

**Federation of Defense and Corporate Counsel
6th Annual Corporate Counsel Symposium**

**The Latest Developments in the
Quickly Changing World of Employment Law
and What's on the Horizon**

by Michele Ballard Miller

The economic free fall and the election of President Obama and a Democrat-controlled Congress have ushered in a new era for U.S. employers – one that presents unprecedented changes and uncertainties across the spectrum of laws and regulations that govern the American workplace. From discrimination to wage and hour and executive pay limits, from health care reform and union organizing to employee leaves and whistleblower protections, employers have to come up to speed on a growing list of new, proposed and anticipated changes, many of which reflect the new administration's promise to bring about employee-friendly change in the work environment.

This paper will survey employment-related laws that have been enacted since January 2009 when President Obama took office, as well as laws, regulations and other developments that are in the works. This paper will also provide best practices for staying in compliance with the new requirements as well as suggestions for corporate counsel on readying employment policies and practices in anticipation of what is yet to come.

New Laws and other Recent Developments

The Lilly Ledbetter Fair Pay Act

Just days into his presidency, President Obama signed into law The Lilly Ledbetter Fair Pay Act, overturning a U.S. Supreme Court decision, *Ledbetter v. Goodyear Rubber & Tire Co., Inc.* (2007) 127 S. Ct. 2162, that invalidated the “paycheck accrual rule” and put limits on how long an employee could wait to sue over pay discrimination. Specifically, the high court ruled that the statute of limitations on a pay discrimination claim begins to run at the time the pay decision is made, and not each time an employee receives a paycheck that is affected by that pay decision.

The new Act amends Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA) and the Rehabilitation Act. It provides that each time an employer pays wages, benefits or other compensation that stems in whole or part from a discriminatory compensation decision or other practice, the payment restarts the employee's 180-day statute of limitations for filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). The Act is retroactive to May 28, 2007.

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The language of the Act is very broad, applying to any type of employment practice that impacts compensation. For example, if an employee is discriminatorily denied a promotion that would have resulted in higher pay, each new paycheck reflecting the adverse decision will start the charge-filing clock anew. As a result, the Act will likely result in a surge of new pay bias claims.

Pro-Labor Executive Orders

Soon after approving the Ledbetter law, the president signed several pro-union Executive Orders impacting federal contractors' labor obligations. The orders, which take effect this year, heralded the first wave of a dramatic shift in labor law policy in the White House. Indicating the change to come, upon signing the orders Obama stated: "I . . . believe that we have to reverse many of the policies towards organized labor that we've seen these last eight years . . . I do not view the labor movement as part of the problem, to me it's part of the solution. We need to level the playing field for workers and the unions that represent their interests, because we know that you cannot have a strong middle class without a strong labor movement."

Here is a summary of the new Executive Orders:

Nondisplacement of Qualified Service Contract Workers, E.O. 13495. This order specifies that when a federal agency changes service contractors, the new contractor must offer jobs to qualified non-supervisory employees of the contractor's predecessor. No new employees can be hired until the incoming contractor offers a right of first refusal to the existing workforce.

Economy in Government Contracting, E.O. 13494. This prevents federal contractors from being reimbursed with federal funds for costs associated with influencing workers to oppose or support union organizing. The order lists examples of employer activities undertaken to persuade employees to organize or not for which costs will not be reimbursed, including: preparing and distributing materials; hiring or consulting legal counsel or consultants; holding meetings (including paying the salaries of attendees at the meetings); and planning or conducting activities by managers, supervisors or union representatives during work hours.

Notification of Employee Rights Under Federal Labor Laws, E.O. 13496. This order reverses a Bush-era order that required federal contractors to post a notice (known as the Beck Poster) alerting workers to the right not to join a union and to limit financial support of unions. Now, federal contractors will be required to post a workplace notice informing employees of their rights under the National Labor Relations Act, including the right to join a union. On August 3, 2009, the U.S. Department of Labor (DOL) issued proposed regulations implementing this order. The regulations are at <http://edocket.access.gpo.gov/2009/pdf/E9-17577.pdf>.

Project Labor Agreements for Federal Construction Projects, E.O. 13502. Under this order, federal agencies may require the use of project labor agreements (PLAs), which are prehire collective bargaining agreements covering terms and conditions of employment, on construction projects where the total cost is \$25 million or higher. Proposed regulations under this Executive Order were issued by the DOL on July 14, 2009, and are available at <http://edocket.access.gpo.gov/2009/pdf/E9-16619.pdf>.

The American Recovery and Reinvestment Act

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (H.R. 1). Among the many provisions of the \$787 billion economic stimulus package are new COBRA requirements that create a federal subsidy for COBRA premiums, new whistleblower protections, expanded HIPAA health information privacy requirements, and new H-1B visa obligations for certain employers. Here is an overview of what employers need to know.

COBRA subsidy. The stimulus bill contains provisions creating a subsidy for the cost of COBRA premiums. Specifically, "assistance eligible individuals" can be charged just 35 percent of the normal COBRA premium for periods of coverage beginning on or after February 17, 2009. An assistance eligible individual is someone for whom the qualifying event for COBRA coverage is the involuntary termination of the covered employee's employment between September 1, 2008, and December 31, 2009. The employer must pay the other 65 percent of the premium and seek reimbursement from the government through a credit against quarterly payroll taxes. The subsidy applies only for the first nine months of the COBRA period and does not extend the time period for which COBRA coverage is available.

The new law also contains a number of new COBRA notice provisions. Further information about the subsidy and related notice requirements is available from the DOL at <http://www.dol.gov/ebsa/COBRA.html>.

Whistleblower provisions. The law prohibits retaliating against an employee who discloses information that the employee reasonably believes evidences: gross mismanagement of an agency contract or grant relating to stimulus funds; gross waste of stimulus funds; substantial and specific danger to public health related to the implementation or use of the stimulus funds; an abuse of authority related to the implementation or use of stimulus funds; or a violation of law, rule or regulation related to an agency contract or grant, awarded or issued relating to stimulus funds.

These retaliation prohibitions apply to a broad range of employers that receive stimulus funds under the ARRA, including: a contractor, subcontractor, grantee, or recipient of funds; a professional membership organization, certification or other professional body; a licensee of the Federal government; a person acting directly or indirectly in the interest of an employer

receiving covered funds; and any contractor or subcontractor of the state or local government receiving stimulus funds.

H-1B Visas. Another provision of the massive stimulus package imposes new foreign labor hiring restrictions on employers that receive Troubled Asset Relief Program (TARP) funds. In particular, TARP recipients will automatically be deemed “Dependent Employers” for H-1B visa purposes, and therefore must make the additional attestations required of dependent employers when submitting a Labor Condition Application to sponsor an H-1B worker. More information on the visa requirements can be found at <http://www.foreignlaborcert.doleta.gov/>.

HIPAA. The ARRA modifies the existing Health Insurance Portability and Accountability Act (HIPAA) privacy, security and penalty rules to include additional restrictions on the disclosure of PHI, new notification requirements in connection with unauthorized disclosures of PHI, and increased penalties for privacy and security violations. In light of the new ARRA changes in the HIPAA arena, it will be critical for employers to place a new focus on compliance.

Children’s Health Insurance Program Reauthorization Act of 2009 (CHIPRA)

On February 4, 2009, President Obama signed CHIPRA, allowing states to subsidize premiums for employer-provided group health coverage for eligible low-income children, but also imposing new requirements on plan sponsors. Under the law, plan sponsors must notify employees of a new special enrollment opportunity and must notify employees of any premium assistance program opportunities. The law also sets penalties of \$100 per day for noncompliance. CHIPRA guidance is available at <http://www.cms.hhs.gov/CHIPRA/>.

What’s on the Horizon?

The new laws explained above are just the tip of the iceberg for employers. Here is a look at some of the many legislative proposals now on the table that will mean big changes for employers in the year ahead.

Executive Compensation Reform

Swept up in the wave of national outrage about executive compensation, Congress is taking swift steps toward setting pay standards for U.S. companies. Adding urgency to the lawmaker’s actions is a recent report from New York attorney general Andrew Cuomo, titled “No Rhyme or Reason: The ‘Heads I Win, Tails You Lose’ Bank Bonus Culture,” revealing that some financial institutions that received funds from the Troubled Asset Relief Program (TARP) have continued to pay out sky-high bonuses.

On July 31, 2009, the House passed, by a vote of 237 to 185, an executive compensation bill, with only two House Republicans voting in favor of it. The bill gives company shareholders a “say on pay” for top executives by granting them a nonbinding advisory vote on the company’s compensation practices. The measure would also authorize federal regulators to restrict inappropriate or imprudently risky compensation at financial companies, although firms that have under \$1 billion in assets would be exempt from the restrictions. In addition, financial firms would also be required to disclose any compensation structures that include incentive-based elements.

Health Care Reform

Going into its August recess, Congress was actively working on a health care reform bill. The House version, H.R. 3200, America’s Affordable Health Choices Act of 2009, would create a government-run public health plan and require employers to provide insurance to employees or pay a sliding scale tax based on amount of payroll; businesses with annual payrolls below \$500,000 would be exempt. And in the Senate, the Affordable Health Choices Act under consideration specifies that employers with 25 or more employees would be assessed an annual fee of up to \$750 if they fail to pay for at least 60 percent of the monthly premiums for employees’ health insurance.

Labor Legislation

Employee Free Choice Act of 2009 (EFCA), H.R. 1409, S. 560. Perhaps no other piece of legislation in recent memory has garnered as much attention as this bill, which seeks to make it easier for unions to organize. One of the most controversial provisions of the EFCA would certify unions on the basis of a card check without going through a secret-ballot election. However, as Congress headed into the August recess, it appeared that in an effort to broker a compromise, this provision was dropped from the bill; labor, on the other hand, won new provisions requiring quicker elections and giving unions workplace access to meet with employees during an organizing drive.

Truth in Employment Act of 2009, H.R. 2808, S. 1227. A rare employer-friendly measure, this would amend the National Labor Relations Act to permit employers to refuse to hire union salts (professional organizers whose primary objective is organizing rather than employment).

Family-Friendly Workplace Legislation

A number of family-friendly workplace bills are also under consideration in Congress, including measures that would expand family and medical leave coverage, provide paid sick leave and the right to flexible work arrangements, and more. Here is an overview of the key pending measures:

Family Friendly Workplace Act, H.R. 933. This bill would authorize private-sector employers, with the agreement of the employee or as authorized in a collective bargaining agreement, to provide compensatory time off at a rate of 1-1/2 hours per hour of employment for which overtime compensation is required.

Family Leave Insurance Act, H.R. 1723. This would create a federal insurance fund to provide employees with 12 weeks of paid leave under the Family and Medical Leave Act (FMLA). The insurance would be funded by employee and employer contributions, and benefit amounts would be based on income level and indexed to inflation. Employers that provide an equivalent or better paid leave plan could opt out of participating in the insurance fund.

Family and Medical Leave Enhancement Act of 2009, H.R. 812. This measure would expand the FMLA as follows: allow employees to take additional leave to participate in or attend their children's and grandchildren's educational and extracurricular activities; allow FMLA leave for the purpose of attending to routine family and medical needs and assisting elderly relatives; and expanding FMLA coverage to employers that have 25 or more employees.

Family Fairness Act of 2009, H.R. 389. This bill would eliminate the requirement that an employee have 1,250 hours of service during the previous 12-month period in order to be eligible for FMLA leave.

Military Family Leave Act of 2009, S. 1441. This measure would provide employees with two weeks of unpaid leave per 12-month period for each family member of the employee who is in the military and either receives notification of an impending call or order to active duty or is deployed in a contingency operation. The Act would apply to spouses, children or parents of members of the military.

Domestic Violence Leave Act, H.R. 2515. This bill would amend the FMLA to allow employees to take leave to address domestic violence, sexual assault or stalking, or to care for a family member addressing these issues.

Healthy Families Act, H.R. 2460. This would require employers that have at least 15 employees who work at least 30 hours a week to provide seven days of paid sick leave, and pro-rated leave for part-time employees. Paid sick leave could be used for the employee or for "a child, a parent, a spouse, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship" requiring care for an illness, injury or medical condition or for obtaining medical diagnosis or preventative care.

Working Families Flexibility Act, H.R. 1274. Employees who work for an employer with 15 or more employees would have a right to request flexible work terms and conditions. An employer would be required to meet with the employee and a designated rep-

representative of the employee's choosing to discuss the request, give a written decision to the employee and justify any denial in writing. If the employee is dissatisfied with the employer's explanation, the employee could request reconsideration of the decision, in which case the employer would have to go through the interactive process again. The legislation also contains an anti-retaliation provision.

Breastfeeding Promotion Act of 2009, H.R. 2819, S. 1244. This would amend Title VII to make breastfeeding and expressing breast milk in the workplace protected conduct, and it would amend the Fair Labor Standards Act (FLSA) to require employers with 50 or more employees to provide their breastfeeding employees with break time and private areas to express breast milk for their nursing children. It also would provide tax credits for employer expenses incurred to support or promote workplace breastfeeding.

Civil Rights and Other Legislation

Still other measures under consideration in Congress would expand federal civil rights protections, broaden mass layoff notice requirements and severely curtail employer use of consumer credit reports and mandatory arbitration agreements.

Employment Non-Discrimination Act (ENDA) of 2009, H.R. 2981. This would amend Title VII to prohibit discrimination in employment on the basis of actual or perceived sexual orientation and gender identity. Gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual, with or without regard to the person's designated sex at birth.

Fair Pay Act of 2009, H.R. 2151, S. 904. This bill would amend the FLSA to bar wage discrimination on the basis of sex, race or national origin, although it would permit payment of different wages under seniority systems, merit systems, systems that measure earnings by quantity or quality of production, or differentials based on bona fide factors that the employer demonstrates are job-related or further legitimate business interests. In addition, the bill would permit compensatory and punitive damages for violations, require employers on an annual basis to disclose certain wage-related records to the EEOC, and allow plaintiffs to pursue Rule 23 class actions (rather than the opt-in collective action mechanism currently used for Equal Pay Act and FLSA actions).

FOREWARN Act, H.R. 3042. This measure would amend the Worker Adjustment and Retraining Notification (WARN) Act by expanding notification requirements and enforcement provisions, including by extending coverage to employers with 75 or more employees, rather than 100 or more employees. The bill also would cover plant closings at facilities with just 25 or more employees at a worksite and specify that a mass layoff is one affecting 25 or more employees at a single worksite. The legislation also would require employers to provide 90 days notice, rather than the current 60.

Alert Laid off Employees in Reasonable Time (ALERT) Act, H.R. 2077. This also would amend the definition of a mass layoff under in WARN to cover an employment loss not just at a single site, but for a single employer at more than one worksite. Violations would carry a penalty of double back pay for each day of violation.

Equal Employment for All Act, H.R. 3149. The bill would amend the Fair Credit Reporting Act to generally prohibit the use of consumer credit checks in relation to current and prospective employees for the purposes of making employment decisions, even if an employee consents to a report for such purposes. The bill would establish certain exceptions, such as where the employee or applicant applies for or holds employment: that requires national security or FDIC clearance; with a state or local government agency that requires use of a consumer report; or that is a supervisory, managerial, professional or executive position at a financial institution.

Arbitration Fairness Act, H.R. 1020, S. 931. This bill specifies that a pre-dispute arbitration agreement will be invalid and unenforceable if it requires arbitration of employment or consumer disputes or any dispute arising under a civil rights statute. Arbitration provisions in collective bargaining agreements would be exempt.

Patriot Employers Act of 2009, S. 829. This bill is aimed at requiring businesses to increase wages and benefits and adopt a position of neutrality in union organizing drives. It would give a one percent tax credit to “Patriot” employers, a business that does the following: maintains U.S. headquarters; pays 60 percent or more of employee health premiums; has a union neutrality policy; and provides specified wage levels and retirement benefits to its employees. In addition, “Patriot” employers with 50 or more employees would be required to maintain or increase full-time positions in the U.S. relative to such positions outside the U.S. and provide full salary and insurance benefit differentials for National Guard and Reserve employees called to active duty.

Eagle Employers Act of 2009, H.R. 989. Similar to the Patriot Employers Act, this bill encourages employers to increase wages and benefits. However, this measure does not require union neutrality.

Wage and Hour Bills

Paid Vacation Act of 2009, H.R. 2564. This would amend the FLSA to require employers with 100 or more employees to provide workers with at least one week of paid vacation after one year of employment. Three years after enactment the requirement would increase to two weeks of paid vacation for large employers and one week for employers with 50 or fewer workers.

Rewarding Achievement and Incentivizing Successful Employees (RAISE) Act, H.R. 2732. The National Labor Relations Act would be amended to provide that an employer does not commit an unfair labor practice or violate the terms of a collective

bargaining agreement because the employer pays its employees higher wages than specified in the collective bargaining agreement.

Living American Wage (LAW) Act of 2009, H.R. 3041. This bill would amend the FLSA to provide for the calculation of the minimum wage based on the federal poverty threshold. It would be recalculated as of June 1, 2010 and then every four years.

Tips for Corporate Counsel: Getting Ready and in Compliance

With the new laws and others that are on the way, employers should begin the process now of implementing policies and practices that will help avoid compliance problems down the road. Here is a checklist to assist employers:

Educate supervisors, managers and human resources personnel. Make sure managers and others are kept fully up-to-date about changes in the law and in their obligations.

Review compensation practices. As a result of the Lilly Ledbetter Fair Pay Act and pending fair pay proposals, lawsuits challenging compensation may become more prevalent. To protect themselves, employers should consider conducting a self-audit (with an eye toward protecting the audit with the attorney-client privilege), as follows:

- Evaluate how pay compares for positions with similar grades in your organization. (It is important for job descriptions to be kept up-to-date.)
- Evaluate how pay compares for individual employees in comparable positions.
- Determine and articulate the legitimate business reasons for disparities.
- Evaluate standards and procedures for awarding wage increases and bonuses, including whether there is a consistent method to tie compensation to performance evaluations (or similar measures) and whether raises are consistent based on similar performance ratings.
- Determine whether wage increases are given in a fair and consistent manner, based upon objective criteria, to the extent possible.
- Ensure that compensation decisions are fully documented, including the process for making the decision and the decision itself.
- Determine whether pay corrections should be made and whether employees should be given back pay.

Evaluate recordkeeping practices. The Lilly Ledbetter Fair Pay Act will permit employees to challenge a wide range of employment decisions that affect compensation and benefits. As a result, employers should consider retaining documents regarding employment decisions for the term of employment plus several years.

Check COBRA subsidy compliance. Ensure that your organization or health plan administrator is using current COBRA notices that include information on the COBRA subsidy under the American Recovery and Reinvestment Act and that procedures are in place to ensure that eligible individuals are receiving the correct subsidy.

Evaluate changes to business associate contracts for HIPAA privacy compliance. Now that business associates of HIPAA covered entities must comply with the privacy and security rules, covered entities, such as employers who are plan sponsors, will need to review their business associate contracts for HIPAA compliance. For example, contracts will now need to contain language specifying that the business associate will comply with the rules, and contracts should specify procedures for notifying the employer in the event of a security breach. Furthermore, employers should consider including a provision to ensure that the business associate indemnifies the employer for any expenses or other losses incurred in connection with a security breach caused by a lapse in the business associate's practices. In addition, to help avoid compliance gaps that could lead to security breaches, employers should consider some form of due diligence to ensure the business associate is in compliance.

Confirm Executive Order compliance. Federal contractors should thoroughly review the recent series of Executive Orders to ensure full compliance. They should also monitor the issuance of proposed and final regulations implementing the orders.

Consider union-free best practices. In anticipation of the passage of the Employee Free Choice Act, which will encourage and facilitate union organizing, employers may want to consider publishing a union-free philosophy statement, as well as providing training to supervisors on how they can help the company remain union-free, including by soliciting employee input, treating employees with dignity and respect, and detecting early warning signs of union organizing activity and reporting same to human resources.

Review EEO policies and practices. Although federal law currently does not include sexual orientation or gender identity as protected classifications, many states already have such protections and passage of federal legislation is likely. Organizations can get a head start on compliance by determining which policies and practices, as well as EEO training materials, will require updating to address sexual orientation and gender identity.



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