EMPLOYMENT LAW UPDATE

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The Obama White House Effect on Employers: Change We Can Expect

By Suzanne Boy, Esq.

After only one month in office, President Obama and the democratically-controlled Congress have already begun instituting significant changes in the employment landscape. Most experts believe this is only the beginning of the changes President Obama will support and implement during his first term in office. Based on the President's campaign statements, we can expect the administration to support changes in traditional labor, employment discrimination, medical leave requirements, employee benefits, and wages. In this issue we will highlight two of the more significant changes you can expect: the Lilly Ledbetter Fair Pay Act, which became law on January 29, 2009; and the Employee Free Choice Act, which is expected to be addressed by the Obama administration this calendar year. In addition to these two pieces of legislation, there are a number of other noteworthy changes employers should anticipate:

Civil Rights Act of 2008

This bill, if passed in its present form, includes sweeping employment law reforms. It would eliminate the current $300,000 damages cap on compensatory and punitive damages for violations of Title VII and the ADA. The bill would also add compensatory and punitive damages to the Fair Labor Standards Act, allowing employees to recover these damages in addition to back pay. The Federal Arbitration Act would be amended to prohibit arbitration clauses requiring the arbitration of constitutional or statutory claims unless the employee knowingly and voluntarily consents to arbitration after a dispute arises. For these reasons, this bill has been called a "wish list" for civil rights advocates, labor organizations, and plaintiffs' attorneys.

Employment Nondiscrimination Act

The Employment Nondiscrimination Act ("ENDA") proposes to prohibit discrimination in employment based on an applicant's or employee's sexual orientation. Under the ENDA, employers would be liable for discriminatory decisions regarding hiring, firing, compensation, and other terms, conditions, or privileges of employment. The military, private membership clubs, and religious organizations would be exempt from the bill's requirements. If passed, this legislation would create an additional protected class of employees, and would expand the universe of potential litigation faced by employers. President Obama supported this bill on the campaign trail, and is expected to sign it if the House and Senate pass it.

RESPECT Act

The Re-Empowerment of Skilled Professional Employees and Construction Tradeworkers Act ("RESPECT Act") is, along with the Employee Free Choice Act, an important component of President Obama's agenda to create a more favorable landscape for union organizing. Passage of the RESPECT Act would effectively overturn three NLRB decisions known as the "Kentucky River" decisions. The Kentucky River decisions expanded the definition of who may constitute a "supervisor" to include workers who spend as little as 10-15% of their time overseeing other employees. These decisions effectively classified hundreds of thousands of nurses, construction workers, and professionals as supervisors, thus barring them from protection under federal labor laws. The RESPECT Act would limit the classification of "supervisor" to those workers who spend at least 50% of their time directly supervising others. As a result, many existing supervisors may be classified as employees eligible to join unions.

Healthy Families Act

The Healthy Families Act would expand the FMLA to require employers with 15 or more employees to provide seven days of paid sick leave to full-time employees. "Full-time" would be defined as those employees who work at least 30 hours per week. While seven days of paid sick leave would be mandatory under this Act, it would declare that these requirements are minimum requirements, and are not construed to discourage employers from adopting or retaining more generous leave policies. The Healthy Families Act would allow employees to use such leave to meet their own medical

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The Lilly Ledbetter Fair Pay Act: Fair to Employers?

By John D. Agnew, Esq.

On January 29, 2009, the Lilly Ledbetter Fair Pay Act ("Act") became the first article of legislation signed into law by President Obama. The Act overturns the controversial decision rendered by the United States Supreme Court, in *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007), which narrowly construed the time period within which a pay discrimination claim could be brought. Supporters of the Act tout the change in law as being a crucial foundation to realizing the goal of the right to equal pay. Opponents of the Act voice fear the change will inundate the legal system with frivolous litigation from present and past employees who now can base their claims upon alleged discriminatory and compensation practices that occurred decades ago.

The Act is named for Ms. Lilly Ledbetter, who accused her employer, Goodyear Tire and Rubber Company, of sex-based pay discrimination. The Supreme Court's decision hinged upon the time limit for filing her claim, as the relevant law required her to file her claim within 180 days of the occurrence of the allegedly "unlawful employment practice". The Supreme Court reasoned the allegedly unlawful employment practice occurred when the initial decision was made to pay Ms. Ledbetter less than the men performing similar work. Although Ms. Ledbetter argued to the Supreme Court that each paycheck was a continuing violation of the law (since the pay she was receiving in each check still was less than her male counterpart), the majority of the Supreme Court rejected her argument.

The United States Congress, however, rejected the majority view of the Supreme Court, in favor of the "continuing violation" approach argument presented by Ms. Ledbetter, which approach permits pay discrimination claims to be timely filed within 180/300[1] days of the issuance of the last discriminatory paycheck, regardless of how long ago the allegedly discriminatory behavior began and regardless of how long ago the actual compensation decision was made. In practical effect, this means the statute of limitations begins again each time the employee receives a paycheck.

Taking the effect of the Act to its logical extension shows the Act even can effect long-standing retired personnel. This is true, because when a retiree receives a pension check, the sum received has been determined based upon the earnings of the retiree when he or she still was a current employee. If that retiree can establish that his or her wages were, at the time of active employment, less than they should have been as a result of some kind of discrimination, then those retirees become potential plaintiffs who could sue to have their pension benefits recalculated. Accordingly, not only is there a serious and legitimate threat from current employees, but an almost limitless exposure from retirees whose employment ended decades ago.

The Act is retroactive to May 28, 2007, which is the day before the Supreme Court rendered its decision against Ms. Ledbetter. In addition to essentially extending the statute of limitations for pay discrimination claims, the Act also expands the definition of unlawful pay practices and broadens the scope of persons who may file claims to include all protected categories of persons, which categories include race, color, religion, national origin, age, and disability. Without a doubt, the Act is certain to promote advertising by plaintiff's attorneys, who will do their best to call to the attention of the public the vast potential for recovery under the new law. Not only will the Act encourage legitimate litigation, however, it also likely will encourage improper claims by plaintiff's attorneys hedging on exacting quick settlements. Regardless of the legitimacy of the claims, the Act is certain to cost employers dearly in attempting to avoid and defend against the lawsuits, not to mention the potential costs in having to pay back wages and other compliance costs.

Employers and their counsel must take measures to reduce exposure to prospective litigation and potential damages. These steps should begin with a thorough review of current compensation policies and practices, as well as a comprehensive review of employee records. If not already in existence, individual job descriptions should be written and included in each employee's file. To the extent pay disparities are found to exist between employees holding like jobs, those disparities should be examined to ensure they are present because of legitimate and non-discriminatory reasons. Likewise, disparities in the promotion rates of similarly skilled individuals should be examined carefully. Where legitimate business reasons for the disparities exist, those reasons should be well documented; and where legitimate reasons do not exist, corrective action should be taken immediately, since the effect of the Act permits potential plaintiffs to sit on claims for years and accumulate massive damages, if they so chose.

John Agnew is a commercial litigation associate at Henderson Franklin. In addition to other business litigation, he represents employers enforcing non-compete agreements, as well as defending ADA accessibility and FLSA overtime claims. John can be reached at 239.344.1364 or at john.agnew@henlaw.com.

1 The statute of limitations is 180 days in most states, but 300 days in Florida and other "deferral" states.

Preparing for Change:

The Employee Free Choice Act and its Effects

By John Miller, Esq.

On March 1, 2007, the United States House of Representatives passed the Employee Free Choice Act (EFCA) which proposes to dramatically amend the National Labor Relations Act (NLRA). The EFCA, as passed by the House, would significantly revamp labor-management relations by modifying the procedure by which employees unionize and adopt a collective bargaining agreement. After its quick passage in the House, the EFCA stalled in the Senate in 2007, but with the election of President Obama , one of the bill's original supporters in the Senate, one can expect that the EFCA will quickly regain its momentum.

There are two significant aspects of the EFCA which will, if enacted, substantially alter the rules regarding the way employers, employees, and unions interact with respect to first time unionization. First, the EFCA changes the way unions become the certified bargaining representatives of employees by streamlining the union certification process contained in the NLRA. Second, the Act also implements a mandatory arbitration process to facilitate the adoption of initial collective bargaining agreements. In addition to these two substantive changes, the Act also imposes harsher sanctions against employers who engage in unfair labor practices. Overall, the changes proposed by the EFCA are considerably pro-union, and these modifications will significantly alter the way employers function by streamlining union certification, facilitating initial collective bargaining agreements and strengthening enforcement.

THE NATIONAL LABOR RELATIONS ACT: CURRENTLY

As it currently stands, the NLRA provides a more balanced methodology by which unions may be certified and first time collective bargaining agreements are adopted. The EFCA proposes to amend these sections. First, as it currently stands under the NLRA, a union may become certified through one of two processes; a secret ballot vote supervised by the National Labor Relations Board (NLRB) or by employer choice. Under the secret ballot provision of the NLRA, if 30% of employees in a bargaining unit sign statements asking for union representation, a secret ballot election, supervised by the NLRB, is held to determine whether a majority of employees agree to the recognition of the labor organization as their union. If more than 50% of employees vote for union representation in the secret ballot election, the union then becomes the certified bargaining representative for the employees. Although much less frequently utilized, the NLRA also contains an employer choice provision. In the employer choice provision, an employer may voluntarily decide to recognize a union if the union can demonstrate that it has the support of more than 50% of the employees. Additionally, as it currently stands under the NLRA, once employees unionize, employers are required to bargain with the union in an attempt to agree on a collective bargaining agreement. Under the NLRA, however, there is no requirement that the employers and employees reach a decision, nor is there any mandatory mechanism in place for forcing a decision. As it is written, the EFCA will significantly amend both of these sections of the NLRA.

UNION CERTIFICATION PROCESS: CARD CHECK

The first major amendment of the EFCA would be the implementation of a card check certification process. In addition the two procedures by which a union may be certified under the NLRA as currently written, secret ballot and employer choice, the EFCA would add a third, much more union friendly method, for union certification.

The EFCA, as proposed, would add a card check certification process for union certification. Under this procedure, if a union is able to gather authorization cards from more than 50% of employees, the union automatically becomes certified as the bargaining representative for the employees. These authorization cards stay "good" for a year after they are signed, and may often be collected without an employer's knowledge or oversight. Authorization cards are also collected without the procedural oversight of the NLRB. As such, under the EFCA, unions would be able to lobby the employees for support without employer oversight or rebuttal, collect authorization cards over a period of time, and unilaterally impose themselves as the certified collective bargaining representative without the benefit of an election or voluntary choice by the employer.

FACILITATING INITIAL COLLECTIVE BARGAINING AGREEMENTS: MANDATORY ARBITRATION

The second major amendment to the NLRA would be the imposition of a mandatory arbitration procedure for facilitating the adoption of an initial collective bargaining agreement. Under the EFCA, if an employer and a union cannot agree on the terms of an initial collective bargaining agreement within 90 days after beginning the collective bargaining process, either party could demand mediation before the Federal Mediation and Conciliation Service ("Service"). After 30 days of mediation, if the Service is unable to bring the parties to conciliation, the matter would be referred to an arbitration panel who would thereafter make a final binding decision as to the terms of the initial collective bargaining agreement. The agreement would then be enforced for the following two years unless amended by the written consent of the parties. This would be a significant change from the NLRA as currently written. Under the current law, employers are only required to bargain with the union in an attempt to reach an agreement on an initial collective bargaining agreement; if the parties are unable to reach a consensus, neither side is forced into an agreement. Under the EFCA, if the parties are unable to reach a consensus after 90 days of bargaining and mediation, the collective bargaining agreement would be decided for them by an arbi-

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The Employee Free Choice Act and its Effects *continued from previous page*

tration panel, and would be in force for the following two years.

STRENGTHENING ENFORCEMENT

The final major change effected by EFCA is the imposition of much harsher sanctions and fines for employers who engage in unfair labor practices during organization drives. Under the proposed law, if an employer engages in unfair labor practices during an organization drive by unlawfully terminating an employee, that employee would be entitled to back pay, plus twice that amount as liquidated damages for his/her termination. Additionally, under the proposed law, any employer who willfully or repeatedly commits unfair labor practices would be subject to a civil penalty of up to $20,000 per violation in addition to any make-whole remedy ordered. These penalties are significantly more severe than those imposed by the NLRA currently. Under the NLRA, a wrongfully terminated employee is not entitled to liquidated damages, and there is no additional civil penalty clause.

EFFECTS ON EMPLOYERS

While the EFCA's proposed amendments to the NRLA, taken piecemeal, do not appear to be landmark in their effect; taken as a whole, the amendments signify a shift in the organized labor ethos of the Federal Government. EFCA represents a significant shift to a much more union friendly policy. The Act would effectively strip employers of their right to participate in the union certification process, and take the final decision as to the terms of the initial collective bargaining agreements out of the hands of employers. Finally, the Act would impose much harsher sanctions on employers for violating the requirements of the Act. In sum, the EFCA, if passed, promises to significantly alter the employer-union balance of power for the foreseeable future.

John Miller is an associate in Henderson Franklin's Tort & Insurance Litigation practice area. He can be reached at 239.344.1310 or at john.miller@henlaw.com.

The Obama White House Effect on Employers: Change We Can Expect *continued from front page*

needs, or to care for the medical needs of certain family members. President Obama co-sponsored this bill when he was in the Senate.

Minimum Wage

President Obama has expressed a desire to increase the minimum wage and index it to inflation. This change would mean the minimum wage would increase every year. President Obama also plans to raise the national minimum wage to $9.50 an hour by 2011, and require all employers to automatically enroll workers in 401(k)s or IRAs.

These are only examples of the myriad changes employers can expect to see at issue during President Obama's first term in office. These anticipated changes are complex, and they cover a wide variety of labor and employment-related areas. Employers would be well-served to consult with their legal counsel and begin making preparations now. Count on us to keep you apprised as these changes take shape over the next four years.

Suzanne Boy is an associate in Henderson Franklin's commercial litigation department. She handles a variety of civil and commercial disputes, with a focus on employment law and appellate matters. She can be reached at 239.344.1403 or at suzanne.boy@henlaw.com.

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HF Speakers:
Robert C. Shearman, Esq.
Vicki L. Sproat, Esq.
Suzanne M. Boy, Esq.
John F. Potanovic, Esq.
Cora C. Molloy, Esq.

Registration begins soon! Visit **www.henlaw.com** for more details.

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