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LABOR AND EMPLOYMENT OUTLOOK FOR 2010

By: Mark M. Stuble, Esq.

It goes without saying, 2009 was a difficult year economically. Many businesses suffered, as did the millions of employees who experienced job losses. However, if there is a silver lining to the 2009 economic cloud, employers from every industry escaped what was expected to be an unprecedented tide of pro-labor legislation.

A Look Back at 2009

With the election of President Obama in 2008, many expected a tidal wave of pro-labor legislation as a payback for labor's unprecedented monetary and political support during the 2008 election. The Employee Free Choice Act (EFCA) and other pro-labor legislative initiatives appeared a foregone conclusion with the Democrats' new supermajority in the Senate and increased control of the House. But, the ambitious legislative goals of America's labor unions were not achieved.

The Lilly Ledbetter Fair Pay Act was enacted in January 2009, which significantly expanded the time within which pay discrimination claims can be pursued. But, the key legislative goal of organized labor, EFCA, was never presented for a vote, and many other pro-labor bills were never even introduced.

Labor's frustration with its inability to further its legislative agenda was compounded by the loss of union jobs and representation in the U.S. workforce. In 2007 and 2008, the percentage of U.S. workers represented by labor unions increased for the first time in decades. Unions believed that the tide had turned and that the election of pro-labor candidates in 2008 would lead to significant increases in union representation nationwide. For now, those expectations have been dashed.

Bureau of Labor Statistics data issued in January indicate that the percent of U.S. workers represented by unions fell slightly in 2009, and the number of workers belonging to unions declined by 771,000. Union membership among public sector employees (37.4%) was significantly higher than union membership of private sector employees (7.2%). Labor unions are frustrated and appear poised for a return to grassroots organizing to reverse this trend.

Labor did receive some measure of payback with Executive Orders issued in early 2009 and with pro-labor provisions tied to the so-called "stimulus" (the American Recovery

and Reinvestment Act or “ARRA”) and government-funded projects. These measures, however, did not increase the ranks of union-represented employees in the U.S. workforce.

The litigation environment for employers in 2009 was more unfavorable. As expected in an economic decline, the number of claims and lawsuits against employers increased. There were 93,277 discrimination charges filed during the 2009 fiscal year – the second highest total ever. The EEOC recovered more than \$376 million in monetary relief for claimants. Furthermore, FLSA suits, ERISA litigation, and Americans with Disability Act claims all increased in 2009. Employers involved in class actions in 2009 paid out large verdicts and settlements. Indeed, employers involved in the 10 largest Title VII settlements reportedly paid out over \$100 million in 2009. These results do not even reflect the growing tide of state claims asserted against employers for alleged violations of state EEO and wage and hour laws.

What Lies Ahead in 2010

Employers, both union and nonunion, might think that the greatest threat of change has been avoided now that the Democratic supermajority has passed with the recent election of Senator Brown from Massachusetts. That sense of security, however, is misplaced. The prospects for legislative, administrative, and regulatory changes in 2010 present significant challenges.

Clearly, the election of Brown in the Senate creates a significant hurdle to health care reform and the enactment of EFCA as currently proposed. However, labor is incensed with the events over the past year and the lost opportunity presented by the 2008 elections. AFL-CIO president Richard Trumka warned politicians last month that their members will not vote in the 2010 midterm elections for those who “think that they can push a few crumbs our way.” He called on Obama to make good on the promises that he made when elected, particularly the enactment of EFCA.

Passing EFCA, as originally proposed, may be beyond reach. However, many of the legislative objectives of EFCA and other pro-labor legislation may be achieved through administrative and regulatory actions. This is an area where labor can expect to see significant change.

Obama has nominated new members to the NLRB who could change, by decision making, rule making, and procedures, the enforcement of the National Labor Relations Act. Wilma Liebman, Chairman of the NLRB, has publicly pronounced that the NLRB is “poised for change.” Furthermore, NLRB nominee Craig Becker (SEIU counsel) has expressed his support of radical changes to current NLRB decisions and procedures, which could result in quickie representation elections, greater union access to employees on employers’ premises, and other changes that would undermine employers’ rights and involvement in representation elections. These changes could significantly enhance the vulnerability of employers and employees to unionization.

The regulatory front presents additional challenges for both union and nonunion employers. As President Obama's new Secretary of Labor Hilda Solis openly boasted, "[t]here is a new sheriff in town" and "the Department of Labor is back in the enforcement business." Enhanced enforcement actions are expected by all federal employment agencies (e.g., OFCCP, EEOC, DOL, OSHA). The DOL hired 710 enforcement personnel in 2009. The Obama budget for 2010 includes \$25 million to help the DOL combat employer misclassification of independent contractors. The DOL expects to hire more than 177 investigators and other enforcement staff this year. The DOL's Wage and Hour Division will receive an increase in funding of almost \$20 million, including funding to hire 90 new investigators. Under the DOL's Davis-Bacon Act (DBA) enforcement, funded under the ARRA, the number of DBA investigations is expected to double over the next two years. Further, the EEOC, OSHA, and OFCCP will also receive additional funding and employ more investigators for enforcement.

Despite the recent changes in the political environment in D.C., a host of pro-employee legislation remains. Some of the proposed legislative reforms include the Paycheck Fairness Act, which would enhance federal protections against compensation discrimination, the Arbitration Fairness Act, which would invalidate pre-dispute arbitration agreements, and the Employment Non-Discrimination Act, which would prohibit discrimination based on sexual orientation and gender identity.

Employers can expect more employment suits in 2010. Recent surveys found that the number of employment-related class action filings increased significantly in 2009. This trend is expected to continue in 2010, particularly with wage and hour litigation in federal and state courts, age discrimination actions, and WARN lawsuits filed by laid-off workers. Employers can also expect a rise in ADA claims due to the ADA Amendments Act.

What This Means for Employers

Employers should be vigilant to oppose proposed employment legislation that could be detrimental to their operations. Moreover, employers should act now to reduce their vulnerability to expected administrative and regulatory/enforcement changes, as well as the continued increase in employment litigation.

Legal compliance audits (e.g., EEO, Wage & Hour, OSHA, etc.) are essential. These audits may need to be conducted in a manner that protects the legal privilege of the audit results. Noncompliance issues also should be addressed in a manner that does not unnecessarily heighten the employer's exposure to claims in the wake of compliance changes.

Further, employers should review all policies for legal and practical sufficiency. Policies should be updated to reflect the realities of the current business practices (this is an excellent area for employee involvement). Employers should ensure that all policies and changes are effectively communicated to employees. Employees should understand the business rationale for policy changes.

Train management, on all levels, regarding legal and policy compliance and enforcement. Employers that fail to properly train management (and hold them accountable for compliance/enforcement) may lose the ability to raise important legal defenses to certain claims and experience greater legal exposure to compensatory and punitive damages. Lack of consistent policy enforcement also negatively impacts management credibility and employee morale.

Finally, employers should plan for anticipated changes in the laws and regulations. Nonunion employers, in particular, must be prepared for the prospect of quickie elections and changes in NLRB precedent that could give unions greater access to employees, redefine who qualifies as a “supervisor” under the NLRA, and enhance employer penalties for alleged unfair labor practices.

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