

Democratic control likely to benefit organized labor

The Obama administration will have a dramatic impact on labor and employment law in the United States. Businesses should expect increased enforcement efforts and new union- and employee-friendly laws and regulations.



Wood
Lay



Jacqueline
Ferrell



Eric
Zion



Yolanda
Brock

EXPERT OPINION

Obama's choice for Secretary of Labor is Hilda Solis. Her parents were both union members, and she has been widely praised by the labor movement. She is a strong supporter of the Employee Free Choice Act and has long been a champion for workers' rights. Business should expect a much more aggressive Department of Labor than that of the Bush administration.

President Obama also plans increased funding for enforcement and regulation. His proposed budget boosts funds for the Department of Justice's Civil Rights Division by 18%. It increases the Department of Labor's budget by \$500 million, including more funding for enforcement by Occupational Safety and Health Administration and the Wage and Hour Division.

In addition to increased enforcement, the Obama administration is expected to push legislation relating to union organization, employment discrimination and employee classification.

Here are some key concerns:

- The proposed Employee Free Choice Act would reshape labor relations in this country. EFCA would make it significantly easier for a union to organize employees. The act would permit unions to bypass the traditional secret-ballot election process by obtaining recognition based solely on authorization cards, which are often solicited surreptitiously. Once a union is recognized, the legislation would short-circuit collective bargaining and provide for binding arbitration if the union and employer can't agree within 120 days on the terms of the first collective bargaining agreement. That means

The Obama administration is expected to push legislation relating to union organization, employment discrimination and employee classification.

a government-appointed arbitrator would set wages, benefits and other terms and conditions of employment. EFCA also would increase penalties against employers for unfair labor practices, while providing no corresponding increase for union violations.

- Another bill, the Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers Act, would amend current law to narrow the definition of supervisor and expand the number of employees eligible to unionize. It would change the definition of supervisor to exclude working supervisors whose only supervisory duties are to assign and direct other employees, but who do not spend most of their time performing strictly managerial duties.

- The Lilly Ledbetter Fair Pay Act, which President Obama signed Jan. 29, expands the time during which a plaintiff may file a claim for unequal pay. The act overturns the Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co. Inc.* The court required a plaintiff to file a charge with the Equal Employment Opportunity Commission within 180 days of a decision resulting in discriminatory pay. The Ledbetter Act implements a "paycheck rule," which expands the statute of limitations by restarting the 180-day clock each time a plaintiff receives a paycheck, benefit or other

form of compensation that derives from a previous discriminatory pay decision. Effectively, the act allows plaintiffs to bring wage claims years after the alleged discrimination occurred.

- Additionally, the proposed Paycheck Fairness Act would make it easier for plaintiffs to claim pay discrimination. This legislation would amend the Equal Pay Act to prohibit retaliation, increase penalties and authorize additional compensatory or punitive damages. The act requires employers to show a pay differential is not based on gender. It would also increase litigation by automatically including employees as part of a class action, unless an employee specifically opts out.

- The proposed Employment Non-Discrimination Act would amend Title VII to prohibit employment discrimination on the basis of an individual's actual or perceived sexual orientation.

- The proposed Independent Contractor Proper Classification Act would change tax laws to require employers to treat misclassified independent contractors as employees for employment tax purposes. It also would eliminate the "industry practice" defense to misclassification. The act would allow workers to seek a determination of their employment status from the Secretary of Treasury and would prohibit employers from retaliating against workers for seeking such a determination. The act requires employers to notify independent contractors of labor and employment protections that do not apply to them, certain tax obligations and the right to seek a status determination.

- The proposed Employee Misclassification Prevention Act would amend the Fair Labor Standards Act to provide penalties for employers that misclassify workers as independent contractors. It would require employers to notify workers of their classification as an employee or independent contractor.

Increased enforcement and new laws and regulations mean businesses should partner with their labor and employment counsel to ensure compliance and explore strategies to minimize risk from these potential liabilities.

Wood Lay, Jacqueline Ferrell, Eric Zion and Yolanda Brock are the labor and employment team in Hunton & Williams' Charlotte office. They can be reached at (704) 378-4700.