

Advisory

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Changes in the U.S. Labor and Employment Laws and Policy in 2009

Now that President Barack Obama has taken office with a strengthened Democratic majority in Congress, we can expect a number of changes in United States labor and employment laws and policy in 2009. This advisory highlights current changes and their consequences.

ADA AMENDMENTS ACT OF 2008

Already effective as of January 1, 2009, the ADA Amendment Act (ADAAA) promises to make it more difficult for employers to defend against disability-related discrimination cases. The Act emphasizes a broad definition of “disability,” directing the Equal Employment Opportunity Commission to draft new regulations defining the key term “substantially limits” in a more expansive manner than have the federal courts. It also enlarges the list of “major life activities.” The ADAAA is a reaction to a string of Supreme Court cases that, in the view of Congress, has unduly limited the ADA’s scope since its enactment in 1990. For instance, one such Court decision, the ADAAA expressly provides that an assessment of an individual’s disability is to be made without regard to corrective measures (e.g. medication) except eyeglasses and contact lenses. To view a full summary of the ADAAA changes, please see our February 2009 advisory.

EMPLOYEE FREE CHOICE ACT

Heralded by President Obama on the campaign trail, the Employee Free Choice Act (EFCA) remains a high legislative priority for the new Congress and

administration, having been passed in the House of Representatives but filibustered by the Senate in 2007. The EFCA proposes three major union-friendly amendments to the National Labor Relations Act (NLRA).

First, the EFCA would eliminate employees’ long-standing right to a secret ballot election, whereby employees privately vote for or against union representation in a confidential process supervised by the National Labor Relations Board (NLRB). Instead, the EFCA would allow a union to demand recognition based on a “card check process.” Under the EFCA, if a union were to garner signed authorization cards from a majority of employees, the NLRB would be required to certify the union as the employees’ exclusive bargaining representative. The card check process would likely intensify peer pressure, and leave employers virtually no time to counter the union’s claims or to educate employees about unions.

Second, the EFCA proposes an overhaul of the rules for negotiating a first contract between a union and an employer, implementing compulsory interest arbitration. The proposed statute stipulates that if a union and employer were unable, or unwilling, to negotiate a first contract after 90 days, the parties would be required to mediate the matter before the Federal Mediation and Conciliatory Service (FMCS). In the event the FMCS was unable to foster an agreement within 30 days, a federally-

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appointed arbitration panel would impose a two-year binding contract on the parties. Current labor law, by contrast, merely requires the parties to bargain in good faith; it does not force them to make concessions or reach an agreement, nor does it allow the government to compel terms of an agreement.

Third, the EFCA would impose stiffer penalties on employers for unfair labor practices, marking a shift away from remedial damages designed to make the aggrieved party “whole” toward sanctions designed to punish the wrongdoer. Such penalties would include fines up to \$20,000, reinstatement with triple back pay, and mandatory injunctions.

LILLY LEDBETTER FAIR PAY ACT

Conceived to overturn the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, the Lilly Ledbetter Fair Pay Act, signed into law by President Obama on January 29, 2009, effectively extends the statute of limitations for filing a wage discrimination claim by re-starting the operative 180-day or 300-day limitations period with the issuance of each paycheck. The Act amends Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans With Disabilities Act, and the Rehabilitation Act to provide that claims alleging discriminatory compensation practices are timely filed if brought within 180 or 300 days of the most recent paycheck allegedly tainted by unlawful

discrimination, regardless of when the underlying compensation decision was made.

CIVIL RIGHTS ACT OF 2008

The Civil Rights Act of 2008, resembling an employee anti-discrimination law wish list, could be reintroduced this legislative session. Initially proposed last February, the Act would, among other things, eliminate caps on damages awarded under Title VII and the ADA, prohibit clauses requiring arbitration of workplace disputes as a condition of employment, and empower the NLRB to award back pay to undocumented workers.

EMPLOYMENT NON-DISCRIMINATION ACT

The Employment Non-Discrimination Act would provide protection against workplace discrimination based on sexual orientation. The bill in its most recent form does not include gender identity discrimination.

LABOR LAW IN THE U.S. SUPREME COURT

The U.S. Supreme Court is expected to decide several cases affecting labor law and policy in 2009; one important decision has already been handed down, and it is not employer-friendly.

In *Crawford v. Metropolitan Government of Nashville and Davidson County*, the Supreme Court held that the anti-retaliation provision of Title VII, and

particularly the so-called “opposition clause,” protects employees who merely cooperate with (i.e., do not initiate a claim leading to) an internal investigation of a discrimination or harassment complaint, even where no EEOC charge is pending. The plaintiff in this case alleged that she was fired for disclosing “sexually obnoxious behavior toward her by a fellow employee” in the course of her employer’s investigation of a sexual harassment complaint lodged by a female colleague. Finding such a claim to be actionable under Title VII, the Court reasoned that: “There is ... no reason to doubt that a person can ‘oppose’ by responding to someone else’s question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.” The ultimate teaching of *Crawford* is that employees who disclose alleged discriminatory acts on inquiry enjoy the same protection against retaliation as employees who actively register a discrimination complaint.

Another case to watch is *14 Penn Plaza LLC v. Steven Pyett*, in which the court will decide the enforceability of an arbitration clause in a collective bargaining agreement that purports to waive the right of individual bargaining

unit employees to pursue statutory discrimination claims in federal or state court.

At stake in *AT&T Corp v. Hulteen*, which was argued in December 2008, is whether AT&T violated Title VII’s prohibition of gender-based discrimination by not fully restoring service credit for pregnancy leaves taken prior to the Pregnancy Discrimination Act’s effective date in 1979.

Finally, *Gross v. FBL Financial Services, Inc.* raises the issue of whether a plaintiff must present direct evidence of discriminatory motivation in order to obtain a mixed-motive jury instruction in a non-Title VII discrimination case.

We can comfortably predict that this is just the beginning. As so-called “pro-labor” and “pro-rights” individuals are appointed to head the U.S. Department of Labor, the NLRB, the EEOC and other labor and employment agencies, there seems to be no question that enforcement actions will be on the rise. Stay tuned.



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