



What's Going on in Washington And Columbus? A Look at Proposed Federal and Ohio Employment Legislation

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As President Obama took office in January 2009, human resource professionals braced for the onslaught of new employment laws that were promised by the new administration. While some fears have been realized (Lilly Ledbetter Fair Pay Act), many of the promised items have been delayed as Washington has been preoccupied with the economic crisis, health care reform and confirming a Supreme Court Justice. Eventually, or perhaps to change the topic, President Obama and Congress will likely turn their sights to their campaign promises related to employee rights.

Although it was promised to be a "first 100 days" piece of legislation, April 30, 2009, came and went without the passage of the Employee Free Choice Act (EFCA). That is the good news. The bad news is the proposed legislation may gain momentum in the coming months. Introduced March 10, 2009, the "card check" legislation would, in most cases, eliminate the right of employees to privately vote for or against union representation. This would enable unions to obtain collective bargaining representative status merely by demonstrating to the NLRB that they obtained cards signed by a majority of employees. EFCA also requires that once the union demonstrates majority status, employers

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must negotiate with the union within 10 days of unionization and participate in binding arbitration of contract disputes after 120 days. Within weeks of EFCA's introduction, however, support began to fade beginning with Republican turned Democrat Sen. Arlen Specter's announcement that he opposes EFCA. In 2007, Sen. Specter was the only Republican senator to support EFCA. Senator Specter's announcement that he no longer supports EFCA means there is no longer sufficient number of votes in the Senate to end the debate and bring the bill to a vote. As a result, congressional democrats began to scramble. On July 16, 2009, compromise legislation was discussed in which the card check provision was eliminated, but shorter campaigns and faster elections were required. President Obama had promised to sign the former EFCA when presented to him.


One piece of legislation that President Obama did succeed in pushing through was the Lilly Ledbetter Fair Pay Act. Signed by President Obama on January 29, 2009, it purports to be retroactive to May 28, 2007. The Lilly Ledbetter Fair Pay Act extends the time for bringing a disparate pay claim under anti-discrimination laws. According to the Act, an unlawful employment practice occurs:

1. any time a discriminatory compensation decision is made;
2. when an employee is subject to a discriminatory compensation decision;
3. when an employee is affected by the discriminatory decision (e.g. whenever compensation is paid).

Therefore, under the Act, even if the alleged discrimination occurred many years ago, a new discriminatory act takes place each time the person is affected by the decision. As a result, employers must document and retain the reason for making compensation decisions well beyond many established document retention guidelines.

Employers also should be aware that on November 21, 2009, the component of the Genetic Information Nondiscrimination Act (GINA) prohibiting discrimination against employees on the basis of genetic information is effective. GINA also prohibits employers from acquiring genetic information of employees or their family members.

Several additional pieces of legislation have been introduced in Washington seeking to reverse the employer-friendly revisions to FMLA that went into effect earlier this year and to broaden the coverage of FMLA. The FMLA Inclusion Act, introduced on April 28, 2009, amends FMLA to include coverage for care for a domestic partner, child of a domestic partner, parent-in-law, adult child, sibling or grandparent. The FMLA Restoration Act, introduced the next day, requires employee recertification only after expiration of the original certification or one year (the new regulations provide for recertification in six months). The FMLA Restoration Act also removes the requirement for a specific number of visits to a health care provider for chronic or serious health conditions. The Balancing Act, introduced on June 25, 2009, combines many of the other proposed legislation into one bill. The Balancing Act expands FMLA to provide 12 weeks of paid leave through the "Family and Medical Leave Insurance Fund" made up of employer premiums of .2% of employee earnings. The Balancing Act also requires employers with 15



or more employees to provide one hour of sick leave for every 30 hours worked (see the Healthy Families Act below) and permits employees to take “Parental Involvement Leave” to attend children and grandchildren’s educational activities or assist elderly relatives. None of these proposed pieces of legislation has moved beyond committee status.

The Healthy Families Act also is back in the news. A similar provision was withdrawn from the Ohio ballot in 2008. Now introduced by Congress for nationwide coverage, the federal Healthy Families Act requires all employers with 15 or more employees to provide 56 hours of paid sick leave per year. Specifically, the Healthy Families Act requires employers to permit employees to accrue one hour for every 30 hours worked. The paid time off requirement applies to full-time and part-time employees. Hearings were held June 11, 2009, by the U.S. House Workforce Protections Subcommittee. The Society for Human Resource Management (SHRM) provided testimony to the Subcommittee that federally mandated sick leave limits employers’ ability to provide flexible benefits packages and is inappropriate during the difficult economic atmosphere.

Not to be left out, Ohio legislators also have been hard at work proposing legislation to broaden the protections of anti-discrimination laws and to provide additional benefits to Ohio employees. Ohio Senate Bill 91, introduced on April 2, 2009, amends Ohio Revised Code Section 4112 to make it unlawful for employers to use a person’s credit rating, credit score or consumer credit history as a factor in making employment decisions. While well-intentioned, the proposed legislation fails to make any exception to its coverage. Therefore, even though an employer may have a legitimate, non-discriminatory, job-related reason for considering a person’s credit history (e.g. banks), the proposed legislation would make any adverse employment action that resulted from a person’s credit score or history unlawful.

Ohio House Bill 176, introduced May 12, 2009, amends Ohio Revised Code Section 4112 to include “sexual orientation and gender identity” to the listed of protected classes. The inclusion of sexual orientation and gender identity as protected classes is not a new concept. Already, over 170 cities and counties (including Toledo and Bowling Green, Ohio) and 26 states have laws making discrimination based on sexual orientation unlawful and nearly 100 cities and counties and 12 states have laws that make it unlawful to discriminate based on gender identity. House Bill 176 passed in the House on September 15, 2009, but is expected to face more opposition in the Senate as opponents argue that the legislation will lead to more litigation and higher costs for small businesses.

Ohio legislators have introduced a piece of “business friendly” legislation. Ohio Senate Bill 17, introduced in February 2009, permits Ohio employers and employees to agree to compensatory time off (comp time) instead of monetary overtime. Currently there is no private sector comp time provision in Ohio. This legislation, if passed, would permit employees to enter into a written agreement to accrue comp time at the rate of 1.5 hours for every hour worked over 40, instead of receiving overtime pay, but in addition to receiving straight time pay. The legislation prohibits employers from requiring employees to accept comp time and limits the amount of accrued comp time to 240 hours. Unfortunately, this

legislation would only apply to small Ohio employers that are not subject to the requirements of the federal Fair Labor Standards Act by having annual gross sales in excess of \$500,000. Therefore, few Ohio employees and businesses may be able to take advantage of this proposed legislation.

In this time of great uncertainty, employers need to remain vigilant in communicating with elected officials on how changes in employment law affect their businesses' bottom lines. The astute employer that stays abreast of what is happening in Washington and Columbus can prepare for changes in advance, budget for increased employment cost and potentially avoid legal liability in this new and uncharted landscape.



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