Financial and Economic Crisis – Law Firms

Obama Administration Changes Employment Rules Of The Game

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During the recent 2008 presidential election campaign, President Barack Obama had promised that his administration would bring "change" to Washington DC and the political process. With a nationwide shift in the mood toward safety and protection in the face of challenging economic times, and a substantial majority in Congress, President Obama has the power to effectuate long-term and significant change in the employment sector. Since his inauguration, President Obama has, in fact, started to deliver on his promise. In the first three months of his administration, the statute of limitations to file federal employment discrimination claims has been extended, federal contractors' free speech rights have been curtailed in responding to union organization efforts, employers are now required to subsidize former employee and other qualified beneficiaries' health benefits under COBRA (though potentially entitled to reimbursement), there has been a creation of new whistleblower protection, and perhaps the most significant change, the elimination of secret balloting in union campaigns is now pending before the Congress. The changes will affect all employers and are summarized as follows.

Pay Practices Discrimination Statute Of Limitations Extended Indefinitely

On January 27, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act. This law substantially extended an employee's right to file a lawsuit by expanding the statute of limitations for individuals and other aggrieved parties to file charges of pay discrimination under the Age Discrimination in Employment Act (ADEA), the Americans With Disabilities Act (ADA), the Rehabilitation Act as well as Title VII of the 1964 Civil Rights Act. The law is retroactive to May 28, 2007, the date before the Supreme Court decision it overturns. This Act overturns the 2007 Supreme Court decision which found Lilly Ledbetter's wage discrimination claim was time barred because she did not file a charge with the EEOC within 180 days of the allegedly discriminatory compensation decisions which had been made between 1979 and 1997, even though these decisions continued to affect her current compensation in retirement.

The new law sets forth several times when a discriminatory compensation act can be challenged. Those times include not only when the decision or practice is adopted, but also when an individual is subject to the decision or practice or when the individual is affected by application of the decision or practice, including each time wages, benefits or other compensation are paid which result in whole or in part from such a decision or other practice. Such affect could continue for the rest of the employee's employment, or even beyond, allowing employees to challenge decisions very remote in time – *i.e*., decades back. In other words, each time the employee received a pay check that somehow reflected that past act, a new statute of limitations period begins anew. The new law also provides an opportunity for a complainant to recover for discriminatory actions both inside and outside the filing period and provides for recovery of back pay for a period of up to two years prior to the filing of the charge. The law does not specifically address future damages, but it is certainly a possibility for an employee's pay or benefits to be affected in the future by the challenged action.

The wording of the statute raises significant issues as to whether and to what extent this law, when signed, might expand the class of individuals bringing claims. As the statute reads, this statute could cover claims by family members who were deprived of the benefit of the appropriate salaries. The net effect of this legislation is to significantly expand the time during which pay decisions can be challenged and therefore expands the scope of potential employer liability. It also means that employers should keep relevant records for a significantly longer period of time than they have in the past since this statute expands the time frame in which litigation can be commenced.

On a different note, employers should also be prepared to face arguments by plaintiffs that the rationale of this Act should be applied to expand the period of limitations for all types of discrimination.

Limitation On Employer Captive Audience Speeches For Federal Contractors

Organized labor has wasted little time in cashing in its political chits. On January 30, 2009, President Obama signed two Executive Orders restricting the rights of federal contractors to engage in "captive audience speech" in which employers pay employees to attend company meetings addressing and refuting union sales pitches. The Washington State Legislature had contemplated a law banning such employer speeches though it was ultimately withdrawn based on concern over union threats to withhold financial support for non-supporters.

The first Executive Order, entitled "Notification of Employee Rights under Federal Labor Laws," revokes the so-called *Beck* notice requirements and requires qualifying federal contractors to post a written notice advising employees of their rights to bargain collectively, to engage in freedom of association, and to designate a bargaining representative. The notice will be prepared by the Secretary of Labor within 120 days. The second Executive Order, entitled "Economy in Government Contracting," disallows costs associated with employer captive audience speeches under federal cost-reimbursement contracts. The Order will require non-union contractors participating in federal cost-reimbursement contracts who wish to exercise their free speech rights under the National Labor Relations Act, to utilize accounting procedures to segregate these costs – whether for retention of outside counsel or employee wages for meeting attendance.

COBRA Changes: It Will Cost the Employer More.

On February 17, 2009 President Obama signed the American Recovery and Reinvestment Act of 2009 ("ARRA"), which imposes significant new obligations on employers. Among the significant changes was a change in who is responsible for paying the premiums for COBRA coverage as a result of employment termination. The ARRA provides that the "assistance eligible individuals" need only pay 35% of the applicable COBRA premium for a period of up to 9 months starting February 17, 2009. Employers will be required to pay the remaining 65% of the premium. That payment may be reimbursed by the government through a credit against withholding and FICA taxes.

This protection applies to any individual who lost coverage under a covered employer sponsored group health plan because of involuntary termination of employment between September 1, 2008 and December 31, 2009 *and* elects COBRA continuation coverage. Persons who can take advantage of these premium reductions are terminated employees and any other qualified beneficiary, like a dependent who was covered immediately prior to the qualifying event. The ARRA requires that the employer locate "assistance eligible individuals" who lost coverage due to an eligible employment termination between September 1, 2008 and February 17, 2009, and notify them of their right to subsidized COBRA coverage. There is no premium reduction or subsidy for periods of COBRA coverage before February 17, 2009, and ARRA does not extend or change the length of COBRA coverage. The Department of Labor published new model COBRA notices on March 19, 2009 at www.dol.gov/esba/COBRAmodelnotice.html.

The ARRA requires that employers refund partial premiums for qualified individuals who pay or have paid more in premiums than they are now required to pay under the Act's subsidy provisions. "Assistance eligible individuals" may be given the option to select different coverage than they had while employed, as long as the premium is no greater than the previous coverage. High income individuals, defined as those with modified adjusted gross income in excess of $145,000 ($290,000 for joint filers), will have their taxes increased by the amount of the subsidy for the tax year in which they receive the subsidy. They also have the opportunity to elect not to receive the subsidy. The amount of premium subsidy that is taxed is reduced for individuals with modified AGI between $125,000 and $145,000 ($250,000 - $290,000 for joint filers). There are new rules on when "assistance eligible individuals" lose their right to a subsidy if they have other group health coverage or Medicare. The COBRA changes in ARRA are also applicable to continuation coverage that may be required by comparable state law (e.g. for small employers) or health plans maintained by federal or state government. They do not apply to FSAs (flexible spending accounts).

New Whistleblower Protection

The ARRA also added new whistleblower protections for non-federal employees who report or disclose perceived misuse of stimulus funds. If an employer accepts stimulus funds, it should be aware of these new protections and take seriously any complaints of misuse of such funds. The ARRA essentially creates employee protection for complaints related to mismanagement, waste and abuse of stimulus funds. The ARRA prohibits a covered employer from taking adverse action against an employee who discloses, reports or complains about: (1) a gross mismanagement of a federal contract or grant; (2) a gross waste of stimulus funds; (3) a substantial and specific danger to public health and safety related to the use of the stimulus funds; (4) an abuse of authority related to the implementation of these funds; or, (5) a violation of any law, rule or regulation related to a federal contract, grant or award of the funds. To be covered, an employee must report the alleged wrongdoing to the ARRA Board, an inspector general, the Comptroller General, a member of Congress, a federal or state enforcement authority, a state or federal court, a grand jury, a federal agency, or even just to a person with supervisory authority. No formal complaint mechanism must be followed, and internal disclosures made by employees during the course of performing their job duties are in fact covered.

Procedurally, an affected employee must file a complaint with the Inspector General of the agency having jurisdiction over the covered funds. There is no explicit statute of limitations to file such a complaint. The Inspector General will investigate the employee's complaint and make a determination within 180 days (the time period can be extended). A report will be submitted to the particular agency head who will make a final determination whether there is a sufficient basis for the complaint and can order the employer to take action to abate the reprisal, reinstate the employee, and pay costs and expenses, including attorney's fees, for bringing the complaint. Unlike other federal and state laws, this determination is not made by an administrative law judge. It is made by the agency head, who may or may not have experience with interpreting and applying legal standards to facts before arriving at a determination. An administrative order can be enforced in federal court and include not only compensatory damages and attorney's fees, but also punitive damages for a willful failure to comply. The agency's determination may be appealed *de novo* to the Court of Appeals in the jurisdiction where the alleged retaliatory conduct occurred.

Once an affected employee has exhausted the administrative process of filing a complaint and received an agency determination, he or she may file a lawsuit in a federal district court, requesting a jury trial and seeking back pay, reinstatement, compensatory damages without limitation, and attorney's fees and costs. Employers must post notice of these new ARRA whistleblower protections and cannot seek to waive or otherwise restrict these rights, including through the use of an arbitration agreement.

Employee "Free Choice" Act: The End of Secret Ballots?

On March 10, 2009, the "card check" legislation heavily promoted by unions was introduced in Congress. This Act, euphemistically known as the "Employee Free Choice Act," would radically change the procedure for union certification elections under the National Labor Relations Act from a majority employee vote in a secret ballot election overseen by the National Labor Relations Board to a majority employee signing of union authorization cards typically overseen by union business agents without any notice to employers. Obtaining cards should be far easier than winning secret ballot elections, and unions hope that this law will reverse decades of declining membership numbers and decertifications. President Obama has promised to sign this proposed legislation upon presentation, as he was a co-sponsor of the bill when he was a Senator in 2007.

Under the proposed Act, employers must recognize unions as the employees' exclusive bargaining representative upon presentation of signed authorization cards representing the majority of the employees. These cards can be obtained at any time without input from employers on the cost and impact of unionization accompanied by peer pressure using knowledge that other co-workers have signed similar cards. The Act could be characterized as an end run around the previously developed open system.

Aside from changing the union certification process, the Act may have far wider reaching impact by setting the terms of employment. Presently, a union must do more than win an election. It must negotiate with the employer to arrive at a mutually agreed upon contract. However, the proposal would require binding interest arbitration to resolve any impasse in negotiations for a first agreement. If an agreement is not reached within 90 days commencement of negotiations, the Act requires parties to first seek mediation and then submit to arbitration of the terms of employment such as wages, benefits, hours, work rules and other terms of employment. The arbitrator would dictate the terms of a collective bargaining agreement. The newly unionized employer would then be subject to this imposed agreement for at least two years. Finally, the legislation would provide *triple back pay* to employees who are discharged or the subject of discrimination in violation of the National Labor Relations Act.

Conclusion

These are the new laws that the Obama Administration has passed or recently introduced which substantially expand protection measures for employees. Employers should anticipate continued pro-labor efforts, which may include the narrowing of the definition of exempt supervisors under the NLRA to exclude front line supervisors in union organization campaigns under the so called RESPECT Act, broader employee coverage and benefits (*i.e*., paid leave, flexible schedules, telecommuting, *etc*.) under the Family and Medical Leave Act, more accommodation requirements under the Americans with Disabilities Act, new protection against discrimination based on sexual orientation under Title VII, the elimination of certain defenses and addition of punitive damages and class action litigation under the Paycheck Fairness Act, and a narrower definition of an independent contractor for purposes of wage and hour laws under the Independent Contactor Proper Classification Act. Presidential candidate Barack Obama promised Americans widespread change during the recent campaign, and, if his first three months in office are indicative of his presidency, change will be delivered.

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