

NEW EMPLOYMENT LAWS TO WORRY ABOUT: IT'S NOT JUST ABOUT CARD CHECK ANYMORE

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Employers are rightfully concerned and even alarmed about what to expect from the new Congress and the Obama Administration. Democrats are firmly in control and owe much to organized labor and other constituencies that are not necessarily employer-friendly. So, what can healthcare expect in the new year and beyond?

Most employers are keenly aware of the Employee Free Choice Act – Labor's most important initiative. For details on EFCA please see our Fall 2008 Healthcare Update. If it passes in the 111th Congress, EFCA could dramatically degrade an employer's ability to fight off union organizing efforts. For over 50 years, a secret-ballot election, and the employee education that precedes it, has allowed many employers to remain union-free. With EFCA, intimidation, not education, will rule the day. But EFCA isn't the only scary legislation introduced in the 110th Congress and expected to have an encore in the 111th Congress. On the horizon are a number of bills which, if passed into law, could dramatically impact healthcare.

RESPECT

The Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act (RESPECT) is a key union initiative and is expected to make a reappearance in the 111th Congress. RESPECT, which many feel is largely healthcare driven, would greatly limit who is a supervisor for organizing and collective-bargaining purposes. It could make charge nurses and other types of "working" supervisors members of a bargaining unit and covered by a collective-bargaining agreement, making it much more difficult to resist organizing efforts and even to operate should an employer become unionized.

Paycheck Fairness

Although EFCA and RESPECT are key labor initiatives, bills relating to employment in other areas will also be re-introduced. There are at least two pieces of legislation which will dramatically effect equal pay issues.

The Paycheck Fairness Act would impose, in addition to backpay remedies already available, compensatory and punitive damages on employers who have violated the Equal Pay Act; expand the availability of class action status to lawsuits under the Equal Pay Act; and eliminate as an affirmative defense the argument that a pay differential exists due to a "factor other than sex."

Under the Paycheck Fairness Act employers would have to economically justify a difference in pay between men and women, rather than relying on evidence showing that the difference, for whatever reason, was not because of an employee's sex.

Lilly Ledbetter Fair Pay Act

Coupled with the Paycheck Fairness Act is the Lilly Ledbetter Fair Pay Act, which is named for a plaintiff whose sex discrimination claim was rejected by the U.S. Supreme Court in 2007. The Supreme Court reasoned that Ledbetter had not brought the claim within 180 days of the alleged discriminatory act. The Ledbetter Act would effectively eviscerate the current statute of limitations for pay discrimination claims, making each paycheck a separate discriminatory act. This would greatly expand an employee's opportunities to bring such a lawsuit and could make employers liable for pay decisions made years in the past.

WFFA

The Working Families Flexibility Act is another intrusion into the workplace. If enacted, it would provide employees with an annual right to apply for a modification of their work hours, schedule or work location. It requires an employer to meet with the employee to discuss the requested modification within 14 days; then within another 14 days the employer must provide a written decision and, if the request is denied, it must state the grounds for denial and propose an alternative modification. If it becomes law WFFA would also give employees the right to a representative of their choosing at any meeting. Further, it not only prohibits retaliation, but gives employees the ability to file a complaint with the Department of Labor if they feel their rights under the Act have been violated.

Changes To FMLA

Bills proposed in the 110th Congress and expected to reappear in the new Congress also concern the Family and Medical Leave Act. The Family Leave and Insurance Act amends the FMLA to provide workers with at least 8 weeks of *paid* FMLA leave, as opposed to the current standard of 12 weeks of *unpaid* leave. The payments would be made through an insurance program to which both employers and employees make contributions. Not only will this legislation burden businesses with the cost of

contributions to the insurance fund – in a manner similar to unemployment compensation – but it will certainly encourage employees to take more FMLA leave (*“Hey, I paid for it, didn’t I?”*).

In addition, legislation will probably be re-introduced in the new Congress expanding the reach of FMLA leave. At present, the FMLA provides leave to employees to care for others only if they are the employee’s spouse, child or parent. If the bill is re-introduced FMLA leave would cover, in addition, care for a same-sex spouse, domestic partner, parent-in-law, adult child, sibling or grandparent.

Although not directly related to the FMLA, also expect legislation to be re-introduced requiring employers to provide at least 7 days of paid sick leave to full-time employees – defined as those working at least 30 hours per week. The bill further requires a pro-rata amount of paid sick leave days for part-time employees.

Title VII of the Civil Rights Act was not ignored in the 110th Congress, and will doubtless receive attention in 2009 and beyond. Employers should fully expect the re-introduction of an amendment, which passed the House in 2007, to extend Title VII’s reach to prohibit employment discrimination on the basis of actual or perceived sexual orientation.

Hold On, There’s More

These are by no means the only employment-related legislation that may be anticipated in the new Congress. While the economy may garner most of the attention, all of these bills were introduced in 2007 to 2008, and likely will be re-introduced in the near future. It is worth noting, too, that almost all of this legislation shares at least one common sponsor or co-sponsor: then Senator, now President, Barack Obama.