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"The Times They Are A-Changin'": Labor and Employment Law Under the Obama Administration

By Daniel J. Aguilar

President Obama made labor and employment issues an important part of his campaign platform. In his 2006 memoir, *The Audacity of Hope*, then-Senator Obama made the following comment concerning the union support his 2004 senatorial campaign received:

> The leaders of service workers unions broke ranks and chose to endorse me over [my opponent], support that proved critical to my campaign. It was a risky move on their part; had I lost, they might have paid a price in access, in support, in credibility. So I owe those unions. When their leaders call, I do my best to call them back right away.

More recently, during the 2008 presidential campaign, he wrote a letter to U.S. Department of Labor employees stating:

> I believe that it's time we stopped talking about family values and start pursuing policies that truly value families, such as paid family leave, flexible work schedules and telework.

Now, a little over two months after his inauguration, with his party controlling both Congress and the White House, President Obama is making good on many of the pro-employee/pro-union reforms he supported during his campaign. Indeed, legislation, executive orders, and appointments under the Obama Administration have brought a new focus on labor relations that is resulting in marked changes to the employment law landscape. The following is a look at some labor and employment reforms that have transpired during President Obama's first 100 days in office and some of the major issues we can expect to see addressed in the coming years.

NEW LAWS

Lilly Ledbetter Fair Pay Act

The Lilly Ledbetter Fair Pay Act was the first piece of legislation signed by President Obama. The act is named after Lilly Ledbetter, a former Goodyear Tire and Rubber Company ("Goodyear") supervisor who lost a 2007 U.S. Supreme Court case where the Court held by a 5-4 vote that her charge of discrimination was untimely because it was not filed within the original 180-day filing period.[1]

Just before retiring, after working at Goodyear for nineteen years, Ledbetter learned that male employees in her same position, and some junior to her, made anywhere from $1,000 to $2,000 more a month than her. Ledbetter filed a complaint against Goodyear with the Equal Employment and Opportunity Commission ("EEOC") and filed suit for pay discrimination under Title VII and the Equal Pay Act of 1963. The jury sided with Ledbetter and awarded her back pay and damages, but Goodyear appealed.

The case eventually made its way to the Supreme Court, which ruled 5-4 that, though her claim was valid, Ledbetter had filed it after the 180-day statute of limitation had run its course. In so ruling, the Court pegged the start of the statute as the day "when the discrete act of alleged intentional discrimination occurred," – *i.e.*, when the discriminatory pay decision was made – not when the effects of the practice were felt.

Responding to the ruling, Congress passed, and President Obama signed, the Lilly Ledbetter Act, which amends Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973, and provides that, with respect to wage discrimination claims, each paycheck affected by a

New FMLA Regulations and their Effect on California's CFRA

By Daniel J. Aguilar

On November 17, 2008, the Department of Labor issued final regulations governing implementation of the federal Family and Medical Leave Act ("FMLA"). These regulations took effect January 16, 2009. Some of the new FMLA regulations deviate from comparable regulations issued by California's Fair Employment and Housing Commission interpreting the California Family Rights Act ("CFRA").

Four big differences that employers should be aware of are found in the sections addressing (1) pregnancy as a "serious health condition"; (2) registered domestic partners; (3) active military duty as a "qualifying exigency"; and, (4) care for ill or injured service members.

Pregnancy as a "Serious Health Condition"

The FMLA covers pregnancy as a serious health condition. The new FMLA regulations did not make any changes on this issue. Under CFRA, however, pregnancy is not covered as a serious health condition. Rather, a pregnant employee is entitled to pregnancy disability leave ("PDL") of up to 4 months. Eligible CFRA employees can then take a 12-week CFRA baby-bonding leave. The first 12 weeks of PDL can run concurrently with FMLA for eligible employees, and employer needs to maintain health benefits for the employee throughout that period.

Registered Domestic Partners Equal Spouses

Neither the former nor the present FMLA regulations cover registered domestic partners. CFRA, on the other hand, applies to registered domestic partners just like spouses. It is important to note that this may give a domestic partner more family leave, as the domestic partner will not have exhausted his or her FMLA leave taking CFRA leave to care for a domestic partner.

Active Military Duty as a "Qualifying Exigency"

Under the new FMLA regulations, employees are entitled to take up to 12 weeks of leave for "any qualifying exigency" arising because the spouse, son, daughter, or parent of the employee is on active military duty, or has been notified of an impending call to active duty status, in support of a contingency operation. The new regulations also require employers to maintain health benefits for the employee throughout that

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discriminatory decision triggers a new filing period.[2]

The Ledbetter Act may fuel an increase in pay discrimination claims. Designed to apply retroactively as of May 27, 2007, the day before the Supreme Court issued the *Ledbetter* decision, the Ledbetter Act allows employees to challenge alleged discriminatory pay-related decisions years or even decades later. The Ledbetter Act does, however, limit the amount of back pay that an employee can recover to no more than lost income for two years prior to the filing of the discrimination claim.[3]

American Recovery and Reinvestment Act of 2009

A massive $787.2-billion economic stimulus bill titled the American Recovery and Reinvestment Act of 2009 ("ARRA") was passed by Congress on February 12, 2009, and signed into law by President Obama on February 17, 2009. ARRA was enacted to provide a stimulus to the U.S. economy in the wake of the economic downturn brought about by the subprime mortgage crisis and the resulting credit crunch.

Along with massive federal expenditures, ARRA contains several employment-related provisions. Chief among these are COBRA-related provisions that

New Family and Medical Leave Act
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period. In contrast, CFRA does not provide leave for similar situations. Thus, CFRA leave is not exhausted when FMLA leave is used.

With respect to military leave, employers should know that, under a 2007 California military spouse leave law (Mil. & Vet. Code § 395.10), an employee who works more than 20 hours per week for an employer with more than 25 employees can take an unpaid leave of up to 10 days while the military spouse is on leave from deployment. Some or all of this may run concurrently with exigency leave.

Care for Ill or Injured Service Member

The new FMLA regulations entitle an employee who is the spouse, child, parent, or next of kin of a covered service member to take a total of 26 weeks of leave during a 12-month period to care for a covered service member who is ill or injured in the line of duty. CFRA benefits apply in similar circumstances to a spouse, child, or parent, but not necessarily to the "next of kin." Therefore, CFRA leave would not be exhausted when FMLA leave is used to care for a covered service member who is "next of kin," but not the spouse, child, or parent or a covered CFRA employee. Moreover, CFRA only provides 12 weeks of leave, in contrast to FMLA's 26-week limit.

California's Fair Employment and Housing Commission plans to revise its CFRA regulations to reflect changes in the new FMLA regulations. In the interim, it has created a table comparing differences between the revised FMLA regulations and the Commission's CFRA regulations.

A chart comparing the regulations addressed here and other FMLA/CFRA regulations can be found on the Commission's website at, http://www.fehc.ca.gov/pdf/FMLA-CFRARegsTable-2.pdf. ■

will affect employers maintaining group health plans and new sweeping whistleblower protections for employees of private employers and state and local governments who disclose waste, fraud, gross mismanagement, or a violation of law related to stimulus funds.

COBRA Provisions in ARRA

"COBRA" is an acronym that refers to the Consolidated Budget Reconciliation Act of 1985 and more specifically to the health care continuation requirements included in the Act. COBRA requires group health plans maintained by employers with 20 or more employees to provide elective continuation coverage to employees and their beneficiaries upon the occurrence of certain "qualifying events" such as termination of employment, reduced working hours, death, or divorce, for example. Prior to the enactment of ARRA, qualified beneficiaries could be charged 100% of the cost of continued coverage plus a 2% administrative fee.

Under ARRA, employees earning less than $125,000 if single or $250,000 if filing jointly, who are involuntarily terminated from employment between September 1, 2008 and December 31, 2009, will only be required to pay 35% of the COBRA premium for coverage under a prior employer's health plan. The employer must then pay the remaining 65% of the premium subject to reimbursement by taking a tax credit against wage withholdings and FICA payroll taxes to the federal government for current employees. If the credit is insufficient to cover the employer's COBRA payment, then the remainder is reimbursed directly from the Treasury Department.

ARRA also imposes a notice requirement on employers. Under ARRA, eligible individuals must be given 60 days to elect to receive the subsidy. The 60-day notice requirement also applies to individuals who initially declined coverage or did sign up but allowed coverage to lapse. Thus, individuals involuntarily terminated between September 1, 2008, and February 16, 2009 must be notified of their right to elect COBRA coverage at the subsidized rate no later than April 18, 2009. Employees involuntarily terminated on or after February 17 and before December 31, 2009 must receive a COBRA continuation notice that details the COBRA premium subsidy as spelled out in the ARRA.

Eligibility for the subsidy terminates when the individual is eligible for coverage under another group health plan or Medicare, or at the end of the 9-month subsidy period, whichever comes first.[4]

Whistleblower Provision in ARRA

To stimulate the economy and create jobs, ARRA provides funding for investment in transportation, defense, education, environmental protection, technological advances in science and health, and other infrastructure to provide long-term economic benefits. Private and public employers receiving ARRA funds, however, will be subject to its whistleblower provisions, which are intended to encourage employee disclosures of mismanagement, waste, danger to public health or safety, abuse, or unlawful activity concerning "covered funds" from a federal government contract, grant, or other payment appropriated or made available under ARRA.

ARRA's whistleblower provisions cover "non-federal employers" who receive "covered funds." It is unclear who is included within the definition of a "non-federal employer." However, given the overall intent of ARRA to ensure that stimulus funds are not wasted, prudent employers should assume that the whistleblower provisions apply to any employer who receives a contract, grant, or other payment appropriated or made available by the stimulus bill, including private employers, federal government contractors and subcontractors, and state and local governments and their contractors and subcontractors.

Under ARRA, protected conduct includes a disclosure of information by an aggrieved employee to a person with supervisory authority over the employee, a state or federal regulatory or law enforcement agency, a member of Congress, a court or grand jury, the head of a federal agency, or an inspector general. Generally, the employee must reasonably believe the disclosed information is evidence of information relating to gross mismanagement or waste, public health danger, abuse of authority, or violations of a law, rule, or regulation that governs an agency contract or grant related to stimulus funds.

Employers receiving ARRA funds should take proactive steps to prevent and detect mismanagement, fraud, waste, situations creating public danger, abuse, or unlawful activity concerning covered funds. At a minimum, employers should review and update policies and related training and monitoring programs to assure appropriate procedures are in place to prevent whistleblower claims under ARRA.[5]

EXECUTIVE ORDERS

President Obama has issued several executive orders concerning labor and employment law matters. By his own account, President Obama's executive orders bear a pro-labor slant and signal a dramatic shift in the federal government's employment and labor policy.

Indeed, at a White House ceremony where he signed three of these orders, President Obama stated:

> I . . . believe that we have to reverse many of the policies towards organized labor that we've seen these last eight years . . . I do not view the labor movement as part of the problem, to me it's part of the solution. We need to level the playing field for workers and the unions that represent their interests, because we know that you cannot have a strong middle class without a strong labor movement.

With these principles in mind, President Obama has signed the following labor- and employment-related executive orders.

Executive Order 13502 – Use of Project Labor Agreements for Federal Construction Projects

On February 6th, President Obama issued Executive Order 13502, which encourages the use of Project Labor Agreements ("PLAs") in federal construction projects with a total cost to the federal government of $25 million or more. The term "project labor agreement," as used in the Order, means a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and constitutes an agreement as one described in 29 U.S.C. 158(f).

Executive Order 13502 is currently discretionary, allowing the executive agency to mandate the use of PLAs if it determines that a PLA will "advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters." The Order, however, requires the Department of Labor and the Office of Management and Budget to formulate recommendations as to whether broader use of PLAs "would help to promote the economical, efficient, and timely completion of such projects." The recommendation is due by early August 2009, and is to cover both federal construction projects and those receiving federal financial assistance.

Executive Order 13502 is likely to have major implications for the labor costs and labor relations of construction contractors and subcontractors working on federal projects. Construction contractors unfamiliar with the practice are likely to encounter difficulties in navigating the uncharted waters involved in PLA negotiations and may also be compelled to pay higher, union-level wages and benefits. The Order may also lead to the increased use of PLAs on non-federal construction projects financed in whole or in part with federal funds, especially in light of the federal ARRA funds issued for state and local construction projects.

Executive Order 13496 – Notification of Employee Rights Under Federal Labor Laws

On January 30, 2009, President Obama signed Executive Order 13496, which will require most contractors entering into new contracts with the federal government to post a notice of employee rights, such as their right to organize and engage in collective bargaining under the National Labor Relations Act (the "NLRA"). The Order revokes Executive Order 13201, which required most contractors who entered into contracts with the federal government to post "Beck Notices," informing employees of certain rights, such as their right to not join a union or their right to a refund of any portion of their union dues used for union activities unrelated to the union's role as a bargaining representative, such as political contributions, lobbying, and union building funds.

Specifically, Executive Order 13496 requires contracting departments and agencies within the federal government to include a provision in all government contracts greater than $100,000 requiring contractors to post a notice of employee rights under federal labor laws. Moreover, contractors will need to include the notice posting provision in subcontracts related to the original contract so that the provision will be binding upon subcontractors.

If a contractor fails to comply with the Order, the Secretary of Labor ("SOL") may direct contracting departments and agencies to terminate the contract and to bar the contractor from future federal contracts until the contractor has complied with and agrees to carry out the provisions of the Order to the satisfaction of the SOL.

Executive Order 13495 – Nondisplacement of Qualified Workers Under Service Contracts

Subject to limited exceptions, Executive Order 13495 affects a contractor's ability to hire new employees when a federal contract expires and a new contract for the same services at the same location is awarded to a different contractor. Under those circumstances, the Order requires the new contractor to offer employment to "qualified" employees who worked under the expiring contract before the new contractor can hire new employees to carry out the contracted work.

Under the NLRA, a contractor who is deemed a "successor" is required to negotiate with the union over a new collective bargaining agreement. In determining who is a "successor," courts look for a "substantial continuity" between the contractors, considering such factors as "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers."[6] Thus, the practical effect of this Order is that non-union contractors awarded new service contracts are more likely to be deemed "successors" to the prior contractor's bargaining relationship and be required to negotiate with a union representing the prior contractor's employees.

Notably, Order 13495 does not require new contractors to offer employment to all "qualified" employees who worked under the expiring contract. The new contractor, for example, has the right to use his or her own employees if those employees would otherwise face layoff or termination and if they have been employed for at least three months prior to commencement of the new contract. The new contractor may also hire fewer employees than the previous contractor used to perform the new contract.

Contractors must strictly comply with the Order or may otherwise face severe penalties. In the event of noncompliance, the Order authorizes the SOL to bar the contractor from eligibility for any contract with the federal government for up to three years. The SOL is also authorized under the Order to require the hiring of employees who worked under the expiring contract and to award them lost wages.

Executive Order 13494 – Economy in Government Contracting

Executive Order 13494, titled "Economy in Government Contracting," was ostensibly signed to promote economy and efficiency in government contracting and to maintain a policy of impartiality concerning any labor-management disputes involving government contractors. In effect, however, the Order prohibits all contracting departments and agencies within the federal government from reimbursing contractors for any costs incurred for activities undertaken to persuade employees not to organize or to engage in collective bargaining.

Expense reimbursements now prohibited under the Order include, but are not limited to, the cost of preparing materials, the hiring of legal counsel or consultants, holding meetings (including the cost of salaries for attendees), and planning or conducting such persuasive activity. Through the Order, President Obama added a new category to the list of "unallowable" costs, which already prohibits reimbursement for certain advertising costs, public relations costs, alcoholic beverages, bad debt, defense and prosecution of criminal and civil proceedings, entertainment costs, lobbying costs to improperly influence federal employees or officers, fines and penalties, membership costs in civil organizations, and pre-contract costs.

Executive Order 13494 will apply to all contracts with the federal government that result from solicitations issued on or after the effective date of regulations to be issued by the Federal Acquisition Regulatory Council. The Federal Acquisition Regulatory Council is required to issue those regulations no later than June 29, 2009.

CONGRESSIONAL LEGISLATION

Many of the failed labor and employment-related bills from the 110th Congress are being reintroduced this year. Given President Obama's expressed commitment to the labor movement and the composition of the 111th Congress, these bills are likely to gain greater headway this time around and, if passed, would almost definitely be signed.

Employee Free Choice Act

At a rally in Illinois in March 2007, then-Presidential candidate Obama told a gathering of 1500 labor supporters: "We will pass the Employee Free Choice Act. We may have to wait for the next President to sign it, but we will get this thing done." Now, less than 100 days into President Obama's term, the introduction of this long-awaited legislation is setting off an unprecedented campaign by its supporters for its enactment and by its opponents for its defeat.

The Employee Free Choice Act ("EFCA") has three major components. First, EFCA would let employees organize either by collecting signed cards from a majority of the employees (dubbed the "card-check" provision) or by holding a secret-ballot election.

Second, within ten days of a demand by the union, EFCA would require an employer and a newly certified union to undertake reasonable efforts to come to a signed collective bargaining agreement ("CBA"). If a CBA is not agreed to within 90 days, the Federal Mediation and Conciliation Service ("FMCS") would be notified. If the FMCS is not able to bring the parties to an agreement within 30 days, the dispute would be submitted to an arbitration board. The arbitration board would then render a binding decision as to the terms of the CBA and the board's decision would be binding for two years.

Third, EFCA would increase employer penalties for unfair labor practices committed during organizing campaigns. In such instances, the NLRB could award an employee back pay and liquidated damages for two times the back pay and issue employers a civil penalty of up to $20,000 for unfair labor practices found to have been willfully or repeatedly committed.

Caught between Big Business and Big Labor in the midst of the deepening recession, several Democratic senators and House-members who co-sponsored the 2007 version of EFCA are now distancing themselves from the legislation. Indeed, a number of past supporters are urging negotiators to strike a deal that will make the legislation more palatable for business interests. As it stands, only time will tell whether EFCA will pass and, if so, in what form.

Paycheck Fairness Act

Forty-five years ago, President Kennedy signed the Equal Pay Act ("EPA") into law, making it illegal for employers to pay unequal wages to men and women who perform substantially equal work. The Paycheck Fairness Act, introduced in both the House (H.R. 12) and the Senate (S. 182) and passed by the House on January 9, 2009, seeks to update and strengthen the EPA.

Among other things, the Paycheck Fairness Act aims to: (1) toughen the remedy provisions of the EPA by allowing prevailing plaintiffs to recover compensatory and punitive damages; (2) facilitate class action EPA claims by requiring potential class members to opt out of the class rather than opting into the suit; (3) amend a broad affirmative defense by toughening the burden on employers and requiring them to prove that disparate pay decisions are justified by "business necessity" and "job performance"; (4) add a provision that prohibits employers from ordering employees not to share salary information; and (5) require the EEOC to survey pay data already available and issue regulations within 18 months that require employers to submit any needed pay data identified by the race, sex, and national origin of employees, to enhance the EEOC's ability to detect violations of law and improve its enforcement of the laws against pay discrimination.

To date, the Senate has failed to act on this legislation, but that does not mean that it will not do so in short order. After all, the House already passed the measure in January by an even stronger bipartisan vote (256-163) than the Ledbetter bill (247-171).

Working Families Flexibility Act

The "Working Families Flexibility Act" (H.R. 1274), if enacted, would provide employees a statutory right to request, and to ensure employers consider requests for, flexible work terms and conditions, such as modifications of the employee's work hours, schedule, or work location.

Modeled after similar European laws, the bill would require an employer to meet with an employee and his or her designated representative to discuss the requested modification within fourteen days. Thereafter, the employer would be required to provide the employee a written decision regarding the requested modification within fourteen days of the meeting. Employers would also be required to submit and justify any denials in writing. If the employee is dissatisfied with the employer's decision, the bill would permit the employee to request reconsideration and would require "the employer and the employee [to] hold a meeting to discuss the request for reconsideration."

The bill also contains an anti-retaliation provision that would make it unlawful for an employer to interfere with an employee's rights under the Act. Employees who believe their rights have been violated would be allowed to file a complaint with the Administrator of the Wage and Hour Division of the Employment Standards Administration of the United States Department of Labor, which could result in civil fines of up to $5,000 per violation and the awarding of such equitable relief as is deemed appropriate by the Department of Labor, including, reinstatement, promotion, back pay, and changes to terms and conditions of employment.

H.R. 1274 was introduced in the House on March 3, 2009, and referred to the Committees on Education and Labor, Oversight and Government Reform, Administration, and the Judiciary. Identical legislation was introduced in the 110th Congress (H.R. 4301, S. 2419), with the Senate bill being cosponsored by then-Senator Obama. Neither body has taken any action on the measure.

Family and Medical Leave Enhancement Act of 2009

Introduced on February 3, 2009, the Family and Medical Leave Enhancement Act (H.R. 824) would: (1) allow employees to take parental involvement leave to participate in or attend their children's and grandchildren's educational and extracurricular activities; (2) clarify that leave may be taken for routine family medical needs and assisting elderly relatives, and for other purposes; (3) make the FMLA applicable to employers with 25 or more employees within the prescribed radius, instead of the 50 employees currently required for the FMLA to apply; and (4) explicitly sanction intermittent leave.

The bill outlines that an eligible employee shall be entitled leave to participate in or attend an activity that is sponsored by a school or community organization and relates to a program of the school or organization that is attended by a son or daughter or a grandchild of the employee. Employees would also be entitled leave to meet routine family medical care needs, including medical and dental appointments of the employee or a son, daughter, spouse, or grandchild of the employee, or leave to attend to the care needs of elderly individuals who are related to the eligible employee, including visits to nursing homes and group homes.

Under this legislation, eligible employees would be permitted to take up to 4 hours of leave in any 30-day period, not to exceed 24 hours during any 12-month period. This is in addition to other types of leave currently allowed under the FMLA. The bill would require employees to provide their employer either seven days' notice or "as much notice as is practicable" to use the FMLA leave. Employers may also require, or employees may elect, parental involvement and family wellness leave in exchange for any accrued paid vacation leave, personal leave, or family leave.

NEW OBAMA ADMINISTRATION OFFICIALS

The purpose of cabinet secretaries and agency chairs is to advise the president on matters relating to the duties of their respective offices. The role of these officials is important because each will serve to promote the administration's policy on legislation and oversee programs, budgets, and the regulatory authority of their respective offices.

Hilda Solis, Secretary of Labor

Despite Republican concerns about her pro-union voting record, Representative Hilda L. Solis (D-Cal.) was confirmed as Secretary of Labor by an 80-17 vote in the Senate on February 24, 2009. As labor secretary, Solis will promote the administration's policy on legislation and oversee programs and agencies within the department whose budgets and regulatory authority were scaled back under the Bush administration. Based on her track record, Solis will undoubtedly change the policy focus and direction at the DOL.

Stuart Ishimaru, EEOC Acting Chairman

Stuart J. Ishimaru was designated by President Obama as Acting Chairman of the U.S. Equal Employment Opportunity Commission ("EEOC") on January 20, 2009. Initially appointed as a commissioner by President Bush in

2003, Acting Chairman Ishimaru is now serving a second term that expires July 1, 2012. The EEOC has five commissioners and a general counsel appointed by the president and confirmed by the Senate. Commissioners are appointed for five-year, staggered terms. The five-member commission makes equal employment opportunity policy and approves most litigation.

Acting Chairman Ishimaru has a strong and extensive track record on civil rights issues while serving at the EEOC, at the Department of Justice, and on Capitol Hill. Prior to joining the EEOC, Acting Chairman Ishimaru served as Deputy Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice between 1999 and 2001, where he supervised the division's attorneys in high-profile litigation, including employment discrimination cases and enforcement of the Americans with Disabilities Act. From 1994-1999, Acting Chairman Ishimaru served as Counsel to the Assistant Attorney General for Civil Rights. In 1993, he was appointed by President Clinton to be the Acting Staff Director of the U.S. Commission on Civil Rights, and from 1984-1993 he served on the professional staffs of the House Judiciary Subcommittee on Civil and Constitutional Rights and two House Armed Services Subcommittees of the U.S. Congress.

Wilma Liebman, NLRB Chairman

On January 20, 2009, President Obama designated Wilma B. Liebman as Chairman of the National Labor Relations Board. Chairman Liebman has served on the board since November 14, 1997, when she was first appointed by President Clinton, and is now serving her third term, which will expire on August 27, 2011.

Before joining the board, Chairman Liebman served from 1994 to 1997 at the Federal Mediation and Conciliation Service, first as Special Assistant to the Director and then as Deputy Director. A former union lawyer, Chairman Liebman began her legal career as an NLRB staff attorney in 1974, and then served as Labor Counsel for the International Brotherhood of Teamsters from 1980 to 1989 and for the International Union of Bricklayers and Allied Craftsmen from 1990 to 1993.

Conclusion

Less than 100 days into President Obama's term, the record shows that labor and employment legislation, regulation, and enforcement are top priorities in the new Administration. Undoubtedly, there will be far-reaching economic consequences for employers and workers alike. With all the change promised, and all the change delivered thus far, employers are well-advised to closely monitor changes in labor and employment law and adjust their practices accordingly to avoid the potential for liability. ■

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[1] *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, 550 U.S. 618 (2007).

[2] In states without their own anti-discrimination laws, the statute of limitations is 180 days; in California and other states with their own anti-discrimination laws, the statute of limitations is extended to 300 days.

[3] For a more detailed analysis of the Ledbetter Act, see, Anna Ferrari, *Obama Signs Ledbetter Fair Pay Act into Law*, Morrison & Foerster LLP Employment Law Commentary, Vol. 21, No. 2, Feb. 2009, at 3.

[4] *See* Paul Borden et al., *COBRA Provisions of the American Recovery and Reinvestment Act of 2009*, Morrison & Foerster LLP Legal Updates & News, Feb. 2009, for a more comprehensive review of the COBRA-related provisions in ARRA.

[5] *See* Daniel P. Westman & Vanessa R. Waldref, *Sweeping New Whistleblower Law May Cover All Employers Who Receive Stimulus Funds*, Morrison & Foerster LLP Legal Updates & News, Feb. 2009, for a more comprehensive review of the whistleblower provision in ARRA.

[6] *Fall River Dyeing & Finishing v. NLRB*, 482 U.S. 27, 43 (1987).

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California Legislature in Budget Battle Amends Alternative Work Schedules

By Daniel J. Aguilar

On February 20, 2009, California Governor Arnold Schwarzenegger signed a bundle of bills and a $130-billion budget plan to close a $42-billion state budget gap. Included in the package was Assembly Bill 5xx ("AB 5xx"). AB 5xx amends California Labor Code section 511, which regulates alternative work schedules, to provide employers more flexibility in adopting alternative work schedules.

Specifically, AB 5xx:

1. Specifies that the proposed alternative workweek menu of work schedule options may include a regular schedule of 8-hour days, and that the employees who adopt a menu of alternative workweek schedules may, with employer consent, move from one schedule option to another on a weekly basis.

2. Codifies the definition in certain existing IWC Wage Orders of a readily identifiable "work unit" to include, for the purposes of an alternative workweek election, a division, department, job classification, shift, separate physical location, a recognized subdivision, or an individual, if the individual meets the criteria for an identifiable work unit.

Employers and commentators have noted that the process remains unwieldy and some are reluctant to take advantage of their legal options for fear they could be found liable for damages if they are sued for not precisely following the required procedures. Accordingly, employers are advised to proceed with caution and consult with counsel before implementing an alternative workweek schedule. ■

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