

Employment Legislation Update

July 2009

Despite the current focus on healthcare legislation in Congress, proposed new statutes that would alter the employment landscape in the United States are steadily progressing toward enactment. We last reviewed the overall legislative situation following the election last year in November. Below is an updated list of labor & employment legislative initiatives under consideration by the 111th Congress. Possible changes include enhancing unions' opportunity to organize workplaces, protecting sexual orientation under Title VII, enhanced "equal pay" requirements, expanding OSHA, reclassifying supervisors as employees under the National Labor Relations Act, expanding FMLA rights, extending the time for filing charges of discrimination under Title VII and authorizing compensatory time off. Now that the Democratic party has both a significant majority in the House and 60 votes in the Senate, there will likely be strong efforts to pass all or most of this legislation as quickly as possible.

1. Employee Free Choice Act (S. 560; H.R. 1409)

Summary: Provides for union representation upon authorization card check and eliminates secret ballot NLRB elections; provides for mandatory mediation and binding arbitration to set the terms and conditions of collective bargaining agreements if employer and union cannot agree within 120 days; greatly increases penalties against employers for unfair labor practices.

Status Update: Currently, the bill is awaiting further action, as no major action has occurred since March 10, 2009, when the bill was introduced to Senate Committee, read twice and then referred to the Committee on Health, Education, Labor, and Pensions. An identical bill, H.R. 1409, was referred to the House Committee on Education and Labor on March 10, 2009, before being referred to the Subcommittee on Health, Employment, Labor, and Pensions on April 29, 2009. Organized labor continues to place heavy emphasis on passage of this bill. A compromise among key senators has been reached on a new version of the Employee Free Choice Act that will attract the necessary 60 votes to assure passage in the Senate. The essential feature of the compromise is elimination of mandatory recognition by "card check." Instead, the new version shortens the preelection campaign period to only 5 to 10 days and mandates elections after 30% or more of a company's workers have signed authorization cards. Although as yet there is no final draft of the proposed compromise, supporters plan to work out the details and then call for action on the new bill in September.

2. The National Labor Relations Modernization Act (H.R. 1355)

Summary: This Act amends the National Labor Relations Act to set forth special procedural requirements for reaching an initial collective bargaining agreement following certification or recognition of an individual or labor organization as the elected exclusive collective bargaining representative of a unit of 20 or more employees. Employers must provide labor organizations with equal access to employees prior to an election regarding representations and must prevent delays in initial collective bargaining. Additionally, the Act would strengthen enforcement against intimidation of employees by employers.

Status: The Act was introduced on March 5, 2009, and referred to the House Committee on Education and Labor. On April 29, 2009, the Act was referred to the Subcommittee on Health, Employment, Labor, and Pensions, where it awaits further action.

3. Employment Non-Discrimination Act (H.R. 2981; H.R. 3017)

Summary: This Act would prohibit employment discrimination, preferential treatment and retaliation on the basis of sexual orientation by employers with 15 or more employees, bringing transexual, homosexual, lesbian and transgendered persons within the same protections afforded to race, sex, age and national origin under Title VII.

Status Update: On June 19, 2009, H.R. 2981 was referred to the House Committee on Education and Labor, as well as the House Administration, House Oversight and Government Reform, and House Judiciary committees. On June 24, 2009, the identical H.R. 3017 was introduced and referred to the same committees. The Act has seen a considerable increase in support since 2007, with the current 2009 version having 114 original co-sponsors as opposed to 62 co-sponsors in 2007. With bipartisan support, there appears to be a good chance the Act will pass this time around.

4. Paycheck Fairness Act (S. 182; H.R. 12)

Summary: This Act would require that employers justify any unequal pay and bear the burden of proving that pay actions are job-related and consistent with a business necessity; prohibits employers from retaliating against employees who share salary information with their co-workers; and allows women to sue for compensatory and punitive damages for pay disparity. It also would require the Department of Labor to collect and disseminate wage information based on gender and create a new grant program to help strengthen the negotiation skills of girls and women.

Status Update: On January 6, 2009, the Act was introduced in the House and referred to the House Committee on Education and Labor. A few days later on January 9, 2009, the Act passed and was agreed to in the House by a vote of 256 - 163 and is now awaiting further action.

5. Protecting America's Workers Act (H.R. 2067)

Summary: This Act significantly expands the Occupational Safety and Health Act. Specifically, the legislation would apply federal safety standards to workers who are not currently covered, including federal, state, and local government employees and previously exempt private sector employees; increase penalties against employers for repeated and willful violations, including making felony charges available when an employer's repeated and willful violation of the law leads to a worker's death or serious injury; expand protections and damages for workers who blow the whistle on unsafe workplace conditions; require public disclosure of safety violations; and mandate that employers must pay for safety equipment, such as goggles, gloves, respirators, or other personal protective equipment.

Status Update: On April 23, 2009, the Act was introduced and referred to the House Committee on Education and Labor. The last major action occurred on May 21, 2009, when the Act was referred to the Subcommittee on Health, Employment, Labor, and Pensions. No change has occurred since that time.

6. Public Safety Employer-Employee Cooperation Act (H.R. 980)

Summary: This Act would enable union organizing and representation of state and local police, firefighters and emergency medical workers, including: the right to join a union, the right to bargain collectively over wages, hours and terms and conditions of employment, a mediation or arbitration process for resolving impasse in negotiations and enforcement of the law through the courts rather than the NLRB.

Status Update: While the 2007 version appeared as though it would easily pass, its progress was halted in May of 2008 when Senate Democrats dropped the bill after receiving complaints by Republicans who needed more time to offer amendments. The bill was once again introduced on January 9, 2009, and on that date referred to the House Committee on Education and Labor, yet no major action has occurred since that date.

7. The RESPECT Act

Summary: This Act (the Re-Empowerment of Skilled Employees and Construction and Tradesworkers Act) would bring supervisors within the definition of "employees" under the National Labor Relations Act, including construction workers or nurses who often assign tasks to and direct the work of less-skilled and less-experienced workers.

Status Update: No major action has been taken since its introduction in 2007. However, much speculation abounds that action will be taken at some future point, considering the fact that President Obama and Vice President Biden both acted as co-sponsors of H.R. 1644.

8. Family & Medical Leave Act - Amendments & Changes (See H.R. 2132 & 824)

Summary: Amendments have been proposed to expand the Act on a wide variety of topics, including mandated paid family, medical and sick leave, military leave coverage and expanded use rights.

Status Update: On January 18, 2009, the Department of Labor finally implemented the first amendments to the Act since its enactment in 1993. The main goal of these amendments is to allow the FMLA to operate more smoothly, and these amendments are the result of an extensive, multi-year fact-finding and review process. The changes reflected in the amendments require that employers review their existing FMLA policies, forms and practices to ensure that they are in compliance with the new regulations. Some of the new regulatory changes include additional benefits for military families (military caregiver leave and qualifying exigency leave) and further clarification of certain policies related to things like serious health conditions, the medical certification process, fitness for duty certifications, substitution of paid leave, and employee notice obligations. Additionally, new amendments are pending that would expand coverage to same-sex spouses and parents and to expand the leave allowed to care for the educational needs of children and the general care of elderly relatives.

9. The Lilly Ledbetter Fair Pay Act of 2009 (S. 181)

Summary: This Act amends the Civil Rights Act of 1964 and declares that an unlawful employment practice occurs when a discriminatory compensation decision or other practice is adopted, an individual becomes subject to that decision or practice, or an individual is affected by application of the decision or practice. The Act also allows liability to accrue, allowing an aggrieved person to obtain relief for up to two years preceding the filing of a charge. This Act also applies the same provisions to claims of compensation discrimination under the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973.

Status Update: After being introduced in the Senate on January 8, 2009, the Act made its way through several hearings and amendments before finally being signed by the President on January 29, 2009, thereafter becoming Public Law No. 111-2.

10. The Title VII Fairness Act (S. 166)

Summary: This Act would amend the Americans with Disabilities Act of 1990 and Title VII of the Civil Rights Act of 1964 to delay the start of the time period for filing charges of employment discrimination until the aggrieved person has, or should be expected to have, enough information to support a reasonable suspicion of the discrimination, if such information was not available on the date on which the alleged discrimination occurred. The goal of the Act is to clarify the filing period and make the entire process more fair for those aggrieved persons.

Status: The Act was introduced on January 7, 2009, and was read twice and referred to the Committee on Health, Education, Labor, and Pensions, where it now awaits further action.

11. The Family-Friendly Workplace Act (H.R. 933)

Summary: This Act amends the Fair Labor Standards Act of 1938 to authorize private employers to provide compensatory time off to private employees at a rate of 1 1/2 hours per hour of employment for which overtime compensation is required. The Act authorizes an employer to provide such compensatory time only if it is in accordance with an applicable collective bargaining agreement, or in the absence of such an agreement, an agreement between the employer and employee.

Status: On February 10, 2009, the Act was introduced and referred to the House Committee on Education and Labor. On March 23, 2009, the Act was referred to the Subcommittee on Workforce Protections, where it now awaits further action.

12. The Whistleblower Protection Enhancement Act of 2009 (H.R. 1507)

Summary: This Act amends federal personnel laws relating to whistleblower protections to expand the concept of protected disclosure to include lawful disclosures without restriction to time, place, form, motive, context, forum, or prior disclosure, including disclosure made in the course of an employee's duties. The Act also, among other things, expands whistleblower protection to certain employees, such as those working for a national security agency and contractors/employees of the Transportation Security Administration.

Status: The Act was introduced on March 12, 2009, when it was referred to the House Oversight and Government Reform, before ultimately being referred to House Homeland Security, where it awaits further action.