

Labor Law Issues for 2009

THE RECENT ELECTION HAS CHANGED THE LANDSCAPE SO THAT EMPLOYERS NOW FACE A HOST OF NEW, GROUNDBREAKING CHANGES, that will redefine the employment relationship in the United States. Here is a summary of some of the most important Issues you need to know about and to prepare for this year.

With the New President and New Congress in January 2009, these Issues will define the Labor Movement for decades to come:

EFCA – THE EMPLOYEE FREE CHOICE ACT

EFCA would eliminate the secret ballot system for determining whether unions are organized in a workplace and allow union representation upon simple card checks.

EFCA is arguably the most profound change in labor law in 70 years. Most of the focus has been on the “card check” provision. That provision substantially dispenses with secret ballot representation elections conducted by the National Labor Relations Board. Instead, unions need only present authorization cards signed by a majority of bargaining unit employees to be certified as the collective bargaining representative.

Obviously, this makes union organizing far easier. The number of unionized workers has declined significantly over the last 50 years. In the mid-fifties 39% of private sector workers were unionized. By 1980, the percentage had shrunk to 23.6. Presently, only 7.5% of private sector workers are unionized. That figure promises to jump appreciably after EFCA is enacted. It's not unreasonable to project that union organizing rates could return to 1980 levels.

As nervous as employers are about card check, it's EFCA's first contract mandatory arbitration provisions that have businesses ordering antacids by the truckload. Under EFCA, if the company and union fail to reach agreement on a contract within 120 days after the union requests bargaining, the matter will be referred to an arbitration panel that will actually write the contract. That contract is binding for two years. I've negotiated more collective bargaining agreements than I can remember, but I can't remember too many times when an agreement was reached on an initial contract in four months. It sometimes takes that long just to agree upon the shape of the table.

What if an arbitrator mandates a wage scale that makes the employer uncompetitive? What if the arbitrator puts the company into a pension plan that renders the company unmarketable? Can the arbitrator require interest arbitration in exchange for a no-strike clause? The questions are interminable.

ARBITRATION FAIRNESS ACT

A new proposed bill, known as the Arbitration Fairness Act, would prohibit any agreement to arbitrate disputes involving employment, consumer, franchise, or civil rights matters before the dispute has arisen.

As amended by this act, the Federal Arbitration Act would now cover three additional categories of disputes: employment disputes, consumer disputes, and most interestingly, franchise disputes, which would be defined as follows: dispute between a franchisor and franchisee arising out of or relating to contract or agreement by which a franchise is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and the franchise is required to pay, directly or indirectly, a franchise fee.

Each of these categories of disputes would become subject to the following new requirements that are part of this proposed act. First, any pre-dispute arbitration agreement relating to these types of disputes would not be enforceable. Second, if a dispute arose “under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power,” that dispute could similarly only be arbitrated if the parties agreed to arbitrate after the dispute arose.

Finally, the act specifically provides that if any issue arises as to whether the Federal Arbitration Act would apply to a particular arbitration agreement, the court, rather than the arbitrator, would decide if the agreement was valid or enforceable, “irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.”

THE R.E.S.P.E.C.T. ACT

Another Issue that has the potential to become law is the R.E.S.P.E.C.T. Act (*Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers*) which, by changing the legal definition of supervisor, would allow many exempt supervisors a chance to join the ranks of organized union labor, and would no doubt lead to conflict of interest and loyalty problems at many worksites.

The revised definition of “supervisor” under Section 2(11) of the NLRA would read as follows:

Any individual having authority, in the interest of the employer, and for a majority of the individual’s work time, to hire, transfer, suspend, lay-off, recall, promote, discharge, ~~assign~~, reward, or discipline other employees, ~~or responsibly to direct them~~, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. (*Underlined added; strikethrough deleted.*)

Changing the definition of “supervisor” would significantly affect many workplaces by:

- Creating divided loyalties among front-line supervisors who assign work to employees. Under the RESPECT Act, such supervisors would be covered by the NLRA and could then form, join or assist labor organizations; be eligible to vote in NLRB supervised elections; solicit signatures for union authorization cards from “co-workers;” or picket, go on strike or engage in other work stoppages that would be inconsistent with a supervisor's duty.
- Fundamentally tipping the balance between the dual functions of the national labor policy:
 - (1) to protect the rights of rank-and-file employees in exercising their rights to form, join or assist a union without managerial or supervisory interference, while at the same time
 - (2) ensuring supervisors act as agents in the interests of their employers in matters of labor-management relations.
- To the extent that the NLRA definition is changed, there may also be changes to the FLSA’s definition, triggering litigation involving individuals currently classified, as “supervisors” but who may not meet a new definition.

THE PATRIOT EMPLOYER ACT

Would offer tax incentives to companies that, among other things, agreed to neutrality during union-organizing drives;

The legislation would provide a tax credit equal to one percent of taxable income to employers who fulfill the following conditions:

- First, employers must not decrease their ratio of full-time workers in the United States to full-time workers outside the United States and they must maintain corporate headquarters in the United States if the company has ever been headquartered there.
- Second, they must pay a minimum hourly wage sufficient to keep a family of three out of poverty: at least \$7.80 per hour.
- Third, they must provide a defined benefit retirement plan or a defined contribution retirement plan that fully matches at least five percent of each worker’s contribution.
- Fourth, they must pay at least sixty percent of each worker’s health care premiums.
- Fifth, they must pay the difference between a worker’s regular salary and military salary and continue the health insurance for all National Guard and Reserve employees who are called for active duty.
- Sixth, they must maintain neutrality in employee organizing campaigns.

WORKING FAMILIES FLEXIBILITY ACT

Would establish a mandatory grievance procedure and allow employees to file a charge with the Department of Labor if they did not agree with employer decisions on pay, work hours or location.

THE FAIR PAY ACT/EQUAL REMEDIES ACT

These pieces of legislation would overturn the Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.* and would expand the interpretation of discrimination claims to allow plaintiffs to reach further back in time when filing such claims.