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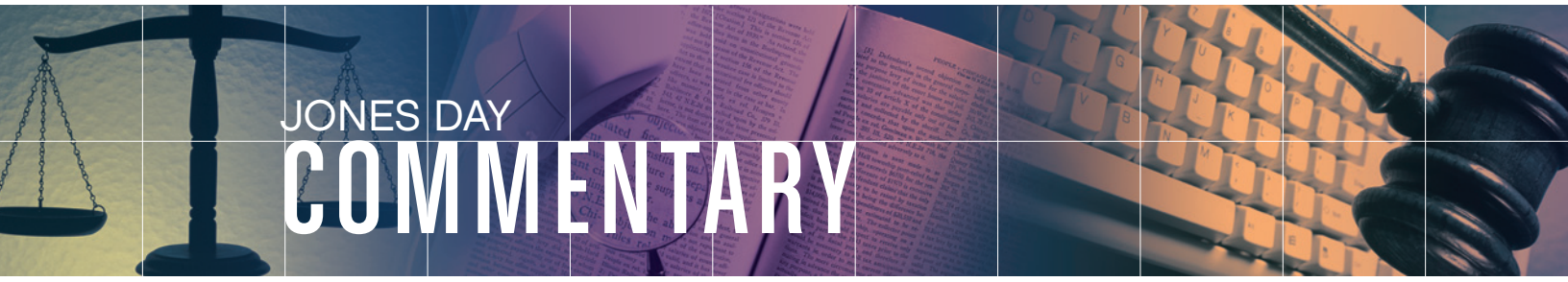


# SIGNIFICANT LABOR AND EMPLOYMENT INITIATIVES OF THE OBAMA ADMINISTRATION AND 111th CONGRESS

With the decisive victory of President Barack Obama and large Democratic gains in both houses of Congress, American businesses are bracing for significant changes in labor and employment legislation and regulation. Based upon the President's track record in the Senate, his comments during the campaign, and long-pending bills in the House and Senate, it is highly likely that the new administration will seek to implement legislative and regulatory changes related to wages, civil rights, executive compensation and benefits, taxes, union elections and collective bargaining, and immigration, focusing heavily on measures designed to support and strengthen the middle class. Many of these initiatives will, if enacted as proposed in the prior Congress, affect the workplace, both in terms of new regulatory measures and potential liability. And, despite the difficult economic environment, recent movement in the Senate last week concerning the Lily Ledbetter Fair Pay Act indicates that the economic climate may not deter quick action by the new administration and the 111th Congress on these issues. Accordingly, to successfully navigate the new legal landscape, employers should remain apprised of the proposed legislation and regulatory measures.

## 111th CONGRESS

### Lily Ledbetter Fair Pay Act (S. 181; H.R. 11)

**Summary of Significant Provisions.** Bypassing the House Education and Labor Committee, the House brought the Lily Ledbetter Fair Pay Act, H.R. 11, directly to the floor on January 6, 2009, where it passed on January 9, 2009. The House bill mirrors the version that passed the House in 2007 and 2008, proposing to amend Title VII by adding to Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(e)): "For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or *other practice*, or when an individual is *affected by* application of a discriminatory

compensation decision or other practice, *including each time wages, benefits, or other compensation is paid*, resulting in whole or in part from such a decision or other practice." (Emphasis added.) The proposed language would also be added to the Age Discrimination in Employment Act of 1967 ("ADEA"), and would apply to claims of discrimination in compensation brought under the Americans with Disabilities Act of 1990 ("ADA") and the Rehabilitation Act of 1973.

With this language, the bill seeks to overturn the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, which held that an unlawful employment act occurs only when the discriminatory compensation decision is made and not each time a paycheck is issued. The bill further provides that, under Title VII, if an employer is found to have engaged in pay discrimination, an affected employee would be entitled to back pay dating to two years prior to the filing of the charge, in addition to other damages provided by the statute. The legislation applies to all claims of discrimination in compensation, including disparate impact cases.

**Forecast and Potential Impact.** President Obama touted equal pay as one of his key campaign priorities. Given his support and the makeup of the new Congress, some version of the sweeping changes contained in the bill is likely to become law in 2009. The bill easily passed the House, and the Senate invoked cloture on January 15, 2009. As this *Commentary* goes to press, the expectation is that the Senate will bring this bill to vote on January 21, the day after the Inauguration, and that it will pass, possibly with amendment.

If enacted, the bill will vastly broaden the scope of potential damages for pay-related discrimination claims by expanding the definition of an unlawful employment discrimination act under the affected statutes by measuring the statue of limitations on compensation decisions from the date each paycheck applying an unlawful compensation decision is issued. This change would, in turn, weaken standing requirements and increase significantly both the settlement value of such lawsuits and the frequency with which they are filed. It may also cause pension funds to face unanticipated and potentially staggering liability. Legal observers have suggested that, in the event the bill meets significant opposition in the Senate, compromise legislation could include a "known or should have known" standard for when the statute of limitations begins to run rather than the above "paycheck rule."

## Paycheck Fairness Act (S. 182; H.R. 11)

**Summary of Significant Provisions.** Bundled with the Lily Ledbetter Fair Pay Act as part of the initial legislation proposed by the 111th Congress, the Paycheck Fairness Act amends the Equal Pay Act within the Fair Labor Standards Act of 1938 ("FLSA") to revise remedies for and enforcement of prohibitions against sex discrimination in the payment of wages. Among other changes, the bill would permit unlimited punitive and compensatory damages; require employers to demonstrate that any pay inequities are not sex-based, are related to job performance, and are justified by business necessity; and facilitate the filing of class action lawsuits. In addition, the proposed legislation allows the Secretary of Labor to make grants to eligible entities to carry out negotiation skills training programs for girls and women. Lastly, the proposed legislation prohibits employers from preventing their employees from disclosing salary information.

**Forecast and Potential Impact.** This bill was introduced as H.R. 12 on January 6, 2009, and then incorporated into H.R.11 when it passed the House on January 9, 2009. The bill has also been introduced in the Senate as S. 182; the current expectation is that the Senate will act first on the Lily Ledbetter Act and move more slowly with respect to this bill. But, again, given President Obama's support for legislation promoting pay equity, a version of this bill is likely to become law in 2009 as well.

Like the Lily Ledbetter Fair Pay Act, if enacted in the form that passed the House, this bill would significantly escalate potential liability for compensation discrimination due to its elimination of damages caps and its significant narrowing of legitimate employer defenses. The ambiguity of the standards set forth in the bill would likely create significant confusion and result in a further increase in litigation.

# 110th CONGRESS

## Arbitration Fairness Act of 2007 (S. 1782; H.R. 3010)

**Summary of Significant Provisions.** The Arbitration Fairness Act of 2007 rendered predispute arbitration clauses invalid if they required arbitration of (1) an employment dispute or (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power. The bill would have reversed the Supreme Court decision in *Circuit City v. Adams*, which held that employer policies could lawfully mandate that employees enter into binding predispute arbitration agreements as a condition of employment. The legislation also would have applied to consumer and franchise disputes but did not apply to arbitration provisions in collective bargaining agreements.

**Forecast and Potential Impact on Employers.** The House bill had 91 cosponsors, while the Senate bill had just six cosponsors. Although consumer rights advocacy groups are likely to push heavily for this bill, its future is uncertain under the incoming administration.

If enacted as previously proposed, this legislation will have a significant effect upon employers' employment dispute resolution procedures. Arbitration language in employment applications and employment agreements, covering at least 20 percent of all nonunion employees, will have to be deleted. Employers will be permitted to decide whether to seek arbitration only after a dispute arises, and those with mandatory arbitration programs would want to consider mediation as an alternative to resolving disputes through mandatory arbitration.

## Bill to Repeal a Limitation in the Labor-Management Relations Act regarding Requirements for Labor Organization Membership as a Condition of Employment (H.R. 6477)

**Summary of Significant Provisions.** The legislation would have amended Section 14(b) of the Labor-Management Relations Act that grants states the authority to enact "right to work" laws. Such laws allow employees to continue working at a unionized employer while refusing to pay union dues.

**Forecast and Potential Impact.** As proposed, the bill enjoyed strong Democratic support in the House. Given the makeup of the Congress and the White House, it is likely that some version will pass under the Obama administration.

If enacted, this legislation would permit agreements between unions and employers making membership or payment of union dues a condition of employment, either before or after hiring.

## Blacklisting Government Contractors

**Summary of Significant Provisions.** Several bills introduced in prior Congresses would have blacklisted contractors for violations of state and federal laws. One such law, S. 606, The Honest Leadership and Accountability in Contracting Act of 2007, would have blacklisted contractors that fail to comply with tax, labor and employment, antitrust, environmental, or consumer protection laws. In addition, H.R. 3496, the Border Control and Contractor Accountability Act of 2007, would have terminated a contract if it were established, by a preponderance of the evidence, that a contractor had employed or had knowledge of subcontractors who employed illegal immigrants unless the contractor or the subcontractor agreed to terminate the illegal immigrant; the House bill also would have debarred or suspended the contractor from federal acquisition contracts for three years. In addition to imposing penalties for unlawful activity, proposed legislation would have required government contractors to report an employee, agent, or subcontractor if the contractor had knowledge of any violations of federal criminal laws.

**Forecast and Potential Impact.** President Obama has expressed a commitment to influencing employer behavior through legislation. Accordingly, some version of bills related to blacklisting of government contractors are likely to pass during his administration.

If enacted, the proposed blacklisting legislation could dramatically increase the consequences for government contractors from participation in prohibited employment practices.

## Civil Rights Act of 2008 (S. 2554; H.R. 5129)

**Summary of Significant Provisions.** Introduced in January 2008 by Representative John Lewis (D-GA) and Senator Edward Kennedy (D-MA), this omnibus bill was designed to "restore, reaffirm, and reconcile legal rights and remedies under civil rights statutes." It contained a multitude of provisions, many of which would have overturned recent Supreme Court decisions. Among other changes, the bill would have eliminated damages caps in Title VII and ADA cases, broadened other employee remedies, including remedies for undocumented workers, limited employer defenses, particularly in Equal Pay Act cases, restricted the use of mandatory predispute arbitration clauses in employment contracts, and overturned the Supreme Court case of *Alexander v. Sandoval* to give individuals a private right of action to sue federally funded programs for actions that have an alleged discriminatory impact under Title VI and Title IX of the Civil Rights Act, as amended, Section 504 of the Rehabilitation Act, and the ADEA. Further, the bill would have required that disparate impact claims under the ADEA be treated the same as those brought under Title VII. It also would have broadened the anti-retaliation provisions of the FLSA and added compensatory and punitive damages as remedies for unintentional and intentional equal pay violations. In addition, the bill would have expanded the definition of "prevailing party" eligible for attorneys' fees under federal civil rights fee-shifting statutes and permitted the recovery of expert fees by such prevailing parties.

**Forecast and Potential Impact on Employers.** In addition to this stand-alone measure, portions of the legislation were also introduced as part of other bills, including the Equal Remedies Act and the Arbitration Fairness Act of 2007. Some aspects of this wide-ranging omnibus bill will likely be reintroduced and receive strong support in both chambers.

If enacted as proposed, many of aspects of this bill would alter significantly both employer practices and potential liability. As will be discussed elsewhere in this *Commentary*, the elimination of damages caps and the overall broadening of employee remedies would likely vastly escalate the rate of litigation as well as settlement values, as would the restriction of arbitration as a means of resolving employment disputes.

## Combustible Dust Explosion and Fire Prevention Act of 2008 (H.R. 5522)

**Summary of Significant Provisions.** The Combustible Dust Explosion and Fire Prevention Act of 2008 was introduced to help prevent worksite explosions like the February 2008 explosion at the Imperial Sugar refinery in Port Wentworth, Georgia, that killed 13 workers and critically injured many others. The bill would have required the Occupational Safety and Health Administration ("OSHA") to issue an interim final standard on combustible dust within 90 days of enactment, followed by a final standard within 18 months. The bill would have required the adoption of standards as to hazard assessment; written programs concerning hazardous dust inspection, testing, housekeeping, and control; engineering, administrative, and operating procedures for control of fugitive dust emission; housekeeping controls for accumulation of combustible dust; building design such as sprinklers; employee participation; and written safety and health information and training for employees. It also would have required that the final rule incorporate provisions from the National Fire Protection Association's two voluntary consensus standards covering combustible dust.

**Forecast and Potential Impact on Employers.** The House passed a modified version of the bill on April 30, 2008, by voice vote. The bill prompted significant criticism, however, centered largely around its abbreviated timetable as well as the fact that the interim final standard would be issued without the OSH Act's normal rulemaking procedures, which provide stakeholders the opportunity to offer input on the proposed regulation. It is likely, though, that, whether through passage of this bill or not, the Obama administration's OSHA will seek to regulate combustible dust.

The probable impact of this bill is uncertain. If enacted as proposed, the final rule may require more hazard assessment, recordkeeping, and training for employers with operations involving combustible dust. However, as many affected employers already implement the voluntary measures that the bill recommends, how extensive the additional requirements are will depend upon the content of the final rule.

## Employee Free Choice Act of 2007 (H.R. 800)

**Summary of Significant Provisions.** The Employee Free Choice Act ("EFCA"), as initially designed, would make four significant amendments to Section 9(c) of the National Labor Relations Act ("NLRA"). First, EFCA would require union certification if a majority of employees in an appropriate collective bargaining unit have "signed valid authorizations." As such, EFCA dramatically would alter current law, which requires a secret ballot election before union certification unless the parties agree otherwise.

Second, EFCA would provide for mediation and mandatory interest arbitration for first contract disputes. Specifically, EFCA would require parties to meet and begin collective bargaining within 10 days of a certified union's request to do so, unless the parties mutually agreed on a later date. If the parties failed to reach agreement after 90 days of bargaining, either party could request mediation with the Federal Mediation and Conciliation Service ("FMCS"). If, after 30 days from the mediation request date, the parties neither reached agreement nor agreed to continue negotiating, the FMCS would have been required to "refer the dispute to an arbitration board" (to be "established in accordance with" FMCS regulations). Then, the arbitration panel would have been directed to "render a decision settling the dispute," which "shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties."

Third, EFCA would impose significantly harsher penalties on employers who commit violations during union organizing drives and first contract negotiations. For example, EFCA would increase the amount of back pay that could be recovered if an employer discharged or discriminated against an employee during the course of an organizing campaign or initial contract negotiations. Moreover, EFCA would provide for civil fines of up to $20,000 each time an employer willfully or repeatedly violated employees' rights during an organizing campaign or first contract drive.

Fourth, EFCA would require the National Labor Relations Board to request an injunction against an employer if there were reasonable cause to believe that it had discharged, threatened, or otherwise discriminated against employees while they were "seeking representation by a labor organization or during the period after a labor organization was recognized . . . until the first collective bargaining agreement" is reached.

**Forecast and Potential Impact on Employers.** Introduced by Representative George Miller (D-CA) and receiving overwhelming support from House Democrats, H.R. 800 passed in the House by a vote of 241-185. Senator Edward Kennedy (D-Mass) introduced an identical version of the House bill to the Senate (S.1041) on March 29, 2007, where it stalled. As of June 26, 2007, EFCA supporters had garnered 51 votes—nine short of the 60 needed for cloture. President Obama continues to express strong support for EFCA; thus, given the increased number of Democratic Senators, it remains likely that some form of EFCA will pass in the future. However, because the Democrats fell short of a 60-vote Senate majority in the recent elections, some compromises may be attempted before EFCA is passed. Either way, EFCA will be high on the legislative agenda for the new Congress and the new President.

If enacted as previously proposed, EFCA would have a substantial and far-reaching impact upon employer practices. First, EFCA would make it much more difficult for employers to oppose union organizing drives. Currently, an employer has the opportunity to express its views regarding unionism to its employees after authorization cards have been signed but before a secret ballot election. Under EFCA, a union will be certified as soon as it collects signed authorization cards from a majority of the bargaining unit. Accordingly, employers who wish to remain union-free will have to spend significant time and resources proactively opposing organization at the earliest stages of union organizing campaigns.

Second, EFCA will significantly decrease employers' bargaining leverage during first contract negotiations. The current system requires parties to negotiate in good faith, but without requiring either party to make a concession or reach an agreement. Under EFCA, mandatory interest arbitration will give unions an incentive to make unreasonable demands for the purpose of having an arbitrator set favorable terms.

This shift in power will have a significant impact on employers because the terms of the first contracts often remain largely intact throughout the years and establish the framework for future bargaining.

Finally, the increased penalties and mandatory injunctive relief provided for under EFCA would require employers to exercise caution in all of their interactions with their employees, especially those interactions involving employee discipline.

## Employment Non-Discrimination Act of 2007 (H.R. 3685; H.R. 2015)

**Summary of Significant Provisions.** The Employment Non-Discrimination Act of 2007 would have prohibited employers from discriminating against employees or applicants on the basis of the individual's actual or perceived sexual orientation (defined as "homosexuality, heterosexuality, and bisexuality") and gender identity. The bill did not require an employer to treat a same-sex couple who is not married in the same manner as the employer treats a married couple for employee benefits purposes in states where homosexuals cannot legally marry. As proposed, the bill did not apply **to the armed forces.**

**Forecast and Potential Impact on Employers.** H.R. 3685 was introduced by Representative Barney Frank (D-MA) and passed the House by a vote of 235 to 184 on November 7, 2007. The vote was split almost evenly down party lines, with 82 percent of House Republicans voting against the bill. Senate Health, Education, Labor, and Pensions Chairman Edward Kennedy (D-MA) has stated that he is committed to bringing up the House-passed bill again in the Senate, which will likely be favorably received by the Obama administration; the Obama campaign indicated that the President would pass the Employment Non-Discrimination Act to prohibit discrimination based on gender orientation, identity, or expression.

If enacted as proposed, this legislation will require employers who do not already prohibit discrimination against employees on the basis of sexual orientation to revise their EEO policies accordingly. Employers may also be forced to amend their health benefit policies to extend benefits to same-sex partners in states where homosexuals are allowed to marry.

## Equal Remedies Act of 2007 (S. 1928; H.R. 5129)

**Summary of Significant Provisions.** The Equal Remedies Act of 2007 would have amended 42 U.S.C. § 1981(a) with potentially sweeping changes. As proposed, the legislation removed the caps in Title VII and the ADA, established by the 1991 Civil Rights Act, that limit compensatory and punitive damages based on an employer's size. (Currently, compensatory and punitive damages for intentional violations are capped based on the size of the employer at $50,000 to $300,000).

**Forecast and Potential Impact on Employers.** S. 1928 was introduced by Senator Kennedy and seven Democratic cosponsors on August 1, 2007. A section of the Civil Rights Act of 2008, entitled "the Equal Remedies Act of 2008," reintroduced the provisions of the Equal Remedies Act of 2007. In 2009, this bill likely will be taken up as a stand-alone measure or, alternatively, its provisions will again be incorporated in other bills and separately considered.

If enacted as proposed, this legislation would have a substantial and far-reaching impact upon employer practices and liability. Potential liability will invariably increase once caps upon compensatory and punitive damages are removed, which will in turn likely encourage more employees to sue and plaintiff's counsel to accept borderline cases. Settlement values will likely also rise as employers face the possibility of adverse judgments without caps. In an effort to avoid claims of "willful" discrimination giving rise to punitive damages, employers would be well-advised to update company policies and ensure appropriate training of officers, managers, and supervisors.

## Equality for Workers Under ERISA of 2007 (H.R. 2622)

**Summary of Significant Provisions.** This bill would have modified the standard of review for certain actions brought under ERISA. The proposed legislation required any civil action brought by a beneficiary or participant of an

employee benefit plan to recover benefits be tried as a *de novo* proceeding without deference to any prior claim determination. Under current Supreme Court precedent, *Firestone Tire & Rubber Co. v. Bruch*, if an employee benefit plan allows an administrator or fiduciary discretion in determining benefits eligibility or to construe the terms of the plan, the beneficiary's or participant's lawsuit is tried under an abuse of discretion standard.

**Forecast and Potential Impact on Employers.** The bill was referred to the House Education and Labor's Subcommittee on Health, Employment, Labor, and Pensions. Due to strong support from House Democrats, a version of this bill will likely pass under the Obama administration.

If enacted as proposed, the determinations of plan administrators will face increased challenge and, likely, reversals under the stricter nondeferential standard of review. ERISA litigation will become more expensive as employers/benefit plan administrators are forced to defend their determinations before fact-finders in *de novo* proceedings, with accordingly higher settlement values.

## Family-Friendly Workplace Act (H.R. 6025)

**Summary of Significant Provisions.** The Family-Friendly Workplace Act would have amended the FLSA to give private-sector employers the option of compensating employees for overtime work with paid time off rather than cash wages. Moreover, in the event an employee wished to receive cash wages rather than compensatory time for overtime work, the bill would have allowed the employee to file a written request to receive cash.

**Forecast and Potential Impact.** "Comp time" proposals for the private sector have not met with much legislative success in the past. However, given President Obama's support for flexible work initiatives, positive action on H.R. 6025 is possible.

If enacted as previously proposed, this legislation will compel employers to revise their record-keeping and payroll practices. As long as employers retain the flexibility of determining whether employees will receive compensatory time in lieu of wages for overtime, however, many employers could benefit from the increased flexibility.

## Family Medical Leave Act Amendments and Regulations

**Summary of Significant Provisions.** On January 28, 2008, President Bush signed into law the National Defense Authorization Act for FY 2008 ("NDAA"), Public Law 110-181. Section 585(a) of the NDAA amended the Family Medical Leave Act ("FMLA") to provide eligible employees working for covered employers two important new leave rights related to military service.

First, the NDAA creates a new qualifying reason for leave. Eligible employees are entitled to up to 12 weeks of leave because of "any qualifying exigency" arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty, or has been notified of an impending call to active duty status, in support of a contingency operation. By the terms of the statute, this provision requires the Secretary of Labor to issue regulations defining "any qualifying exigency." In the interim, employers are encouraged to provide this type of leave to qualifying employees.

Secondly, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member who is recovering from a serious illness or injury sustained in the line of duty is entitled to up to 26 weeks of leave in a single 12-month period to care for the service member. This provision became effective immediately upon enactment.

Various bills dealing with the FMLA were also proposed in the prior Congress. One bill would have clarified that employees may independently settle FMLA claims without the approval of the Department of Labor ("DOL") or a court, overturning the Fourth Circuit decision in *Taylor v. Progress Energy, Inc.*, which held that DOL regulations preclude both the prospective and retrospective waiver of claims under the FMLA and bar all waivers of any rights under the FMLA without prior DOL or court approval. Another bill, H.R. 7233, proposed to lower the coverage threshold for employers from 50 or more to 25 or more employees. This bill would also have provided up to 24 hours of unpaid leave during any 12-month period for parents and grandparents to attend

parent-teacher conferences or to take a child, grandchild, or other family member to doctor or dental appointments. Other proposed legislation would have eliminated certain laws related to FMLA eligibility and notice. For example, proposed legislation would have eliminated current laws that allow an employee who did not receive notice of her FMLA rights to be eligible for FMLA leave, as well as laws that permit employers to give proper notice of FMLA rights through "electronic posting."

DOL has also proposed revisions to the FMLA regulations that would, among other changes, amend the medical certification process. The current regulations require the employer to communicate with a health care provider through its own health care provider regarding authentication and clarification of the medical certification. The proposed regulations allow direct contact between the employer and the employee's health care provider. Moreover, DOL has proposed that contact between the employer and the employee's health care provider for the purpose of clarifying the medical certification must comply with the HIPAA Privacy Rule. If HIPAA-compliant consent is not given, an employee may jeopardize his or her FMLA rights if the information provided is incomplete or insufficient. Further, proposed regulations also require that an employer's request for clarification of vague medical certification must be provided within seven calendar days or the employee is not protected under the FMLA, and may require employers to notify employees if medical certification forms have not been returned by the health care provider. The DOL may revise Form WH-380 used for medical certifications to help eliminate the need to request clarification.

Additionally, proposed regulations amend the 12-month employment requirement for FMLA eligibility. The requirement may be satisfied based on the preceding five years, regardless of breaks in service, allowing for the aggregation of past service with present service to meet the requirement. Proposed regulations also extend the deadline for employers to send eligibility and designation notices to employees to five business days. Currently, employers must communicate eligibility status to the employee within two business days after the employee requests leave or the employer acquired knowledge that the employee's leave may be for an FMLA qualifying reason. In addition, employers must communicate designation of FMLA leave within two business days once the employer has sufficient information to make a determination.

**Forecast and Potential Impact.** The Amendments under the NDAA went into effect in February 2008. Proposed FMLA-related bills have been referred to several committees in the House and Senate. President Obama favors the expansion of the FMLA. With strong Democratic support from both chambers, it is likely that there will be positive action on some sort of FMLA legislation early in his administration.

If enacted as previously proposed, many of the bills will assist employers in navigating what currently is a poorly written, and consequently confusing, set of legal requirements. Amendments to the certification process, particularly the allowance of direct communication between the employer and the health care provider, should facilitate the making of more accurate eligibility determinations. Revised "designation notice" and "medical certification" forms may also provide employers with improved guidance in carrying out related FMLA obligations. Unfortunately, the proposed bills and regulations do not clarify the significant ambiguities surrounding determinations regarding intermittent leave. Accordingly, unless this omission is addressed, employers will continue to struggle with those important issues in the near future.

## Forewarn Act of 2007 (S. 1792; H.R. 3662)

**Summary of Significant Provisions.** The Forewarn Act of 2007 would have amended the Worker Adjustment and Retraining Notification ("WARN") Act to redefine the terms "employer," "plant closing," and "mass layoff" for purposes of the Act. Among other changes, the Forewarn Act would have reduced the coverage threshold, applying its requirements to employers of 50 or more employees as opposed to the current threshold of 100 or more employees. Another key change pertained to the threshold numbers to qualify for plant closing and mass layoffs. The current WARN threshold numbers to qualify for a plant closing are 50 employees and 500 employees for a mass layoff. As proposed, the Forewarn Act would have lowered the threshold qualifying numbers to 25 employees for a plant closing and 100 employees for a mass layoff.

The Forewarn Act also would have modified the written notice requirement with regard to plant closings and mass layoffs. Currently, WARN requires 60 days' notice. The proposed amendment would have required 90 days' written notice to employees and government officials before ordering a plant closing or mass layoff, with notification to be sent to the Secretary of Labor within 60 days, as well as notice to the United States, the state senators and representatives who represent the area in which the plant is located, the governor, and the chief elected local official of the area.

Another change would have increased the aggregation period for plant closings or mass layoffs. The House version amended the aggregation period of plant closings or mass layoffs from a 90-day period under WARN to 180 days under the proposed legislation.

Employer liability was also modified under the proposed Forewarn Act. WARN currently imposes back-pay liability for 60 days and varies by jurisdiction with regard to whether back pay is based on calendar or work days within the violation period. The Forewarn Act would have made employers who violate the notice requirements liable for double back pay for each calendar day of the violation period for up to 90 days. The proposed legislation also would have granted the Secretary of Labor or the state attorney general the authority to bring a civil action on behalf of employees for relief.

**Forecast and Potential Impact.** President Obama has expressed support for expansion of WARN and was the cosponsor of the Forewarn Act of 2007. Accordingly, some version of this bill will likely be introduced and pass under his administration.

If enacted as proposed, more reductions-in-force will qualify for WARN analysis and require notice and/or pay in lieu of notice. Given the increased penalties for failure to provide the requisite notice, employers would be well-advised to initiate a WARN analysis at the outset of any major transaction or personnel action.

## Healthy Families Act (S. 910; H.R. 1542)

**Summary of Significant Provisions.** The Healthy Families Act would have required employers to provide seven days of paid sick leave annually for those who work at least 30 hours per week to their own medical care or that of their family, as well as a prorated annual amount of paid sick leave for those who work less than 30 hours but at least 20 hours a week, or less than 1,500 but at least 1,000 hours per year. The Healthy Families Act would have applied to employers who employ 15 or more employees for each working day during 20 or more workweeks a year.

**Forecast and Potential Impact.** Senator Kennedy, Chairman of the Senate Committee on Health, Education, Labor, and Pensions Committee, indicated that S. 910 will be a priority for his committee in the new Congress. Although President Obama was a cosponsor of the bill, the legislation is not likely to be a focus of his administration given the seriousness of other economic issues and the additional burden that would be placed on employers by mandating paid sick leave.

If enacted as proposed, the bill would require the majority of employers in the United States to assume the increased expense of providing seven days of paid sick leave annually for employees who work at least 30 hours per week, and a prorated annual amount of paid sick leave for those who work less than 30 but more than 20 hours per week, or less than 1,500 but more than 1,000 hours per year.

## Nurse and Patient Safety and Protection Act of 2007 (H.R. 378)

**Summary of Significant Provisions.** The Nurse and Patient Safety and Protection Act of 2007 would have required OSHA to issue new ergonomics regulations for the health care industry that would require, among other initiatives, nurses to use mechanical lifts to move patients. Under the proposed legislation, employees could file suit if their employer discharged them, discriminated against them, or retaliated against them for asserting their rights under the bill. This bill was designed partially to resuscitate OSHA's controversial ergonomics regulation, which was struck down by Congress in early 2001 under the Congressional Review Act.

**Forecast and Potential Impact.** The Nurse and Patient Safety and Protection Act is likely to be favorably received during the Obama Administration. In his response to a survey from the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), President Obama indicated that safety and health programs protect workers, save money, and increase productivity levels. In addition, President Obama stated that, as President, he would reinstate OSHA's ergonomics rule, which is a high priority for labor unions. Thus, it is likely that a version of this bill will pass.

If enacted, this legislation would require significant modification of workplace practices, often at great expense to the medical facilities.

## Patriot Employers Act (S. 1945)

**Summary of Significant Provisions.** Under the Patriot Employers Act, certain companies would have been considered "patriot employers" and be eligible for preferential tax treatment. Eligible companies would have been those that "pay at least 60 percent of each employee's health care premiums"; remain neutral "in employee organizing drives"; "maintain or increase the number of full-time workers in the United States relative to the number of full-time workers outside the United States"; pay a salary to each employee "not less than an amount equal to the federal poverty level"; and provide a pension plan.

**Forecast and Potential Impact.** Referred to the Senate Committee on Finance, S. 1945 was co-sponsored by President Obama and receives strong support from Congressional Democrats. Accordingly, proponents predict that it will pass during his administration.

If enacted and the tax preferences contained in the bill are significant enough, the Patriot Employers Act may serve as the catalyst toward influencing employer behavior through legislation that the President has strongly advocated.

## Popcorn Workers Lung Disease Prevention Act (H.R. 2693)

**Summary of Significant Provisions.** The Popcorn Workers Lung Disease Prevention Act would have required OSHA to adopt standards on diacetyl. Specifically, the bill directed the Secretary of Labor to promulgate an interim final standard within 90 days regulating worker exposure to diacetyl. The bill further required that, if diacetyl continued to be utilized after two years, a final standard containing permissible exposure limits must be issued. The standards were required to provide no less protection than the recommendations contained in the National Institute for Occupational Safety and Health ("NIOSH") Alert "Preventing Lung Disease in Workers who Use or Make Flavorings." Additionally, the standards were directed to include specified requirements for (1) engineering, work practice controls, and respiratory protection to minimize exposure to diacetyl; (2) a written exposure control plan that will indicate specific measures the employer will take to minimize employee exposure; (3) airborne exposure assessments; (4) medical surveillance for workers and referral for prompt medical evaluations; (5) protective equipment and clothing for workers; and (6) the provision of written safety and health information and training to employees.

**Forecast and Potential Impact.** H.R. 2693 passed in the House on September 26, 2007, 260–154. President Obama has voiced strong support for OSHA reform and has vowed to reverse the Bush administration's track record of issuing just one health standard in the last eight years. However, while the Popcorn Workers Lung Prevention Act thus will likely be favorably received, it may not be at the forefront of anticipated OSHA measures because of the small number of employers utilizing diacetyl in the workplace.

If enacted, employers continuing to utilize diacetyl would be required to modify significantly workplace and record-keeping practices virtually across the board. Critics of the legislation are concerned that the bill would create a dangerous precedent by requiring a regulation without data demonstrating the appropriate level of exposure.

## Private Sector Whistleblower Protection Streamlining Act of 2007 (H.R. 4047)

**Summary of Significant Provisions.** The Private Sector Whistleblower Protection Streamlining Act of 2007 would have expanded whistleblower protections for private-sector employees who report violations of federal laws, rules, or

regulations, or the state or local implementation of a federal law governing working conditions and benefits. In addition, the legislation would have reinstated employees who were fired for reporting violations on a preliminary basis. The bill did not set a limit on compensatory and punitive damages. It also made conforming whistleblower amendments to the OSH Act.

**Forecast and Potential Impact.** Again, because President Obama has indicated his commitment to influencing employer behavior through legislation, components of this bill will likely be reintroduced and adopted under his administration.

If enacted, given that the bill prohibits restrictions on whistleblowing and provides virtually unlimited relief, it will likely encourage such complaints and suits against private sector employers. The establishment of the Whistleblower Protection Office within the Employment Standards Administration of DOL suggests that investigations and enforcement will escalate as well.

## Protecting America's Workers Act (S. 1244; H.R. 2049)

**Summary of Significant Provisions.** The Protecting America's Workers Act would have extended OSHA protections to employees currently not covered, including state and federal government workers. In addition, the proposed legislation would have increased penalties for violations, eliminated the Secretary of Labor's ability to issue "unclassified" citations, significantly broadened employee and union involvement in settlement of citations, and widened the scope of whistleblower protections.

Specifically, the Protecting America's Workers Act would have increased the maximum penalty for a "serious" violation of any OSHA standard from $7,000 to $10,000; a serious violation resulting in the death of an employee would carry a minimum penalty of $20,000 and a maximum penalty of $50,000. The Act would have increased the maximum penalty for a "willful" violation of any OSHA standard from $70,000 to $100,000; a willful violation resulting in the death of an employee would carry a minimum penalty of $50,000 and a maximum penalty of $250,000. Employees and unions, who currently have the right only to contest the timing of abatement required by a citation, would have gained the right to contest the characterization of violations (whether serious, willful, repeat, or other than serious) and the penalty amounts as well.

**Forecast and Potential Impact.** As noted, President Obama strongly supports OSHA reform. It is unclear at this time, however, whether this or any OSHA reform initiatives will be pushed early in his administration, particularly given the number and significance of his many other labor and employment priorities.

If enacted as proposed, the legislation would broadly affect a significant segment of the workforce given its expansion of employee rights and increased penalties. With mandatory DOL inquiries into all cases of death or serious incidents of injury, workplace investigations—and resulting litigation and settlement values—will likely increase as well. In addition, as the Secretary will be required more formally to consider the input of victims, employees, and employee representatives when settling cases and will lose the ability to issue "unclassified" citations—a means often used now to settle more significant citations by eliminating the "willful" characterization—cases may become more difficult to resolve.

## Protecting Employees and Retirees in Business Bankruptcies Act of 2007 (S. 2092; H.R. 3652)

**Summary of Significant Provisions.** The Protecting Employees and Retirees in Business Bankruptcies Act of 2007 would have protected workers' and retirees' wages and benefits when a company files for bankruptcy. The proposed legislation raised the amount of unpaid wage and benefit claims to $20,000, respectively, and created a new priority claim for the loss of value of employees' pensions. The bill also restricted the criteria under which collective bargaining agreements can be amended. Moreover, the bill prohibited companies that have filed for bankruptcy from compensating executives with substantial performance bonuses or incentives.

**Forecast and Potential Impact.** Because President Obama cosponsored this bill and has since voiced his intention to reform the Bankruptcy Code, some version of this bill may pass under his administration.

If enacted, this legislation will enhance protections for employees and retirees and restrict the ability of companies to divest themselves of expensive and/or restrictive collective bargaining obligations in bankruptcy proceedings.

## RESPECT Act (S. 969; H.R. 1644)

**Summary of Significant Provisions.** The Re-empowerment of Skilled and Professional Employees and Construction Tradesworkers (RESPECT) Act would have amended the NLRA to narrow how the Act defined the term "supervisor." As proposed, individuals would only have been considered "supervisors" if they (1) had authority over their employees for a majority of the workday and (2) had the authority to responsibly direct employees.

**Forecast and Potential Impact.** The House Education and Labor Committee held a hearing on the bill on May 8, 2007, in which G. Roger King of Jones Day testified. On September 19, 2007, the House Education and Labor Committee reported H.R. 1644 on a 26–20 party line vote. Although the RESPECT Act is likely not to be one of the House's early priorities in 2009, given strong Democratic support for the bill, some version is likely to be passed during the Obama administration.

If enacted as proposed, this legislation would limit significantly which workers the NLRA classifies as supervisors. In its current form, the RESPECT Act would make most employees nonsupervisors for NLRA purposes and thus eligible for union organizing. This would allow unions to collect compulsory dues from workers with supervisory authority and could potentially affect employer efficiency and productivity, as supervisors who are expected to assist in running the business are faced with divided loyalties due to their union membership.

## Safe Nursing and Patient Care Act of 2007 (S. 1842; H.R. 2122)

**Summary of Significant Provisions.** The Safe Nursing and Patient Care Act of 2007 would have prevented health care facilities that receive payments under the Medicare programs from requiring nurses to work overtime except during declared emergencies. In addition, the proposed legislation would have allowed the Department of Health and Human Services to investigate complaints and impose penalties of up to $10,000 per violation with higher penalties for patterns of violations.

**Forecast and Potential Impact.** The Safe Nursing and Patient Care Act of 2007 was cosponsored by President Obama. Positive action on a version of this bill is likely.

If enacted, health care facilities will likely be faced with the decision whether to increase hiring of nursing staff or to decrease capacity and/or the provision of services.

## Save America Comprehensive Immigration Act of 2007 (H.R. 750)

**Summary of Significant Provisions.** The Save America Comprehensive Immigration Act ("SACIA") would have prohibited employment discrimination and retaliation against immigrants. Under SACIA, employers could not threaten an individual with removal from the United States or with any immigration-related or employment benefit-related adverse consequence so as to intimidate, pressure, or coerce the individual into not exercising a state or federal labor/employment right. Further, employers could not retaliate against an individual for having actually exercised or stating an intention to exercise any such right. The legislation also prohibited employment discrimination on the basis of "immigration status." Lastly, the proposed legislation required employer-petitioners for nonimmigrant labor to describe their efforts to recruit aliens lawfully admitted for permanent residence or U.S. citizens, which must include substantial recruitment in "minority communities."

**Forecast and Potential Impact.** President Obama has voiced support for this bill and has indicated that immigration reform is high on his agenda. A version of this bill will likely pass under his administration.

If enacted as proposed, this legislation would dramatically expand family-based immigration to the United States, with little in the way of annual caps or limits. It also contains significant amnesty provisions for illegal aliens and decreases

incentives for worksite enforcement, as it neither mandates use of the E-Verify program nor increases employer sanctions for illegal employment practices.

## Victims of Domestic Violence (S. 1136; H.R. 5845)

**Summary of Significant Provisions.** S. 1136, the Survivor's Empowerment and Economic Security Act, and its House counterpart, H.R. 5845, the Crime Victims Employment Leave Act, would have allowed employees to use authorized leave in order to seek legal assistance and attend domestic violence-related court proceedings. The bills also granted employees who had terminated employment as a result of domestic violence the right to collect unemployment compensation.

**Forecast and Potential Impact.** The future of S. 1136 is uncertain. In previous sessions, proponents of this bill have considered including it as an amendment to federal spending bills. It does not appear to be a priority for the Obama administration, although it bears noting that Representative Rahm Emanuel (the Chief of Staff to President Obama) introduced H.R. 5845.

If enacted, this legislation would provide employees with another basis for FMLA protection. Consequently, it would require employers to modify their FMLA policies and to adhere to additional notice, certification, and leave requirements, often with respect to issues that may raise sensitive privacy concerns.

## Working Families Flexibility Act (S. 2419; H.R. 4301)

**Summary of Significant Provisions.** President Obama cosponsored the Working Families Flexibility Act in the Senate, which was modeled after practices in some European countries and would have allowed employees the right to request a change in their terms and conditions of employment related to: (1) the number of hours the employee is required to work; (2) the times when the employee is required to work; and (3) the location at which the employee is required to work. The bill further imposed duties on employers with respect to such requests, including the requirement to meet and discuss the request with the employee, to provide a written decision and, if denied, a reason for the denial, and an obligation to meet again with the employee upon receiving a request for reconsideration. The bill also allowed employees to file a complaint with the administrator of the Wage and Hour Division of DOL for violations of the law, who would have the authority to investigate the complaints and order civil penalties and equitable relief for any violations. The bill would have applied to employers with 15 or more employees.

**Forecast and Potential Impact.** The House bill was introduced by Representative Carolyn Maloney (D-NY). Senator Edward Kennedy (D-MA) introduced S. 2419. President Obama, in turn, has voiced his own strong support for legislation directed at improving the work/family balance. Many believe that a first step might be to make the federal government a model employer in terms of adopting flexible work schedules and permitting employees to petition to request flexible arrangements. As well, workplace flexibility initiatives may prove increasingly popular in the current economic climate.

If enacted as proposed, the bill will require employers to modify certain practices and policies, with an attendant potential escalation in DOL scrutiny and liability. The overall burden on employers resulting from this initiative, however, does not appear to be significant.

## Workplace Religious Freedom Act of 2007 (H.R. 1431; S.3628)

**Summary of Significant Provisions.** The Workplace Religious Freedom Act of 2007 would have amended Title VII to clarify the definition of "undue hardship," which currently is not defined in the statute. Under the Supreme Court decision in *TWA v. Hardison*, however, an employer does not have to accommodate a person's religious practice if doing so would bring a *de minimis* expense upon the employer. The proposed legislation would have redefined the concept of "undue hardship" to require significant difficulty or expense, and set forth factors to determine whether an accommodation causes such hardship.

Under the bill, an employee would have been required to perform essential job functions with or without reasonable accommodation. The proposed legislation defined "perform the essential functions" to include the core requirements of a job, excluding practices related to clothing, taking time off, or other practices that may have a temporary or tangential impact on the employee's ability to perform job functions. The bill further required employers to remove the conflict between employment requirements and the employee's religious practices in order for an accommodation to be considered reasonable.

**Forecast and Potential Impact.** Although the Workplace Religious Freedom Act was cosponsored by influential Democrats, including Secretary of State Hilary Clinton, several organizations have expressed significant concern. Opponents of the bill, including the ACLU, contend that the bill would threaten important rights of religious minorities, racial minorities, women, gay men and lesbians, and persons seeking reproductive health care and mental health services. Given these issues, its future under the Obama administration is uncertain.

If enacted, this bill would potentially increase employers' exposure to liability, as the new law provides no clear definition of "undue hardship" and employers will no longer be excused from providing accommodations by proving only a *de minimis* expense. Employers would be required to modify their policies and training relating to accommodation of employees' religious observations.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

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