relaxation of the requirement that people must make annual withdrawals from their 401(k) plans and IRAs beginning at the age of 70 ½. By allowing a temporary change in rules, people would not be forced to sell securities at depressed prices or required to take minimum required distribution that are pegged to account balances at the end of 2007, when retirement portfolios were 40% higher.

Senator McCain also supported proposals with parallel objectives during his campaign, and it appears that, in addition to President-elect Obama and Senator McCain, these proposals have received much traction on both sides of the aisle. Despite the strong support for these two proposals, making such changes quickly might not be possible for Congress or the complex systems used by funds and plan administrators to track retirement account activities. Therefore, from a practical perspective, these proposal may not be passed by Congress and implemented by plans until late 2009. If Congress were to approve President-elect Obama's plan, then employers would face the burden of amending their plans and communicating the changes to plan participants.

In addition to these two Obama initiatives, House Education and Labor Committee chairman George Miller (D-CA), Rep. Richard Neal (D-MA), Sen. Tom Harkin (D-IA), and Senate Special Committee on Aging Chairman Herb Kohl (D-WI)'s proposals requiring increased disclosure of 401(k) plan fees, which were proposed during the 110th Congress (S. 2473; H.R. 3765; H.R. 3185), will gain new momentum. Finally, plan fiduciaries also are likely to face increase responsibility for investment decisions as part of other legislation likely to be introduced in Congress.

Health Care

While sweeping reforms to health care on the scale envisioned by President-elect Obama are less likely than before the current financial crisis and Congress' massive multi-billion response to it, incremental changes that are still substantial will likely be made to the nation's health care system. It is possible that once the crisis has passed, the 112th Congress may take up a more comprehensive overhaul of the health care system.

Focusing specifically on employer-related health care initiatives, President-elect Obama's approach towards health care reform involves expanding coverage by creating an employer mandate and a partial individual mandate for children (participant's children under the age of 25 could remain covered). Employers that do not offer or make a meaningful contribution to the cost of quality health care coverage for their employees would be required to contribute a percentage of payroll towards the costs of a national plan. The Obama plan would also provide small employers with a refundable tax credit of up to fifty percent of the premiums paid on behalf of their employees. The definition of "meaningful contribution," the percentage of payroll that would be required as a contribution towards a national plan, and the definition of small employer have not been specified. The costs for employers that currently provide health care coverage would not be directly affected, unless the employers do not provide coverage or fall short of the undefined "meaningful" threshold. Whether more employers would adopt coverage or would simply pay toward the national plan is unclear and will likely depend on the level of required payment.

While comprehensive reform will likely not be advanced, there is strong bipartisan support for taking steps in that direction in the areas of improved quality of care and health information technology. Also, there is a good chance that as an alternative to federal legislation, the new administration will look to encourage and partially fund state-level initiatives on creative ways of accomplishing health care reform in preparation for addressing national reform when the economy recovers. Employers need to be aware of the variety of issues as health care reform moves forward, including the extent to which employers will be required to provide coverage and be able to retain flexibility to choose and design benefits.

Executive Compensation

Since the enactment of Section 409A of the Internal Revenue Code[13] in 2004, which primarily regulates the tax treatment of

nonqualified deferred compensation paid to executives, Congress has continued to closely examine executive compensation. The executive compensation restrictions included in the Emergency Economic Stabilization Act provide some guidance on where the new administration and Congress will be focusing. This might include further cutbacks on the ability of companies to deduct executive compensation, such as reducing the amount that can be deducted and expanding the current $1 million limit so that it applies to private companies as well as public companies. Sen. Hillary Clinton's (D-NY) bill, S. 2866, which was introduced earlier this year and creates a $1 million dollar cap on nonqualified deferred compensation, will likely receive more attention this session.

Automatic Pensions and Employee Saving Incentive

An odd bit of good news from the current economic downturn is that many Americans are saving more. However, given the increasing concerns about the stock market and the viability of retirement savings plans, the new administration and Congress are likely to press forward with changes to enhance retirement security for American workers. Among the initiatives on which President-elect Obama campaigned was a plan that would automatically enroll workers in a workplace pension plan. Under the plan, employers who do not currently offer a retirement plan will be required to enroll their employees in a direct-deposit IRA account that is compatible to existing direct-deposit payroll systems. Employees may opt-out if they choose. Additionally, President-elect Obama has stated that he intends to create savings incentives by creating a savings match for working low and middle-income Americans. The plan is to match 50% of the first $1,000 of savings for families that earn less than $75,000. The savings match will be automatically deposited into designated personal accounts.

In addition to this initiative, which may come early with the new administration, Congress may also resurrect the **Protecting Employees and Retirees in Business Bankruptcies Act of 2007** (S. 2092, H.R. 3652). Introduced in the Senate by Sen. Dick Durbin (D-IL) and in the House by Rep. John Conyers (D-MI), this bill protects the employees of bankrupt companies in several ways including increasing the amount of wage claims of employees and establishing a new priority for severance pay. With respect to pension plans, it is likely that the new version of the legislation might protect those plans through the bankruptcy proceedings. As unemployment rolls rise, the impetus for this type of legislation grows.

Social Security

President-elect Obama is considering a plan to raise payroll taxes for those making more than $250,000 by two to four percent (combined employer and employee) to improve Social Security's financial position. If this proposal passes, this will mean employers will be required to pay additional contributions to Social Security for its highly paid employees. At this juncture, there is no proposed legislation in place regarding this proposal.

Immigration

It is unlikely that the new administration will bring about fast or radical change in immigration policy. Immigration reform is a polarizing issue, and it will require bipartisan support in Congress to enact comprehensive reform legislation. Therefore, even though President-elect Obama voted in the Senate for comprehensive immigration reform and has stressed that legalizing workers will boost U.S. wages, we are likely to see enactment only of piecemeal, "band-aid" legislation addressing the most urgent and critical problems.

This piecemeal legislation will likely fare better with the new Congress and administration, compared to the lack of action in the past several years. The landscape in Congress has become more favorable for immigration legislation in general. Voters overall continued to reject candidates with strong anti-immigration policies such as Lou Barletta, the mayor of Hazelton, Pennsylvania, Marilyn Musgrave in Colorado and Thelma Drake in Virginia. Voters also elected several new pro-immigration-reform Senators—including Mark Warner in Virginia, Jeanne Shaheen in New Hampshire, Mark Udall in Colorado, Tom Udall in New Mexico, and Kay Hagen in North Carolina.

Potential Legislation

The new administration will likely act early to support legislation to extend the E-Verify program, Conrad 30 program for physicians working in medically underserved areas, EB•5 million-dollar investor program, and the Religious Workers program, all of which must be reauthorized by March 6, 2009.

The extension of the E-Verify program will likely include the appropriation of additional funds to make it more accurate and efficient. The Department of Homeland Security (DHS) will continue to encourage employers to participate in its E-Verify and IMAGE programs. In order to ensure the integrity of the system and the enrollment mandates, DHS will need to focus additional

scrutiny upon participating employers. It is possible there will be more interagency cooperation and more state-level participation in confirming E-Verify enrollment. For example, since OFCCP already conducts on-site audits of federal contractors, confirmation of E-Verify enrollment could easily be added to the checklist for compliance. Similarly, cooperative agreements between DHS and those states that mandate E-Verify enrollment for some or all employers would give the federal government an enhanced ability to police the E-Verify system.

We expect the Obama Administration to tackle more controversial issues later in the term. The administration has stated that it supports increasing the number of legal immigrants to meet the demand for jobs that employers cannot fill. This could include increasing H-1B limits for professionals in temporary positions as well as increasing the number of permanent resident or "green cards" available each year. This would provide employers much needed flexibility in hiring temporary workers and would relieve current backlogs for foreign national employees to become permanent residents, which currently can take up to seven years. This type of legislation is more difficult to enact, particularly with a struggling economy and increased focus on protecting the U.S. workforce.

Enforcement

Immigration enforcement is here to stay. The Bush Administration doubled the number of law enforcement personnel devoted to immigration enforcement. The statistics demonstrate that the DHS's enforcement strategy is having positive results. Arrests of immigration violators are way up, as are criminal investigations and indictments.

Politically, the new administration cannot afford to be "soft" on immigration enforcement. The Executive Branch must be seen to be vigorously enforcing immigration law at the border and in the interior if Congress is to consider meaningful immigration reform. As a result, employers can expect to be the target of continuing enforcement efforts, and the DHS will continue to use all enforcement tools at its disposal. Although the Obama Administration states in its immigration policy that immigration raids are ineffective as currently implemented, the policy supports continued enforcement actions against employers who hire undocumented immigrants in order to remove incentives to enter the country illegally.

Because of its past successes, the DHS will continue to focus its enforcement efforts upon key, "targeted" industries that have historically employed significant numbers of legal and illegal immigrants. Thus, employers in agriculture, construction, food processing, hospitality, and textiles will continue to be subject to heightened enforcement scrutiny. In addition, because the DHS perceives that there is a high correlation between terrorism and illegal immigration, enforcement efforts will continue to focus upon critical infrastructure (e.g., military bases, airports, ports and harbors, nuclear power plants, water treatment facilities, etc.).

One of the most effective enforcement tools that the DHS uses is the threat of criminal prosecution. It is likely that the number of criminal investigations and indictments will continue to increase as the DHS and Immigration and Customs Enforcement (ICE) target and prosecute employers that are knowingly employing illegal aliens.

The DHS will take advantage of the No-Match Safe Harbor regulation to assert that employers receiving no-match correspondence from the Social Security Administration or "suspect document notification" from the DHS are on constructive notice that they employ illegal aliens. Failure to act correctly in response to such correspondence will likely lead to criminal prosecution.

Given that enforcement efforts are likely to continue for the foreseeable future, prudent employers will want to review their I-9 compliance because enforcement efforts usually begin with an audit of I-9 compliance. If the employer's compliance level is fairly high, the prospects of any enforcement action against the employer diminish radically. Conversely, if the employer's I-9 compliance is not good, the DHS and ICE assume that the poor compliance is the direct result of actual knowledge that illegal workers are being employed.

IV. PREPARING FOR CHANGE

Obviously, no workplace changes will occur prior to Inauguration Day. By then, employers will have a better idea of what to expect as the Obama Administration comes together and the workplace agenda begins to come into focus. That does not mean, however, that employers should wait to begin preparing for change. In fact, as history has proven, companies that prepare for change are able to adapt more quickly when it occurs with fewer operational, financial and legal challenges than employers who wait and hope change will not come. Clearly, no company will be able to completely prepare for the coming workplace changes until it is known what they will be, but every employer can and should begin to prepare by following these initial steps:

- **Do Not Bury Your Head in the Sand.** The Obama workplace agenda is daunting, and the concept of such fundamental change is frightening to many employers. With so many possible changes coming, potentially in a short time frame, determining how to react and comply can be overwhelming. But the proper response is not to ignore the coming change and hope it all goes away. Employers should take a rational, reasoned approach to monitoring the progress of the Obama agenda and preparing for at least some inevitable change.
- **Create a "Response Taskforce."** Assemble internal resources and external legal advisors tasked with the responsibility of designing and implementing the employer's response to any workplace change in a timely fashion. This team should include someone to: (1) interpret new laws and regulations; (2) advise as to how to respond and/or comply; and (3) assist and train appropriate individuals on compliance. Once change comes, employers who do not quickly respond and comply quickly risk increased legal exposure and costs.
- **Follow the Littler Washington, D.C. Update Blog.** Assign at least one individual with the primary responsibility for tracking and regularly reporting on the new workplace agenda as it unfolds in the new administration and Congress to review Littler's blog. The blog will track the scope of the changes and provide guidance on the best way to respond and comply when changes comes. The blog is scheduled to be launched in December 2008.
- **Set Benchmarks.** Conduct a comprehensive workplace audit of all labor and employment policies and practices. Without a clear understanding of how the company is operating, it is difficult to quickly assess how a workplace change may affect the employer and implement a response to the change. Do not overlook the company's workplace culture in this process, particularly employee satisfaction and supervisory leadership issues.
- **Help Shape the Change.** This Report has discussed where the debate over workplace change will start, but many voices will be heard before the final shape of the new workplace is formed. Employers should make their voices heard by identifying trade organizations, business groups, and others through whom they can have a say in what the American workplace will look like in 2009 and beyond.
- **Account for the Cost of Change.** Equally important is understanding and planning for the cost of compliance with or responding to coming workplace changes. Understanding in a general sense what would be the cost of compliance will help companies plan accordingly.
- **Communicate and Educate.** As change occurs, and in some cases before it occurs, it is critical to communicate to and educate leadership at all levels regarding the change. Failure to do so has the potential to make responding to or complying with the change harder and more costly.
- **Review Training Requirements with Provider Partners.** Gain a commitment from your outside employment law compliance training partner (on-line or live) to ensure training programs are automatically adjusted to meet the requirements of any new legislation, regulations or Executive Orders.
- **Keep Employees Informed.** In these times of change and job insecurity, it is vital for employers to maintain open communication channels with employees. Communicate with employees to let them know of company efforts to stabilize and grow the business. If legislative or regulatory changes threaten the company, speak loudly through your employer organizations and make sure your employees know you are fighting for their jobs.
- **Do Not Panic.** As with any new law or regulation, there will be some delays in implementation, and no one knows exactly what laws and regulations will pass, and in what form. The economic slowdown alone may lead to a longer transition time to a revamped workplace. Do not rely on the weak economy to derail the Obama juggernaut, however; it may only slow it down.

Workplace change is inevitable after Barack Obama takes the oath of office and assumes the presidency. Employers can and will adapt to whatever changes are introduced, but employers that begin now to prepare for the new workplace landscape will be in the best position to minimize the disruption and cost of those changes.

ENDNOTES

III. THE LEGISLATIVE WORKPLACE AGENDA

1 http://www.barackobama.com/issues/economy.

2 Currently, the Right to Work states are: Alabama, Arizona, Arkansas, Florida, Georgia, Guam, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming.

3 341 NLRB No. 148 (2004).

4 351 NLRB No. 70 (2007).

5 351 NLRB No. 70 (2007).

6 351 NLRB No. 28 (2007).

7 *Toering Elec. Co.*, 351 No. 18 (2007).

8 342 No. 42 (2004).

9 343 NLRB No. 76 (2004).

10 550 U.S. 618 (2007).

11 *Bureau of Labor Statistics, Workplace Injury and Illnesses in 2007,* http://www.bls.gov/iif/oshsum.htm.

12 *Occupational Health and Safety Administration, Making the Business Case for Safety and Health, Costs of Workplace Injuries and Illnesses*, http://www.osha.gov/dcsp/products/topics/businesscase/costs.html.

13 26 U.S.C. § 409A.

Littler Mendelson Offices

Atlanta, GA
404.233.0330

Birmingham, AL
205.421.4700

Boston, MA
617.378.6000

Charlotte, NC
704.972.7000

Chicago, IL
312.372.5520

Cleveland, OH
216.696.7600

Columbia, SC
803.231.2500

Columbus, OH
614.463.4201

Dallas, TX
214.880.8100

Denver, CO
303.629.6200

Detroit, MI*
313.446.6400

Fresno, CA
559.244.7500

Houston, TX
713.951.9400

Indianapolis, IN
317.287.3600

Irvine, CA
949.705.3000

Kansas City, MO
816.448.3558

Las Vegas, NV
702.862.8800

Los Angeles, CA
310.553.0308

Melville, NY
631.293.4525

Miami, FL
305.400.7500

Minneapolis, MN
612.630.1000

Mobile, AL
251.432.2477

Newark, NJ
973.848.4700

New Haven, CT
203.974.8700

New York, NY
212.583.9600

Northwest Arkansas
479.582.6100

Orlando, FL
407.393.2900

Philadelphia, PA
267.402.3000

Phoenix, AZ
602.474.3600

Pittsburgh, PA
412.201.7600

Portland, OR
503.221.0309

Providence, RI
401.824.2500

Reno, NV
775.348.4888

Sacramento, CA
916.830.7200

St. Louis, MO
314.432.4797

San Diego, CA
619.232.0441

San Francisco, CA
415.433.1940

San Jose, CA
408.998.4150

Santa Maria, CA
805.934.5770

Seattle, WA
206.623.3300

Stamford, CT
203.564.1449

Stockton, CA
209.472.7944

Tysons Corner, VA
703.442.8425

Walnut Creek, CA
925.932.2468

Washington, D.C.
202.842.3400

*PLC, a wholly owned subsidiary of Littler Mendelson, P.C.

Employment & Labor Law Solutions Worldwide

Employment and Class Action Litigation • Unfair Competition and Trade Secrets • Privacy and Data Protection
Employee Benefits • Labor Management Relations • HR Risk Management and Corporate Compliance
Workplace Safety • Immigration and Global Migration • International Employment and Labor Law

LITTLER MENDELSON, P.C. • littler.com