



Employment Notes

FLURRY OF LEGISLATION EXPECTED UNDER OBAMA ADMINISTRATION

President Barack Obama has repeatedly pledged to sign into law new employment laws favorable to workers. The President and the 111th Congress are moving swiftly to fulfill those promises.

The Lilly Ledbetter Fair Pay Act. President Obama is expected to sign into law the Lilly Ledbetter Fair Pay Act (H.R. 11; S. 181), which overturns Ledbetter v Goodyear Tire & Rubber Co. Inc.

In Ledbetter, the plaintiff (Ms. Lilly Ledbetter) accused her employer of sex discrimination stemming from unequal pay. The U.S. Supreme Court held 5 votes to 4 that, under Title VII of the Civil Rights Act of 1964, Ms. Ledbetter should have filed a claim of discrimination with the E.E.O.C. within 180 days of the employer's first decision to pay her less than a man working in the same position. The Court rejected the "continuing violation" argument that each paycheck she received resulted in a new violation.

The decision was subsequently cited by many judges, resulting in the dismissal of hundreds of claims under Title VII, the Age Discrimination in Employment Act, Title IX and the Fair Housing Act, among others.

The Fair Pay Act would amend Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Rehabilitation Act to provide that a new violation results from each paycheck made as a result of a discriminatory compensation decision. Thus, the new "paycheck accrual" rule means the claimants will have a new 180-day "statute of limitations" to file with the E.E.O.C. as the result of each paycheck (or 300 days if the claim is also covered by a state or local anti-discrimination law). The legislation is applicable to claims filed as the result of discrimination based on sex, race, color, national origin, religion, disability and age.

The Employee Free Choice Act. President Obama supports the proposed legislation (H.R. 800; S. 1041), which, among other things, would amend the National Labor Relations Act to provide that the N.L.R.B. shall certify a union if a majority of employees sign valid union authorization cards. Currently, an employer can require a secret ballot to ratify the decision, even if a majority of employees has signed union authorization cards. Employers would lose this right and thus, the amendment would make it easier to form a union.

The Independent Contractor Proper Classification Act. It is expected that the Obama administration will push for the passage of the Obama-Durbin Independent Contractor Proper Classification Act (originally introduced in September 2007 as S. 2044).

Section 530 of the Revenue Act of 1978 currently provides a safe harbor for an employer which relies on a common practice in its industry of designating certain workers as independent contractors. The IRS is

barred from penalizing employers that comply with the requirements of the safe harbor, and the IRS lacks the power to reclassify workers where the employer satisfies the safe harbor requirements.

The Independent Contractor Proper Classification Act would eliminate the ability of employers to justify the classification of workers based on the decisions of other employers in the same industry. The bill would also empower the IRS to reclassify workers and issue guidance on the classification issue.

The bill provides that the Secretary of the Treasury shall establish procedures by which individual workers may ask the IRS to determine whether he or she is properly classified. Employers would be prohibited from retaliating against a worker who seeks such a determination, and employees may be entitled to reasonable attorneys' fees and expenses in any case in which she or he achieves reclassification. If a violation is found, the IRS would be directed to perform an audit of the employer.

Other elements of the bill include increased cooperation between the IRS and the U.S. Department of Labor, and employer notification, posting and records retention requirements.

The Family and Medical Leave Act. President Obama has promised to expand the coverage of the Family and Medical Leave Act of 1993 (FMLA), which generally provides 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons. The FMLA currently only applies to employers with 50 or more employees.

President Obama has sought to expand the coverage of the FMLA to include businesses with 25 or more employees. The President also desires to expand the FMLA to allow workers to take job-protected leave, among other reasons, (i) for elder care; (ii) to participate in a child's academic activities; and (iii) to address domestic violence and sexual assault against themselves or a family member.

Paid Leave Programs. The new administration is likely to propose legislation to encourage and support states in enacting paid leave programs. President Obama has proposed providing up to \$1.5 billion to assist states with the initial costs of paid leave insurance programs. According to President Obama's proposal, the U.S. Department of Labor would provide technical advice to the states on how to craft paid-leave programs. The proposal is in addition to the President's promise to require that employers provide at least seven paid sick days per year.

Other Developments. The President is expected to seek to (i) extend unemployment insurance benefits and suspend taxes on those benefits; (ii) raise the minimum wage and peg it to inflation; (iii) provide a new tax credit to companies that add jobs in the United States; and (iv) vigorously enforce the recently-enacted E.E.O.C. guidelines on caregiver discrimination.

Conclusion. The Obama administration will press for the speedy enactment of legislation favorable to workers. Employers will be well-served by closely following the new President and Congress, and by remaining aware of their obligations under any new legislation.

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This is a general summary of potential legislative action and is not intended to be legal advice rendered in response to a specific set of facts. If you have any questions regarding new legislation or other issues of employment law please contact any of the following partners in our Employment Law Group:

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