

Workplace Law Implications of 2012 Presidential Election

Now that we know President Barack Obama will remain in office for the next four years, what can employers expect from a second-term Obama Presidency? In 2008, the first piece of legislation President Obama signed into law was the Lilly Ledbetter Fair Pay Act. He later signed the 2010 health care reform law. President Obama and the federal agencies responsible for enforcing the nation's workplace laws likely will continue to pursue a number of pro-employee initiatives. A sampling is provided below.

Department of Labor

Over the next four years, we may continue to see initiatives from the Department of Labor (DOL), including the Wage and Hour Division (WHD), Occupational Safety and Health Administration (OSHA) and Office of Federal Contractor Compliance Programs (OFCCP), that will add to employers' compliance obligations.

At the WHD, we can expect regulations such as a final rule substantially restricting the scope of the companionship services exemption under the Fair Labor Standards Act. We also foresee aggressive enforcement initiatives, increased demands for liquidated damages in order to resolve wage and hour investigations, higher levels of civil money penalties, and more *amicus* *briefs* and other guidance documents taking positions that can make it harder for employers to prevail. In general, litigation rather than amicable resolution of disputes with employers is in the offing.

Employers may see a more active OSHA. From a regulatory perspective, rules that could impact many employers are about to be proposed or published in final form. From an enforcement perspective, employers should expect to see the same high level of OSHA enforcement. Some of the specific regulatory initiatives that are primed to move forward include:

- **Injury and Illness Prevention Program (IIPP).** OSHA's IIPP rule has been the agency's most significant regulatory priority. Although it has been under development for almost three years, over the last several months, OSHA has hinted that it is ready to begin the Small Business Regulatory Enforcement Fairness Act (SBREFA) process for the rule, in which the agency would solicit input on the rule from affected small business entities. This is a significant step in developing regulations.
- **Crystalline Silica.** Employers should stay tuned for OSHA's rulemaking to comprehensively regulate crystalline silica. The proposed regulation could have significant effects on employers and has been under review by the Office of Management and Budget (OMB) since February 2011.
- **Stricter Injury and Illness Reporting Obligations.** OSHA has proposed requiring employers to report workplace amputations to the agency within 24 hours, as well as *all* in-patient hospitalizations within eight hours. Existing recordkeeping rules require employers to report in-patient hospitalizations of three or more employees to OSHA within eight hours. Any workplace fatality would continue to be reportable as well.

Similarly, at OFCCP, proposed regulations for federal contractors and subcontractors likely will go into effect during President Obama's second term. First, OFCCP has proposed increased veterans-related obligations. These include setting veteran "goals" in areas of

underutilization, entering into formal linkage agreements with diversity organizations to refer veterans to employers, and according an undefined hiring “preference” to veterans. Second, OFCCP proposed imposing added disability-related restrictions on federal contractors and subcontractors. These include requiring them, among other things, to request the disability status of applicants and new hires, set disability “goals” in areas of underutilization, make online application systems technologically accessible to individuals with disabilities, and allow disabled employees to provide their own accommodations. Despite significant employer criticism of the proposed disability regulations, similar or modified regulations are likely to go into effect under the Obama administration. Finally, proposed changes to the Scheduling Letter and its accompanying Itemized Listing, which outline the information contractors and subcontractors must provide to OFCCP in an audit, likely will be delayed or subject to modification. The proposed changes include, among other things, detailed information on accommodations and leaves requested, detailed compensation data, data on promotional and termination “pools,” and data on individuals who have declined to self-identify.

Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) likely will continue its aggressive enforcement agenda. This may include implementing components of its Draft Strategic Enforcement Plan, released on September 4, 2012. The Plan lists eliminating systemic barriers in recruiting and hiring discrimination as the EEOC’s first priority, followed by protecting immigrant and migrant workers from discrimination. The EEOC also is committed to investigating “emerging” issues. Among these are scrutinizing common Americans with Disabilities Act (ADA) defenses invoked by employers, utilizing Title VII of the Civil Rights Act to protect members of the LGBT community, and pushing employers to accommodate

pregnant women. The EEOC also may move forward on issuing potentially controversial guidance on leave as a reasonable accommodation under the ADA and guidance on the use of credit checks.

Health Care and Employee Benefits

The hallmark of President Obama's first term, the 2010 health care reform law, is here to stay. The three government agencies primarily charged with enforcement of the health care reform law (Department of Health and Human Services, Department of Labor and Internal Revenue Service) likely will move quickly to promulgate regulations, regardless of the make-up of the 113th Congress. While employer lawsuits challenging various provisions of the law and the agencies' enforcement authority may increase, companies must ensure they are in compliance with the new law's requirements.

It is also possible that, under President Obama, the capital gains and income tax rates may rise as a result of the expiration of the Bush tax cuts. The impact of these rate increases on high-income taxpayers, together with the application of the new 3.8 percent "Medicare surtax" on investment income, would result in a tax-deferral advantage available to certain sellers of employee stock ownership plans or ESOPs. Thus, ESOP formation and growth might be likely. (For more information, see [Revival of Section 1042 of Internal Revenue Code and Uncertainty of Post-2012 Capital Gains Rates.](#))

The Department of Labor may revisit its controversial regulations defining ESOP appraisers as ERISA fiduciaries and continue the aggressive enforcement of ESOP valuation investigations and cases.

Further, legislative proposals to address 401(k) structural issues likely will be explored in light of the impact that both investment performance and withdrawals during the past few years have had on these plans as viable retirement vehicles.

National Labor Relations Board

During President Obama's first term, the National Labor Relations Board's (NLRB) decisions and rulemaking have favored organized labor. We expect this trend to continue — through Presidential Executive Orders as well as NLRB and Department of Labor agency initiatives.

Over the past few years, the Board has taken action both through adjudication (i.e., new decisions overturning or expanding existing case law) and administrative agency rulemaking that broaden the National Labor Relations Act's (NLRA) impact and make it easier for unions to organize workers. In particular, the Notice of Employee Rights posting requirement (if upheld by the courts), the expedited election rule (if upheld or reissued by the Board), and bargaining unit composition changes will all work together to increase pressure on employers in 2013 and beyond.

In addition, the NLRB's "protected concerted activity" initiative is creating a significant alternative for unrepresented employees to contest employer policies and practices. Section 7 of the NLRA protects the rights of both union and non-union employees to engage in "concerted activities" for their mutual aid and protection. This includes discussions among employees concerning their terms and conditions of employment. Employer policies dealing with social media, "at will" status, class action waivers, electronic communications, confidentiality of investigations, harassment and solicitation/distribution are among those receiving critical

scrutiny from the Board. For example, under recent Board decisions, unlawful conduct can be found not only in written workplace policies, but also in seemingly reasonable statements made by executives, supervisors and human resource representatives that are construed as interfering with an employee's rights. The Board's aggressive, employee-friendly agenda will no doubt continue.

Immigration

During his second term, President Obama probably will try to revive comprehensive immigration reform. Efforts have failed repeatedly over the past 12 years because of lack of agreement in Congress over the elements of such reform. Key issues have included whether to create a "path to citizenship" for certain illegal aliens, how to maintain national security when the southern border remains porous, how to strengthen the I-9 employment eligibility verification system to ensure that employers hire legal workers (a new Form I-9 is pending and workplace enforcement efforts remain vigorous), and how to make the system more welcoming to foreign investors, entrepreneurs, and those with technical, STEM skills (science, technology, engineering, and mathematics) in high demand in the U.S. labor market.

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Jackson Lewis attorneys will present their views in the following free webinars: [Election 2012 Is Over – What Can We Expect from OFCCP?](#) on November 14, and [Analysis of the Labor Relations Implications of the Election](#) on November 20. Jackson Lewis attorneys will continue to track the latest developments on the legislative and regulatory fronts and will provide updates. If you have any questions, please contact the Jackson Lewis attorney with whom you regularly work.