



The Silver Lining – Congress Is Distracted

Insights

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With the economic downturn and political change in Washington, the past year has been difficult for American businesses. But in many ways, employers have benefited by the fact that legislators have been focused on bailouts, stimulus packages, and healthcare reform. These politically-charged subjects have kept the legislators' focus off of other big changes to the workplace that are waiting in the wings. Without these larger issues, legislators would have been acting on numerous proposed laws to change virtually every area of employment law.

Most people are aware of the continuing attempts to amend the National Labor Relations Act, such as the Employee Free Choice Act and the Patriot Corporations Act. But many other proposed laws have received less publicity. If passed, these bills would dramatically change laws on discrimination, leave, wages and hours, and safety. Just a few of the laws currently proposed in the 111th Congress are summarized in this article.

Arbitration Of Disputes

Procedurally, the *Arbitration Fairness Act* would prohibit pre-dispute arbitration agreements for employment, consumer or franchise disputes, or disputes arising under any statute intended to protect civil rights. This proposed law would undo case law and a growing trend that has developed over almost 20 years in favor of such agreements.

Leave

Perhaps no area is more important to the Obama Administration than changing the kinds and amounts of paid leave that employers are required to provide. More than half a dozen laws are proposed that would expand employee leave rights. Among others:

The *Healthy Families Act*. This would allow employees to earn one hour of paid sick leave for every 30 hours worked to address their own health needs and health needs of their families. Employees would begin accruing sick leave when employed and may begin using their leave after 60 days. Employer coverage would be phased in over time, but the law would eventually cover employers with 25 or more employees.

The *Paid Vacation Act*. This act would amend the Fair Labor Standards Act (FLSA) to require employers to provide a minimum of one week paid annual leave to employees.

The *Security and Financial Empowerment Act (SAFE)* aims to promote economic security and safety of victims of domestic and sexual violence by providing entitlement standards and implementation guidelines for employee use of emergency leave to address domestic violence, dating violence, sexual assault, or stalking; permitting victims of domestic or sexual violence to substitute existing leave in lieu of emergency leave; and prohibiting certain discriminatory employer practices against victims of domestic or sexual violence.

The *Family Fairness Act*, the *Family and Medical Leave Enhancement Act*, and the *FMLA Inclusion Act* would all expand the coverage of the Family and Medical Leave Act, expand the category of employees eligible for such leave, and generally make it easier for employees to be eligible for family and medical leaves.

The *Family Leave Insurance Act*. This law would establish a Family and Medical Insurance Program, mandatory for certain covered employers, which would entitle eligible employees to paid family and medical leave benefits, similar to unemployment compensation or social security benefits.

Moreover, under the *Working Families Flexibility Act* (the so-called "Union of One" law), employees would have the right to "negotiate" changes in their hours of work, work schedules, place of employment, or related terms and conditions of work. Employers would be required to confer with employees and provide them with relevant information. This proposed law would also impose substantial penalties for noncompliance.

Employee Protections

In the area of employee rights and discrimination, the *Employment Non-Discrimination Act* (ENDA) would add to the list of federally-protected categories by prohibiting employment discrimination on the basis of sexual orientation or gender identity. Similar versions of this bill have failed over the past ten years, but with the current makeup of Congress, this law seems destined to finally pass – once legislators turn their attention to it.

In the area of plant closings or reductions in force, two laws have been proposed to amend the Worker Adjustment and Retraining Notification Act (WARN): the *Federal Oversight Reform and Enforcement of the WARN Act* (FOREWARN) and the *Alert Laid off Employees in Reasonable Time Act* (ALERT). Essentially, these proposed laws would expand the coverage of plant-closing laws to smaller employers, require more notice, and increase penalties for noncompliance.

The *Equal Employment for All Act* would amend the Fair Credit Reporting Act to prohibit the use of consumer credit checks against prospective and current employees as a factor in making adverse employment decisions. Exceptions would allow them to be used if the job involves national security, FDIC clearance, or positions of "significant financial responsibility," such as bank manager, loan officer, or financial manager. This proposed law would also prohibit employers from asking applicants to submit to voluntary credit checks

Wage & Hour Protections

In the wage and hour area, the *Fair Pay Act of 2009* would amend the Fair Labor Standards Act to prohibit discrimination in the payment of wages on account of sex, race, or national origin. This law would allow payment of different wages under seniority systems, merit systems, systems that increase earnings based on quantity or quality of production or that differentiate based on bona fide factors the employer proves are job-related or further legitimate business interests. It would also prohibit discrimination against or discharge of an individual for opposing any act or practice made unlawful by the act or for assisting in an investigation or proceeding under the act.

Two other proposed laws would effectively implement "maximum wage" controls:

The Excessive Pay Shareholder Approval Act would require a super majority (60%) shareholder vote to approve excessive compensation of any employee of a publicly traded company. "Excessive" compensation would be defined as being more than 100 times the average pay of all company employees. It would also require proxy materials to include information about a company's pay practices (lowest wages paid, average pay for all employees, number of persons paid more than 100 times the average pay, and total amount paid to those earning more than 100 times the average pay rate).

The Executive Pay Capped Deduction Act would prohibit employers from deducting any pay considered to be excessive compensation. It would use a similar definition for "excessive" as proposed in the Excessive Pay Shareholder Approval Act (100 times the average wage). This proposed law would also require reporting information about wages and pay practices to the Secretary of the Treasury.

Even if these maximum wage laws are not passed, the *Corporate and Financial Institution Compensation Fairness Act* would require all publicly-traded companies to give shareholders a nonbinding vote on executive compensation and golden parachute packages. This bill is similar to the Investor Protection Act and follows the provisions of the American Recovery and Reinvestment Act that requires TARP participants to give shareholders a voice on executive compensation.

Rights To A Safe Workplace

In the area of employee health and safety, the *Protecting America's Workers Act* would substantially overhaul the Occupational Safety and Health Act of 1970 (OSHA). This proposed law would expand the scope of OSHA, allow felony prosecutions against employers who commit willful violations that result in death or serious bodily injury, increase civil and criminal penalties, and expand whistleblower protections. Several other safety and health laws are proposed to increase recordkeeping by large employers and to address perceived issues in specific industries.

The Bottom Line: Expect Changes And Adapt

Regardless of whether any or all of these proposed laws actually pass, employers must accept that the economic, political, and social climate has changed. Employers who adapt to these changes will continue to survive and prosper, while those who don't will be more at risk for failure in today's world

world.

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