Morrison & Foerster Monthly News

Volume 23, No. 12 December 2010

Employment Law Commentary

2010 Legislative Review

By Michael Chin

INTRODUCTION

With the 2010 congressional sessions in both Sacramento and Washington, D.C. having come to a close, employers would be wise to take stock of the changes in state and federal legislation that will affect their businesses in the coming years. From a labor and employment law perspective, the past year saw a number of key pieces of legislation up for consideration in California; however, a majority of them were not enacted due to the Governor's veto.

On the federal front, with the Obama Administration focused on hot-button issues such as health care, financial reform, and immigration reform, there were few significant labor and employment legislative developments in 2010. And with the Republican Party re-taking the House, few are predicting significant changes in labor legislation in the coming years. If anything, we can expect the advancement of the President's labor agenda to come by way of the Department of Labor and administrative agencies, rather than through acts of Congress.

CALIFORNIA LEGISLATIVE RETROSPECTIVE

As in years past, Governor Schwarzenegger vetoed a number of labor and employment bills that were up for consideration this year. Nevertheless, a few significant bills were signed into law. Employers will have to become familiar with new laws governing "serious violations" under the California Occupational Safety and Health Act, meal break periods, and the use of investigative consumer reporting agencies, to name a few.

(Continued on page 2)

San Francisco

Lloyd W. Aubry, Jr. (Editor)	(415) 268-6558 laubry@mofo.com
James E. Boddy, Jr.	(415) 268-7081 jboddy@mofo.com
Mary Hansbury	(415) 268-7199 mhansbury@mofo.com
Karen Kubin	(415) 268-6168 kkubin@mofo.com
Linda E. Shostak	(415) 268-7202 lshostak@mofo.com
Eric A. Tate	(415) 268-6915 etate@mofo.com

Palo Alto

Christine E. Lyon	(650) 813-5770 clyon@mofo.com
Joshua Gordon	(650) 813-5671 jgordon@mofo.com
David J. Murphy	(650) 813-5945 dmurphy@mofo.com
Raymond L. Wheeler	(650) 813-5656 rwheeler@mofo.com
Tom E. Wilson	(650) 813-5604 twilson@mofo.com

Los Angeles

Timothy F. Ryan	(213) 892-5388 tryan@mofo.com
Janie F. Schulman	(213) 892-5393 jschulman@mofo.com

New York

Miriam H. Wugmeister	(212) 506-7213 mwugmeister@mofo.com

Washington, D.C./Northern Virginia

Daniel P. Westman	(703) 760-7795 dwestman@mofo.com

San Diego

Craig A. Schloss	(858) 720-5134 cschloss@mofo.com

London

Ann Bevitt	+44 (0)20 7920 4041 abevitt@mofo.com
Suzanne Horne	+44 (0)20 7920 4014 shorne@mofo.com

California Bills Signed Into Law

California Transparency in Supply Chains Act of 2010 (S.B. 657)

In passing the California Transparency in Supply Chains Act of 2010, the California Legislature has written into law Civil Code section 1714.43. Starting January 1, 2012, California manufacturers and retail sellers with over $100 million in annual worldwide gross receipts will be required to publicly disclose their efforts to eliminate slavery and human trafficking from their direct supply chains for tangible goods for sale.

The public disclosure requirement can be met by the conspicuous posting of a link on a company's Internet home page to certain required information. If the company does not maintain a website, the statute provides that the company shall produce the information to consumers within 30 days of a request. Specifically, a business subject to the statute will have to disclose the extent to which it: (1) "[e]ngages in verification of product supply chains to evaluate and address risks of human trafficking and slavery"; (2) "[c]onducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains"; (3) "[r]equires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business"; (4) "[m]aintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking"; and (5) "[p]rovides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products." The bill further provides that the exclusive remedy for a violation of section 1714.43 shall be an action for injunctive relief to be brought by the Attorney General, who, pursuant to Revenue and Taxation Code section 19547.5, shall be provided with a list by the Franchise Tax Board of businesses that are required to be in compliance.

Meal Break Periods Amendment (A.B. 569)

Prior to its amendment and subject to certain exceptions, Labor Code section 512 prohibited employers from requiring an employee to work more than 5 hours per day without providing the employee with a 30-minute meal break period. A number of employer groups decried the law as impracticable for certain industries and onerous to the extent it resulted in employers having to become meal break monitors/disciplinarians. The same employer groups argued that more flexible solutions to the meal break period issue were already in place under applicable collective bargaining agreements.

In passing A.B. 569, the California Legislature amended section 512 by adding to the list of employees who are exempt from the application of the 5-hour/30-minute rule. Specifically, A.B. 569 provides that the following employees are exempt: (1) employees in a construction occupation; (2) commercial drivers; (3) security officers; and (4) employees of an electrical corporation, a gas corporation, or a local publicly owned electric utility. However, these employees are only exempt if their employment is covered by a collective bargaining agreement that "expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning application of its meal period provisions, and a regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate."

The theory behind the amendment is that certain occupations are unique in character and require a more flexible approach to the meal break period issue. Provided that employers and employees have already resolved the issue in a mutually agreed upon collective bargaining agreement, the state government will respect the parties' decision.

Amendments to the Investigative Consumer Reporting Agencies Act (S.B. 909)

Prior to the passage of S.B. 909, the Investigative Consumer Reporting Agencies Act ("ICRAA") provided that, subject to certain exceptions, any entity seeking to have an investigative consumer report prepared for employment purposes was required to disclose to the subject of the report the name and address of the agency conducting the investigation, the nature and scope of the investigation, and general information regarding consumer investigations. Amending Civil Code section 1786.16, S.B. 909 provides that, as of January 1, 2012, the consumer-in-question must also be provided with the Internet website address or telephone number of the agency conducting the investigation "where the consumer may find information about the investigative reporting agency's privacy practices, including whether the consumer's personal information will be sent outside the United States…."

Further amending the ICRAA, S.B. 909 provides that, as of January 1, 2011, a California consumer reporting agency must conspicuously post on its primary Internet website "information describing its privacy practices with respect to its preparation and processing of investigative consumer reports." Such information shall include, but need not be limited to: (1) a statement indicating whether the consumer's personal information will be transferred "to third parties outside the United States or its territories" and (2) a section that "includes the name, mailing address, e-mail address, and telephone number of the investigative consumer reporting agency representatives who can assist a consumer with additional information regarding the investigative consumer reporting agency's privacy practices or policies in the event of a compromise of his or her information."

Of note, S.B. 909 also provides that a consumer whose personally identifiable information is accessed without authorization, as a result of an investigative consumer reporting agency's negligent preparation or processing of a report outside the U.S., may recover actual damages, plus attorneys' fees and costs by way of an independent civil action.

Occupational Safety and Health—Redefining "Serious Violation" (A.B. 2774)

Heralded by many as the "most significant occupational safety and health bill to come out of Sacramento in several years,"

(Continued on page 3)

A.B. 2774 rewrites the "serious violation" standard set forth in California Labor Code section 6432. Prior to the bill's passage, to prove that an employer had committed a "serious violation," the Division of Occupational Safety and Health had to demonstrate that there existed a substantial probability that death or serious physical harm could result from an employer's violation. In practical terms, the Division faced significant challenges proving serious violations because the phrase "substantial probability" was interpreted by the Cal/OSHA Board of Appeals to require that there exist at least a 51% likelihood of death or serious injury. As a result, under the previous version of the Code, serious violation citations were often dismissed or downgraded to "general" violations, with greatly reduced monetary penalties.

Rewriting section 6432, A.B. 2774 provides for a rebuttable presumption of a "serious violation" where the Division "demonstrates that there is a *realistic possibility* that death or serious physical harm could result" from the hazard created by an employer's violation. In short, under this new version of the Code, the hurdle the Division must clear to establish that an employer has committed a serious violation has been significantly lowered. Whereas before, the Division carried the burden of demonstrating a 51% likelihood of death or serious injury, now it must only set forth a "realistic possibility" of such dangers. As indicated, however, the employer may rebut the presumption of a serious violation by demonstrating that it did not or could not have known about the violation through the exercise of reasonable diligence—that it took "all the steps a reasonable and responsible employer in like circumstances should be expected to take."

The bill further provides that the Division shall make a reasonable attempt to "determine and consider" the following information from an employer prior to issuing a citation for a serious violation: (1) available training relevant to preventing the exposure of employees to hazards; (2) procedures for discovering, limiting access to, and correcting hazards; (3) the supervision of employees exposed to hazards; (4) procedures for communicating an employer's health and safety rules and programs to employees; (5) the employer's explanation of the circumstances leading to the alleged violations; (6) the employer's explanation of why a serious violation, in fact, does not exist; (7) the basis for the employer's belief that it responded reasonably and responsibly to the alleged violative events; and (8) any additional information the employer wishes to provide. Only after the Division investigators have made a reasonable attempt to determine and consider this information, shall they be able to issue a citation for a serious violation. Of note, A.B. 2774 provides that the Division shall satisfy this requirement by sending the employer-in-question a form at least 15 days prior to issuing a serious violation citation that describes the conditions it deems cite-able and requests the information listed above from the employer.

Unemployment Insurance Benefits—Good Cause Exception Expanded (A.B. 2364)

With the passage of A.B. 2364, eligibility for unemployment insurance benefits has been slightly expanded with respect to situations involving domestic violence abuse. Under the previous version of Unemployment Insurance Code section 2364, employees were eligible for unemployment insurance benefits upon leaving employment voluntarily to protect themselves and/or their children from domestic abuse. A.B. 2364 revises the Code to allow for the provision of benefits to employees who leave employment to protect themselves and/or any member of their "family." By expanding the scope of benefits eligibility, A.B. 2364 provides for increased amounts payable from the Unemployment Insurance Fund, thereby effecting an appropriation.

Michelle Maykin Memorial Donation Protection Act (S.B. 1304)

By way of S.B. 1304, the California legislature has enacted Labor Code section 1508 *et seq.* Better known as the Michelle Maykin Memorial Donation Protection Act, S.B. 1304 mandates that private employers permit employees to take paid leaves of absence when making organ or bone marrow donations, even if the donating employees have already exhausted their sick leave quota. In the case of organ donation, employees are entitled to 30 days of paid leave, compared to just 5 days for bone marrow donations.

In addition, the new Labor Code section prohibits employer retaliation against employees exercising their right to paid donation leave and requires that employers return donating employees to their same or an equivalent position upon return from leave. Providing teeth to the new law, S.B. 1304 further authorizes a private right of action for employees seeking to enforce the provisions of the new Labor Code section.

California Bills Vetoed

While a number of pieces legislation received Governor Schwarzenegger's stamp of approval, a far greater number of labor bills were vetoed by the outgoing Republican. Employers would be wise to take note of these bills, as they may resurface either at the federal level or under the administration of recently-elected Democratic Governor Jerry Brown.

Restrictions on Employers' Use of Employee Credit Reports (A.B. 482)

Vetoed this past September, A.B. 482 would have dramatically restricted the circumstances under which an employer could use a credit report for pre-employment screening or other employment purposes. Specifically, the bill provided that use of credit reports would be prohibited for employment purposes unless the job position in question fell into one of the following categories: (1) a managerial position; (2) a law enforcement position; (3) a California Department of Justice position; or (4) a position for which information contained in a credit report is required by law to be disclosed to or obtained by the employer.

Justifying his veto of the bill, Governor Schwarzenegger reasoned that California and federal laws already provide employees with adequate protection against the improper use of credit reports by employers. He further expressed concern that passage of the bill would "significantly increase the exposure for potential litigation over the use of credit checks." For further discussion of the veto of A.B. 482, please see Morrison & Foerster's September 28, 2010 Client Alert: California Governor Vetoes Bill Restricting Employer Use of Employee Credit Reports.

(Continued on page 4)

Enhanced Security Breach Notification (S.B. 1166)

Under current California security breach notification law, Civil Code section 1798.82, businesses that own or license "computerized data which includes 'personal information'" are required to notify California residents "whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person" by way of a security breach.

Had it not been vetoed, S.B. 1166 would have amended section 1798.82 to require that security breach notices "be written in plain language." In addition, notices would have been required to include: (1) a list of the categories of "personal information" affected by the breach; (2) the actual or estimated date of the breach; (3) the nature of the breach; (4) contact information for the entity reporting the breach; (5) contact information for the major credit reporting agencies; (6) and an indication of whether the notice was delayed as a result of a law enforcement investigation. Furthermore, had S.B. 1166 been enacted, businesses suffering from a personal information security breach would have been required to notify the California Attorney General of the breach.

In vetoing the bill, the Governor took the same position he advocated one year earlier when he vetoed a similar piece of legislation, S.B. 20. Specifically, the Governor noted that the additional restrictions of S.B. 1166 were "unnecessary" because "there is no evidence that there is a problem with the information provided to consumers under California's existing data breach laws." For further discussion of the veto of S.B. 1166, please see Morrison & Foerster's October 1, 2010 Client Alert: California Governor Vetoes Enhanced Security Breach Notification Bill.

Agricultural Union Certification Due to Employer Election Misconduct (S.B 1474)

Also receiving a veto, S.B. 1474 would have modified existing California law regarding what actions the Agricultural Labor Relations Board may take in response to employer misconduct during a secret ballot election to certify a labor union as the representative of agricultural workers. Currently, Labor Code section 1156.3 provides that the Board may set aside the results of the election and a new election may be held the following year. Provided that at least fifty percent of the potential bargaining unit had already presented valid authorization cards, S.B. 1474 would have mandated that the Board certify a labor union in response to such employer misconduct. Explaining his veto decision, the Governor noted that S.B. 1474 would create an imbalance in favor of the union without providing for an equivalent consequential measure in the case of union misconduct.

Misdemeanor Penalty for Employers Who Willfully Fail to Pay Wages (A.B. 2187)

A.B. 2187 would have created a criminal penalty for employers who willfully failed to pay departing employees all wages to which they were entitled within 90 days of when the wages should have been paid. Per A.B. 2187, violating employers would have been subjected to fines of up to $10,000 and six months in jail. Striking down the proposed legislation, the Governor explained that waiting time penalties and enforcement mechanisms already exist in California law and further statutory regulation is unnecessary.

Expanding an Employee's Right to Bereavement Leave (A.B. 2340)

With A.B. 2340, the California legislature sought to enact Labor Code section 230.5. Under the terms of this section, employees would have had the right to inquire about, request, and take 3 days of unpaid bereavement leave upon the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner. The proposed Code section would have further provided aggrieved employees with two alternatives for enforcement of their rights: (1) the ability to file a complaint with the Division of Labor Standards Enforcement and (2) the ability to bring a civil action for the recovery of damages, including attorneys' fees. Vetoing the bill, the Governor stated that, in these difficult economic times, he did not wish to expose employers to new sources of potential liability.

Increased Liquidated Damages for Failure to Pay Minimum Wage (A.B. 1881)

Existing law sets a minimum wage for all employees in California, with limited exceptions, and prohibits employers from paying less than that wage. Should an employer fail to pay the minimum wage to an entitled employee, existing law provides that the aggrieved employee may sue his or her employer for liquidated damages in an amount equal to the wages unlawfully unpaid, plus 10% interest. Had it not received Governor Schwarzenegger's veto, A.B. 1881 would have increased the aggrieved employee's liquidated damages award to two times the wages unlawfully unpaid, plus interest.

Employers' Ability to Advertise as "Mother-Friendly" Worksites (A.B. 2468)

Had it received the Governor's approval, A.B. 2468 would have made it permissible for an employer to refer to itself as a "Mother-Friendly worksite" in advertisements and promotional materials, provided that the employer's workplace breast-feeding policy had been submitted to and approved by the Labor Commissioner. Vetoing the bill, the Governor noted that existing law already provides lactating mothers with ample protection and there is no need to create additional requirements and potential liability.

Right to Attorneys' Fees for FEHA Claimants (A.B. 2773)

As interpreted by the California Supreme Court in *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010), California Code of Civil Procedure section 1033(a) provides that when a prevailing plaintiff brings a claim under the California Fair Employment and Housing Act ("FEHA") in a court of unlimited jurisdiction, but recovers less than the jurisdictional minimum ($25,000.00), the trial court has the discretion to deny the plaintiff its attorneys' fees.

In proposing A.B. 2773, the legislature sought to amend the Code to provide that section 1033(a) did not apply to FEHA claims. The theory behind the bill was two-fold: (1) the defense of civil rights is so important that the Code should not create barriers against their protection;

(Continued on page 5)

and (2) FEHA claims are generally of such a complex nature that the discovery restrictions inherent in limited jurisdiction matters are inappropriate. Exercising his veto power, the Governor suggested that A.B. 2773 encouraged frivolous litigation and sought to improperly infringe upon the judiciary's authority to exercise discretion in the awarding of attorneys' fees.

FEDERAL LEGISLATIVE RETROSPECTIVE

As indicated above, with the Obama Administration's political and legislative agendas focused elsewhere in 2010, federal labor and employment law developments were few and far between. Nevertheless, against the backdrop of a power-shift in Washington, a number of pieces of proposed labor legislation warrant mention.

Proposed Federal Legislation

The Fair Playing Field Act of 2010 (H.R. 6128/S. 3768)

With the intent of closing the federal tax "loophole" provided by Section 530 of the Revenue Act of 1978, this past September, Representative Jim McDermott (D-Wash.) and Senator John Kerry (D-Mass.) presented their respective chambers of Congress with H.R. 6128/S. 3786—the Fair Playing Field Act of 2010.

Under Section 530, businesses are permitted to classify workers as independent contractors for employment tax purposes as long as they have a reasonable basis for the classification and have met certain other conditions. The authors of the Fair Playing Field Act contend that employers have abused this "safe harbor" provision and have engaged in the practice of intentionally misclassifying workers' employment status, so as to avoid paying certain federal taxes and other benefits. If enacted, the Fair Playing Field Act would take a number of steps towards curtailing this practice: (1) the Secretary of the Treasury would be permitted to issue guidance in an attempt to clarify the employment status of individuals for purposes of taxes and withholdings; (2) penalties for failing to properly classify an employee and for failing to withhold the proper amount of federal income and FICA taxes would be increased; (3) companies utilizing independent contractors in their workforce would be required to provide them with information regarding their classification status and how they may challenge their classification; and (4) the IRS would be permitted to issue guidance on worker misclassification.

The Paycheck Fairness Act (H.R. 12/S. 3772)

Proponents of H.R. 12/S. 3772, better known as the Paycheck Fairness Act, sought to amend the Equal Pay Act ("EPA") by adding employer non-retaliation requirements to the EPA, increasing penalties for EPA violations, and authorizing the Department of Labor Secretary to seek additional compensatory or punitive damages against employers that violate the EPA. Furthermore, under the proposed legislation, employers seeking to justify an unequal pay situation would bear the burden of proving that the decision to pay unequally was job-related and consistent with business needs.

Detractors of the bill argued that the EPA already contains adequate safeguards to protect against unwarranted, gender-based disparities in pay. They further argued that the proposed legislation is sure to open the door to increased employer liability, an unwelcome possibility, especially in light of the current economic climate. On November 17, 2010, the detractors won the day. In a 58-41 vote in favor of the bill, the Senate failed to achieve the 60 votes necessary to proceed to a floor debate on the Paycheck Fairness Act and avoid a filibuster. As such, the proposed legislation is probably dead for the foreseeable future.

The Employee Free Choice Act (H.R. 1409/S. 560)

Had it been enacted, the Employee Free Choice Act ("EFCA") would have amended the National Labor Relations Act to provide for unionization upon a majority of a target employee population signing union authorization cards. Such a rule would have effectively done away with the secret ballot election process that currently dictates whether workers may unionize. The proposed legislation also provided for the Federal Mediation and Conciliation Service to mediate and arbitrate first collective bargaining agreements, should parties find themselves unable to compromise. Furthermore, the EFCA would have imposed stiffer penalties for unfair labor practices committed by employers during a union organization campaign or during the bargaining process for an initial contract. As with the Fair Playing Field Act and the Paycheck Fairness Act, given the recent shift in power in Congress, the EFCA is unlikely to reach the President's desk over the next few years.

The Employment Non-Discrimination Act (H.R. 3017/S. 1584)

Another piece of labor legislation that probably has little chance of passage is the Employment Non-Discrimination Act ("ENDA"). ENDA seeks to make it illegal for employers with more than 15 employees to terminate, refuse to hire, or otherwise discriminate against an employee on the basis of his or her perceived or actual sexual orientation or gender identity. Proponents argue that discrimination in the workplace on the basis of sexual orientation and gender identity should be just as readily prohibited as discrimination on the basis of sex, race, religion, age, national origin, or disability. Detractors, however, have thus far successfully argued that the 1964 Civil Rights Act provides the individuals-in-question with adequate protection and that passage of the proposed legislation would only serve to increase employer liability with no corresponding benefit to employees.

The Working Families Flexibility Act (H.R. 1274/S. 3840)

Introduced in the Senate in late September 2010, the Working Families Flexibility Act would provide employees with a statutory right to request flexible work terms and conditions, specifically with respect to "(1) the number of hours the employee is required to work; (2) the times when the employee is required to work; or (3) where the employee is required to work." In response to such a request, employers would be required to meet with the employee within 14 days of the request and then provide the employee with a written decision within 14 days of the meeting. Should the employer ultimately decide to reject the employee's application for more flexible work terms and conditions, the employer would be required to state the basis for the decision in compliance with regulations issued by the Secretary

(Continued on page 6)

of Labor. This bill failed to make it out of committee before the close of the legislative term and is unlikely to do so in 2011.

Federal Administrative & Regulatory Issues

The Department of Labor and Secretary of Labor Hilda Solis worked earnestly in 2010 to advance a pro-labor agenda. Among other notable moves, the Department of Labor transitioned from issuing "Opinion Letters" to "Administrator Interpretations" and set forth its new approach to the enforcement of regulatory compliance: Plan/Prevent/Protect.

Wage and Hour Division Administrator Interpretations

To date, the Wage and Hour Division of the Department of Labor has only issued three Administrator Interpretations. The first, issued on March 24, 2010, addressed the application of the administrative exemption under Section 13(a)(1) of the Fair Labor Standards Act ("FLSA") to employees who perform the typical duties of a mortgage loan officer. Likening them more to sales representatives than managers exercising "discretion and independent judgment with respect to matters of significance," the Interpretation found that mortgage loan officers are entitled to overtime pay. In doing so, the Division overturned two Bush Administration opinion letters that deemed such employees exempt.

The second Administrator Interpretation issued in 2010 narrowed the definition of "changing clothes" under section 3 of the FLSA. Per that section, the time an employee spends changing clothes or washing at the beginning of work each day should not be included in compensable time. However, on June 16, 2010, the Division issued an Interpretation stating that the process of changing into and out of protective equipment necessary for the performance of one's job does count as compensable time.

The final Administrator Interpretation issued in 2010 clarified the definition of "son or daughter" under section 101 of the Family and Medical Leave Act. Under that section, eligible employees are entitled to take up to 12 weeks of unpaid leave to tend to the birth of a "son or daughter" with a serious health condition. Redefining the operative phrase, the June 22, 2010 Interpretation held that section 101 also applies to an employee standing "in loco parentis" to a child. Thus, as long as the employee either provides day-to-day care for the child or is financially responsible for the child, it would appear under this new definition that such an employee is entitled to 12 weeks of unpaid leave.

The Three Ps: Plan/Prevent/Protect

With the stated goal of replacing employers' "catch me if you can" attitudes with a "find and fix" culture of compliance, the Department of Labor memorialized its Plan/Prevent/Protect system in its "Spring 2010 Regulatory Agenda." Under the "Plan" mantle, the Department intends to "propose a requirement that employers and other regulated entities create a plan for identifying and remediating risks of legal violations and other risks to workers" in the workplace. Such plans are to be made available to workers so that they can fully understand and comply with them. To effectively "Prevent" non-compliance, the Department of Labor plans on proposing "a requirement that employers and other regulated entities thoroughly and completely implement the plan in a manner that prevents legal violations." Finally, to ensure compliance and effectively "Protect" workers, the Department of Labor intends to "propose a requirement that the employer or other regulated entity ensures that the plan's objectives are met on a regular basis." While the regulations necessary to provide teeth to the Plan/Prevent/Protect program have yet to be published or finalized into rules, employers with an eye to the horizon would be well-advised to begin taking stock of their present compliance programs in anticipation of further developments.

The National Labor Relations Board

Another labor agency that bears watching this coming year is the NLRB. With recess appointments having cemented a pro labor majority on the Board and labor law reform stymied in Congress, many believe that 2011 will be the year promises made to labor in the 2008 election will be kept or at least start to be kept. The Board is poised not only to reverse Bush era Board decisions despised by labor but also to possibly engage in rulemaking that might lead to changes in election procedures that are part of the now dead Employee Free Choice Act. Rulemaking of this nature would no doubt engender a battle with Congress.

Conclusion—What to Expect in 2011

The November 2010 elections produced mixed results with respect to what labor and employment law developments employers can expect in the coming years. Locally, in California, Democrat Jerry Brown is set to replace outgoing Republican Governor Schwarzenegger; and the expectation is that labor reform efforts in Sacramento will once again gain steam. On the federal level, however, the prospects are quite different.

With Republicans now holding the House of Representatives by a strong majority and with Democrats having lost substantial ground in the Senate, it is unlikely that any significant labor legislation will come out of the 112th Congress. As a result, the Obama Administration will have to turn toward the Department of Labor and federal labor agencies to fulfill the President's promises of reform. At the same time, the Obama Administration may be concerned that sweeping administrative or regulatory change could hurt the President's election chances in 2012. As such, many will be closely monitoring the activity of these entities over the coming months, paying careful attention to what steps, if any, they may take on the regulatory front.

Wende Arrollado
Morrison & Foerster LLP
12531 High Bluff Drive, Suite 100
San Diego, California 92130
warrollado@mofo.com