Inside The Beltway

Keeping You Informed

A publication of Nixon Peabody LLP's Washington, DC office

March 11, 2010

Critical Developments in Labor and Employment Law

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Executive Branch/Administration

Jobs Stimulus—At the March 1, 2010 AFL-CIO annual winter meeting, Vice President Biden announced that the "Administration's greatest priority is to stimulate job growth that unions can then organize." In contrast, a February 2010 GAO report found that the prevailing wage and Buy American requirements of the American Recovery and Reinvestment Act delayed implementation of stimulus projects. As of December 31, 2009, only 63 percent of the $309 billion appropriated for recovery act projects had been obligated due to the Department of Labor's required assessment of Davis-Bacon Act prevailing wage requirements for each county in the U.S. and for processing waivers under the Buy American provisions. Prevailing rates are most often union hourly wage rates reflecting what is paid to the construction trades in urban areas. *See* "Procuring the Union Agenda," *Wall Street Journal*, March 9, 2010.

Middle Class Task Force—On February 26, Vice President Biden released the first Annual Report of the Middle Class Task Force (Report). Among the goals are restoring labor standards, including workplace safety, and protecting middle-class and working-family incomes and retirement security. The 2010 Report defines "middle-class" as family incomes between $51,000 (25th percentile) and $123,000 (75th percentile) annually. Organized labor's Economic Policy Institute estimates that nearly 20 percent of the 2 million federal contract workers earn less than the poverty threshold hourly wage of $9.91. To jump start job creation and enhance bargaining power to help middle-class workers, the Report recommends the following initiatives for 2010:

1. Passing the Employee Free Choice Act to restore lost bargaining power and eliminate the growing divergence of wage growth from productivity growth. The passage of some form of this bill remains a high priority for organized labor. EFCA, as proposed (S. 560, H.R. 1409), would equate card-check union recognition with a secret ballot representation election, introduce dollar penalties for employer violations, and mandate interest arbitration for first contracts if the parties fail to reach agreement within 130 days.

2. Preventing federal government contracts from being awarded to employers that violate tax, labor and employment, fraud, and/or environmental laws. Notably, the Report states that the Task Force will examine ways to improve the procurement process "by allowing

procurement officers to consider *job quality* when awarding contracts…."

3. Requiring "responsible" federal contracting by all federal agencies to "increase the quality of both the services procured and the jobs created under [f]ederal contracts." In awarding contracts, the U.S. Department of Labor would create a compliance office to evaluate and score contractors on factors including hourly wage rates and benefits schedules, past performance, and ability to meet stated contract terms. In addition, each federal agency would establish a labor standards advocate with the discretion "to adjust" a contractor's score, based on the contractor's compensation and benefits packages for all employees company-wide. It is anticipated that the new "High Road Contracting Policy" requirements will also address substandard wages and benefits that can impact quality and productivity on federal contracts.

4. Ensuring proper classification to prevent employees from being misclassified as independent contractors. The Department of Labor is significantly increasing enforcement and legislative changes will be proposed to protect workers from misclassification, impose penalties on employers for misclassifying, and ensure additional taxes are collected by significantly limiting independent contractor status.

5. Pushing the "middle-class" agenda to reduce income inequality by utilizing Presidential Executive Orders. Several Executive Orders have already been issued, including E.O. 13502, signed on February 6, 2009, which "encourages" project labor agreements (PLAs) for large-scale construction projects. PLAs are pre-hire collective bargaining agreements with one or more unions establishing terms and conditions for a construction project. According to the Report, "[t]he use of a project labor agreement can provide structure and stability to large-scale construction projects…ensure compliance with laws and regulations [including labor standards] and enhance the economy and efficiency of [f]ederal construction projects." E.O. 13494 issued on January 30, 2009, prohibits federal contract monies to reimburse contractors for activities undertaken to persuade or influence employees' decisions regarding unionization and E.O. 13495 requires successor contractors to federal service contracts to give a right of first refusal to the predecessor's employees, which would provide protection to unionized workers. E.O. 13496, also issued on January 30, 2009, requires federal contractors to post notices of workers' rights to join unions and directs the Secretary of Labor to promulgate a rule regarding the text of such notice and posting requirements. A notice of proposed rulemaking soliciting comments was issued August 3, 2009. *See* 74 Fed. Reg. 38488 (August 3, 2009). John Raudabaugh of our Washington office prepared comments on behalf of the Society of Human Resource Management. A final rule has yet to be announced.

Department of Labor—Final Regulation: Improving Workers' Access to Multiemployer Retirement Plan Information—The new regulation to take effect in April 2010 increases transparency for multiemployer plans and collectively bargained pension plans. Pension plan administrators must now provide covered employees with plan data upon request.

Department of Labor—Proposed Regulation: Increase Workers' Access to High Quality Investment Advice—The rule would ensure that workers receive unbiased investment advice regarding investment elections in 401(k) and IRA plans. As proposed, investment advisers would not make extra fees if workers chose an investment in which the adviser has an interest, advisers must disclose their fees, and computer models used for rendering investment advice must be certified as objective.

Department of Labor—Request for Information: The International Labor Affairs Bureau (ILAB) published a Notice February 24, 2010, seeking information on the use of forced labor, child labor, and/or forced or indentured child labor in the production of goods internationally and on government, industry, or third-party actions and initiatives to address such problems. ILAB intends to maintain and publish a list of goods produced in violation of international labor standards, the Trafficking Victims Protection Reauthorization Act of 2005, and the 1999 E.O. 13126—"List of Products Produced by Forced or Indentured Child Labor." The goal is to embarrass companies involved in tainted supply chains. Monitoring the forthcoming ILAB listing will be critical for corporate social responsibility commitments.

National Commission on Fiscal Responsibility and Reform—On February 26, 2010, President Obama named Andy Stern, president of the Service Employees International Union and the AFL-CIO breakaway Change-to-Win, to serve on the bipartisan Commission. The Commission's stated goal is to make recommendations to Congress by the end of this year about how to balance the budget.

National Labor Relations Board—At the AFL-CIO's March 2010 winter meeting both Vice President Biden and Secretary of Labor Solis suggested that the President will recess appoint SEIU attorney Craig Becker later this month. By statute, the Board may have a maximum of five members with decisions issued by a minimum of three members. Generally, a majority of three are from the sitting President's party. President Obama's package of nominees has been held up in the Senate due to the dispute over Becker. The Board has operated for 26 months with only two members. Current Republican Member Schaumber's term ends on August 27, 2010. The U.S. Supreme Court granted certiorari review of a challenge to the legitimacy of NLRB decisions issued by the two member Board on November 2, 2009, in *New Process Steel LP v. NLRB*, No. 08-1457.

Occupational Safety and Health Administration—On January 29, 2010, OSHA announced a proposed rule regarding recording and reporting work-related musculoskeletal disorder (MSD). *See* 75 Fed. Reg. 4728 (January 29, 2010).

Written comments are due by March 15, 2010. OSHA first published the rule on January 19, 2001, but the rule never became effective and was deleted on June 30, 2003. The new proposed rule would add an MSD column to the recording and reporting OSHA 300 Log. OSHA is advancing the additional employer reporting because MSDs for 2007, according to the Bureau of Labor Statistics, resulted in 335,390 lost work days accounting for 29% of the 1,158,870 injuries and illnesses with days away from work and 8.4% of all occupational injuries and illnesses combined. National trade associations are concerned with the proposed MSD definition:

> MSDs are disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs. MSDs DO NOT include disorders caused by slips, trips, falls, motor vehicle accidents, or other similar accidents. Examples of MSDs include: Carpal tunnel syndrome, Rotator cuff syndrome, De Quervain's disease, Trigger finger, Tarsal tunnel syndrome, Sciatica, Epicondylitis, Tendinitis, Raynaud's phenomenon, Carpet layers knee, Herniated spinal disc, and Low back pain.

It is anticipated that the additional reporting will be significant given that the MSD definition is broad and applies to many disorders typically encountered in off-duty activities and which are now frequently the subjects of causation issues in workers compensation claims. Reportedly, both the

National Association of Manufacturers and the U.S. Chamber of Commerce are preparing comments.

Legislative Branch/Congress

Proposed Legislation—"Protecting Employees and Retirees in Business Bankruptcies Act of 2010" (S. 3033; H.R. 4677) introduced February 24, 2010, would amend Chapter 11 bankruptcy laws by:

1. Doubling employee wage claims entitled to priority payment to $20,000 per worker;
2. Allowing employee benefit contribution claims up to $20,000 per worker;
3. Eliminating the current restriction that priority employee wage and benefit claims must be earned within 180 days of the bankruptcy filing;
4. Prohibiting bonus payments and incentive compensation to senior officers and prohibiting retirement benefits for insiders and senior officers if workers lose their benefits;
5. Granting priority to severance pay and retiree benefits claims, WARN, and NLRA backpay or damage awards prior to any modification or unilateral termination of a collective bargaining agreement.

Judicial Branch/U.S. Supreme Court

Citizens United v. Federal Election Commission No. 08-205—The 5-4 decision decided January 21, 2010, holds that corporate funding of independent political broadcasts cannot be limited under the First Amendment.

The Court's decision invalidated a provision of the McCain-Feingold Act banning for-profit and not-for-profit corporations and unions from broadcasting "electioneering communications" in the 30 days before a presidential primary and in the 60 days before the general elections. Congressional reaction was prompt. Joint resolutions to amend the Constitution of the United States were introduced in the Senate (S.J. Res. 28) and the House (H. J. Res. 68) to limit or regulate political expenditures by corporations and unions. Bills were introduced in the Senate (S. 2959 and S. 3004) to regulate and limit political contributions by foreign nationals, foreign corporations, and publicly traded companies. More legislation will be forthcoming as well as state initiatives.

Private Sector—Organized Labor

AFL-CIO—In 2009, affiliated unions organized 401,817 new members and lost 260,743 members. As reported at its 2010 winter meeting March 1–3, the average membership was 8,510,395 with a net increase of 141,075 members. Affiliates with the largest losses were the United Auto Workers (84,656), United Steelworkers (57,732), the International Association of Machinists (27,035), and the Communications Workers of America (21,333). Union membership in the private sector, measured as a percentage of the work force, is at its lowest rate since data has been maintained, but it continues to grow in the public sector.

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