

Employment Law Changes in 2009

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The fields of labor and employment law are undergoing change in 2009. A culmination of factors, including the passage of several new federal laws, in addition to the new Obama administration, has set the stage for the most employee-friendly legal atmosphere that the United States has seen in many years. This article discusses some of the many changes employers can anticipate in the coming year.

Americans with Disabilities Act Amendments

Effective January 1, 2009, new amendments to the Americans with Disabilities Act (ADA) substantially broaden the number of conditions that will now qualify as a “disability,” and overturn Supreme Court of the United States cases that previously limited the scope of the ADA.

One of the most significant changes brought by the amendments is that “mitigating measures” are no longer taken into consideration to determine whether a person is disabled. This means that in determining whether an impairment “substantially limits” an employee’s major life activity, the analysis is made without taking into account the ameliorative effects of mitigating measures such as medication, medical supplies, hearing aides, mobility devices, prosthetics or other assistive equipment. The only exception to this rule is that if a person’s vision can be corrected with eyeglasses or contact lenses, he or she will not be considered disabled.

The amendments specify two categories of “major life activities,” substantially expanding the activities that traditionally fell within this description and eliminating the requirement that the major life activity be of “central importance” to daily life. The first category of major life activities includes caring for oneself, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. The second category of activities covers major bodily functions such as those involving the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive systems. The amendments require only that one of these particular bodily systems be impaired, without requiring a demonstration that the impairment affects an individual’s daily life. With the addition of these categories, sleeping disorders, eating disorders, fertility-related disorders, hearing problems, learning impairments, cancer and diabetes all will be considered “disabilities” under the amendments.

The amendments also clarify that the definition of “disability” includes an impairment that is episodic or in remission if it would substantially limit a major life activity when active. Therefore, even if a condition comes and goes, it may still constitute a disability (*e.g.*, chronic bronchitis). However, one will not be regarded as having a disability if the impairment is “transitory and minor,” meaning it has an actual or expected duration of six months or less.

In short, the amendments drastically expand the reach of the ADA. The likely effect for employers will be an increase in accommodation requests and disability discrimination claims as more employees will now fall within the definition of “disabled” under the ADA. Employers should prepare handbooks, supervisors and human resources personnel to adequately respond to this new legislation.

Employee Free Choice Act

Although not yet passed, the Employee Free Choice Act (EFCA) signifies a major change on the horizon for employers and their interactions with unions. The EFCA would modify the National Labor Relations Act (NLRA) to make it easier for unions to organize a workforce and increase the penalties on employers for any obstruction with the process. Employers should be aware of three major changes that will occur if the EFCA becomes law.

Most importantly, if the EFCA is enacted, a union will officially be certified as the exclusive bargaining representative of all employees if a simple majority of employees signs authorization cards, also known as a “card check” process. This is a drastic change from the current process that requires an official secret ballot National Labor Relations Board (NLRB) election before a union can officially be designated as the chosen bargaining representative. If a union is certified after merely securing authorization cards from a majority of employees, it will become much easier for unions to organize workforces. In fact, a union could actually be certified as the official bargaining representative of the employees without the employer even knowing that an organizing drive had begun. This means that employers will not necessarily have advance notice when an organizing campaign is occurring, and thus will not be able to communicate to employees the benefits of staying non-unionized before making their

decision. It will also result in a complete loss of anonymity in the voting process, as the union will know exactly how each employee voted, and may result in workers being more vulnerable to threats, intimidation and coercion by unions.

Another important modification that would result from passage of the EFCA is mandatory mediation after 90 days of bargaining. Employers will have to begin bargaining for a first contract within 10 days of receiving a written request for collective bargaining from a newly certified labor organization. If the parties are unable to form a first contract within 90 days, either party can request mediation by the Federal Mediation and Conciliation Services (FMCS). If there is still no contract after 30 days of mediation, the dispute is referred to binding arbitration, where federal arbitrators will write the terms of a binding contract, including setting wages, benefits, hours, work rules and all other terms of employment. This contract will have the force of law for two years.

The EFCA will also increase penalties against employers, but not unions, for any violations. Civil penalties of up to \$20,000 may be imposed against companies found to willfully or repeatedly violate employees' rights during an organizing campaign or first contract negotiation. Employers will also have to pay three times back pay when an employee is found to be fired or discriminated against during an organizing campaign or first contract negotiation. Lastly, there will be a mandatory application for an injunction when there is reasonable cause to believe a company has discharged or discriminated against employees or significantly interfered with employee rights during an organizing campaign or first contract negotiation.

In response to organized labor's push for the EFCA, Republican congressmen are sponsoring a bill called the Secret Ballot Protection Act (SBPA), which would prohibit a union from being recognized as the official bargaining representatives of employees unless a secret ballot election is conducted by the NLRB. The goal of the SBPA is to preserve worker free choice and protect workers from intimidation, threats, misinformation or coercion by a union. This bill was introduced on February 25, 2009, but has not yet been put to a vote in Congress.

By giving unions more rights, and imposing harsher penalties on employers, passage of the EFCA will drastically alter the labor landscape by giving unions an advantage in the organizing and first contract negotiating process. As an original co-sponsor of the act, President Obama supports the EFCA and other pro-employee legislation as described below.

Other Changes and Potential Changes in Employment and Labor Law in 2009

With a Democratic president now in the White House, a range of proposed changes to employment and labor law are likely. President Obama has endorsed, co-sponsored and in various forms supported a plethora of pro-union and pro-employee legislation that, if enacted, would affect employment law in a variety of ways.

Among the changes is a proposal to eliminate statutory caps on damage awards that plaintiffs can receive under Title VII and the ADA. Currently, plaintiffs suing under either of these statutes are limited to a maximum of \$300,000 in compensatory and punitive damages from employers with more than 500 employees. If these caps are lifted, employers could potentially be subjected to limitless monetary liability. Obama has co-sponsored, and promised to sign into law if passed, multiple bills that would, among other things, eliminate these caps, including the Equal Remedies Act of 2007 and the Civil Rights Act of 2008.

Three new laws with substantial labor and employment impact have already been acted upon in 2009:

- On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA) to stimulate the U.S. economy in the wake of the recent economic downturn. As part of the ARRA, qualified individuals receive a 65 percent government subsidy for up to nine months of the premiums paid for health care coverage under COBRA. This subsidy provides an incentive to elect COBRA coverage for employees involuntarily terminated between September 1, 2008, and December 31, 2009, provided that they are eligible for COBRA. ARRA will result in increased administrative costs as employers are now subject to additional requirements to notify employees of their rights under this provision and new administrative burdens involved in understanding and implementing these provisions.
- On January 29, 2009, President Obama signed the Lily Ledbetter Fair Pay Act (FPA) into law, a bill which tolls the deadline for filing pay discrimination claims with the EEOC each time the employer issues the employee a paycheck that was the product of a past discriminatory pay decision.
- On January 9, 2009, the Paycheck Fairness Act (PFA) was passed by the House of Representatives, but it has not yet been introduced to the Senate. If passed, the PFA would make punitive and compensatory damages available under the Equal Pay

Act of 1964 (EPA) without requiring proof of discriminatory intent, and would make it easier for plaintiffs to become parties to class action lawsuits under the EPA by requiring plaintiffs to opt-out rather than opt-in, as the law currently stands.

In addition, a number of other bills currently under consideration or planned for submission in Congress also promise major employment law change if enacted:

- The Employment Non-Discrimination Act (ENDA) would amend Title VII to make actual or perceived sexual orientation discrimination unlawful under federal law and would protect workers based on the concept of gender identity.
- The Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers (RESPECT) would amend the definition of “supervisor” in the NLRA to exclude employees whose only supervisory duties involve assigning or directing other employees, and require that supervisors spend the majority of their workday in a supervisory capacity. Whether a worker is a supervisor is an important issue under the NLRA because supervisors do not have the right to join a union. Limiting the definition of supervisor in this way will mean that more employees are eligible to join unions.
- The Protecting America’s Workers Act (PAWA) would expand federal occupational safety regulations, increase whistleblower protections, increase penalties against employers for repeated safety violations, and heighten an employer’s duty to provide safety equipment.
- The Arbitration Fairness Act (AFA) would overhaul the Federal Arbitration Act (FAA) to invalidate any pre-dispute arbitration agreement requiring arbitration of an employment controversy arising under any statute intended to protect civil rights or between parties of unequal bargaining power. This would result in a dramatic shift in such controversies from arbitrators to state courts for businesses that utilize arbitration agreements.
- The Independent Contractor Proper Classification Act of 2007 (ICPCA) would amend the Revenue Act of 1978 to require that employers treat workers misclassified as independent contractors as employees for employment tax purposes. This would eliminate the defense of industry practice as a justification for misclassifying workers as independent contractors.
- The Military Family Job Protection Act (MFJPA) would amend the Family Medical Leave Act (FMLA) to provide up to a full year of job protection for any family member caring for a recovering service member at a military medical facility.
- The Family Leave Insurance Act (FLIA) would create a federal insurance fund to provide eight weeks of pay for employees taking FMLA leave, similar to a program already in effect in several states.
- The Healthy Families Act (HFA) would expand paid sick leave by guaranteeing that workers get seven days of paid sick leave per year, in workforces with at least 15 employees.
- The Working Families Flexibility Act (WFFA) is a proposal to reform employee rights, allowing employees to request flexible work terms and conditions, and requiring employers to meet with an employee requesting this arrangement and justify any denial in writing.
- The FOREWARN Act would increase employer responsibilities similar to those under NY WARN, by expanding the Federal WARN Act’s coverage to all employers with at least 50 employees, requiring 90 days’ notice before a triggering event, and defining a “mass layoff” as an employment loss of 25 employees, in contrast to the previous 50 employees. It would also require employers to notify the U.S. Secretary of Labor within 60 days of a mass layoff or closing and would increase penalties for employers failing to comply with notification requirements by making employers liable for double back pay.
- Lastly, the Civil Rights Act of 2008, mentioned earlier, not only would eliminate the cap on statutory damage awards, but would also, among other things, prohibit clauses requiring arbitration of workplace disputes as a condition of employment and would give the NLRB the power to award back pay to undocumented workers.

In addition to the above legislation, President Obama has supported a variety of employment policies including restoring overtime instead of compensatory time for non-exempt employees who work more than 40 hours a week; opposing “right to work” and “paycheck protection” bills that would regulate unions; banning the permanent replacement of striking workers; strengthening whistleblower protections; raising the minimum wage and increasing the earned income tax credit; reforming corporate

bankruptcy laws to protect workers; ending tax breaks for companies that send jobs overseas; increasing the maximum amount of earnings covered by Social Security; requiring full disclosure of company pension investments; expanding the Occupational Safety and Health Administration (OSHA) to allow more job site inspections; and expanding FMLA to, among other things, cover employers with as few as 25 employees.

Lastly, President Obama has the power to appoint federal trial court judges across the country. With this power, President Obama will be sure to spread a pro-employee agenda. President Obama will nominate replacements for any Supreme Court positions that become available and fill the three current vacancies on the NLRB. On January 20, 2009, President Obama nominated Wilma B. Liebman, who has served on the board since 1997 and before that served as counsel for various unions, to be chairman of the NLRB. It is to be expected that in short order the NLRB will become even more sympathetic to union positions.

The policy changes, proposed legislation and appointment power discussed above will likely result in drastic changes in labor and employment law. President Obama and the Democratic-controlled Congress have a pro-employee agenda that will certainly bring change to the employment landscape in 2009 and employers should be aware of the many potential obstacles that they may encounter this year. Employers should also anticipate the need for more training, revamped human resources procedures and revisions to handbooks to deal with the already enacted and potential new legislation in 2009.

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