



# **New President, New Labor Agenda**

Insights

2.01.09

*(Labor Letter, February 2009)*

As Democrats take control of the Presidency and expand their control of Congress, employers await dramatic changes to labor and employment law. In the House and Senate, Democratic lawmakers are expected to introduce a host of controversial measures, from the now well-publicized Employee Free Choice Act (EFCA) to the lesser known Employment Non-Discrimination Act (ENDA).

While these laws could take months to pass, employers do not have the luxury of time. In a number of recent announcements, President Obama has stated his clear intention to use the full extent of his executive authority to "hit the ground running." Starting with the inauguration, employers must therefore be prepared for change in the form of increased union influence, stricter workforce regulations, and greater government oversight.

## **Secretary Of Labor**

On December 19, 2008, labor achieved its first key victory in changing the current employment landscape. Unions and employee rights groups alike applauded President-elect Obama's nomination of Rep. Hilda Solis (D-Calif.) as Secretary of Labor. Rep. Solis is considered instrumental in pushing the incoming administration's goals of increased oversight and stricter regulation of the workplace.

As a board member of American Rights at Work, a non-profit group dedicated to furthering the labor agenda, and a co-sponsor of legislation calling for the elimination of the secret ballot election in union campaigns, Rep. Solis will also be a powerful voice in favor of the many decidedly pro-employee measures expected to come before the Democratic Congress in 2009. As President-elect Obama has acknowledged, Rep. Solis' nomination goes hand in hand with the expansion of union influence, "from organizing to collective bargaining, from keeping our workplaces safe to making our unions strong."

## **Strict Enforcement Of Existing Laws**

With Rep. Solis' nomination, employers can also expect strict enforcement of existing labor law. Last month, the Center for American Progress Action Fund issued a lengthy, politically charged report detailing areas where the incoming administration could immediately impact the workplace. The report suggests that the Department of Labor could make significant changes simply through strict

enforcement of existing labor laws, and specifically outlines key strategies for doing so at the administration's disposal.

Most notably, the report encourages an Obama-led Department of Labor to pursue maximum penalties against employers thought to be in violation of the law. This includes holding *both* contractors and direct employers liable for wage and hour violations, imposing increased penalties on employers who misclassify their employees as independent contractors, and revoking government contracts and blocking the shipment of goods produced by affected employees.

The report also suggests litigating any and all employer violations. That means employers should no longer count on settling disputed OSHA citations. Indeed, the report encourages the incoming administration to impose and then publicize steep penalties against employers in the hopes of deterring future bad conduct.

The report offers a number of additional suggestions – from devoting more funding to the Department of Labor to specifically targeting high risk industries – designed to draw attention to and impose penalties against workplace violations. While it remains to be seen to what extent the incoming administration will implement these suggestions, each one presents significant hurdles for employers. Clearly, you should begin to consider the impact that a more employee-friendly Department of Labor may have.

## **Executive Orders**

The most likely device President-elect Obama will employ upon being sworn into the office is the executive order. John Podesta, chief of Obama's transition team, announced that Obama has been reviewing President Bush's Executive Orders to determine which will no longer have effect under an Obama presidency. "There's a lot that the President can do using his executive authority without waiting for congressional action, and I think we'll see the President do that," Podesta said. "I think that he feels like he has a real mandate for change. We need to get off the course that the Bush administration has set."

In the employment context, "change" will most likely occur through the repeal of certain Executive Orders signed by President Bush.

### **A. EO 13201**

In February 2001, President Bush signed into law Executive Order 13201, which requires employers working on government contracts to advise their employees of the right to refrain from joining a union. The Order also requires employers to inform non-union employees of their right to withhold union dues not directly related to collective bargaining, contract administration, or grievance adjustment.

While the effects of the Order are largely speculative, some White House projections estimate that it saves non-union employees up to \$2.4 billion annually, or \$400 per employee.

Of course, unions strongly contest these statistics and argue that the Order unfairly emphasizes the employee's right to refrain from union activity while ignoring the employee's right to join a union.

Executive Order 13201 is therefore a likely target for an incoming Democratic administration. Indeed, shortly after President Clinton took office in 2003, he repealed an Order signed by President H.W. Bush that was nearly identical to Executive Order 12301. Employers can expect similar action from a President Obama in 2009.

#### **B. EO 13202**

Executive Order 13202 is also subject to repeal. This Order prohibits federal agencies from requiring government contractors to enter into agreements with unions.

While the Order does not prevent unionized employers from obtaining government contracts, it has been heavily criticized by a labor movement which had grown accustomed to eight years under President Clinton in which government contracts could only be awarded to unionized employers. Given unions' resurgent influence in Washington, expect a strong push from organized labor for a President Obama to repeal Executive Order 13202 and return to Clinton administration policy requiring awards of government contracts to unionized employers.

#### **C. EO 12989**

On June 9, 2008, President Bush amended Executive Order 12989 to require all government contractors to electronically verify the immigration status of their employees. While President-elect Obama expressed his support for "e-verify" during the presidential campaign, many within the Democratic Party have vigorously opposed the system. The extent to which a President Obama will continue Bush administration policies with regards to immigration is therefore still very much in the air.

#### **Others**

The Executive Orders listed above are just a few examples of where an incoming Obama administration might diverge from the labor and employment policies of President Bush. In the public sector, President Obama will likely repeal the recent Bush amendments to Executive Order 12171, in which the Departments of Energy, Homeland Security, Justice, Transportation, and Treasury were exempted from the Federal Labor-Management Relations Act.

### **Conclusion**

It is clear that labor's goals for 2009 are ambitious. You must be prepared not only for the possibility of new laws affecting the workplace, but also the strict enforcement of existing laws. Since the incoming administration intends to "hit the ground running," you need to do the same. Our advice is to start considering your employment practices – sooner, rather than later.

---

Ed Foulke was Assistant Secretary of Labor for OSHA in the George W. Bush administration, and was formerly Chairman of the Occupational Safety and Health Review Commission.

## ***Related People***

---



**Edwin G. Foulke, Jr.**

Partner

404.240.4273

[Email](#)