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TMG Update

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PRESIDENT OBAMA'S FIRST DAYS IN OFFICE SHOW PRO-LABOR SUPPORT

(by Michael W. Chance)

The Ledbetter Fair Pay Act

On January 29th, President Obama signed his first bill into law, the Lilly Ledbetter Fair Pay Act, highlighting his focus on labor related issues. The measure amended the 1964 Civil Rights Act and effectively nullified a decision rendered by the Supreme Court in May, 2007. In 2007, the Supreme Court, in a 5-4 ruling, threw out Lilly Ledbetter's case against her employer Goodyear Tire & Rubber. Ledbetter had alleged that she was earning 40% less than her male colleagues in her position and that Goodyear discriminated against her on account of her sex thereby, violating the fair pay requirements Title VII of the 1964 Civil Rights Act.

The Supreme Court overturned a lower court decision in her favor ruling that she was required to bring her suit within 180 days of the initial act of discrimination even though she was not aware at the time that she was receiving less than her male colleagues. She had worked at Goodyear for nearly 20 years before she became aware of the discrepancy.

Lilly Ledbetter has become a more recognizable figure since she addressed the Democratic National Convention in Denver in 2008. She traveled with the Obama train to attend the Presidential Inauguration ceremonies. Ledbetter was present as the bill carrying her name became law.

The new Fair Pay Act clarifies that the 180 day statute of limitations is extended every time an employer violates the law by issuing a paycheck or engages in other practices that discriminate. Had the Fair Pay Act's interpretation been in effect for Ledbetter, each new pay check she received after the initial pay discrimination would be considered a new violation that would reset the statute of limitations.

Under the newly signed law, employees who allege that they have suffered discrimination may file suits immediately under the newly clarified statute of limitations.

When he signed the bill, the President cited census bureau figures that women still receive only about 78 cents for every dollar paid to men for performing equivalent jobs.

Executive Orders Undo Bush Administration Policies.

On January 30th, the President signed several executive orders that undo Bush administration pro-employer policies. President Obama said, "we need to level the playing field for workers and unions that represent their interests." The orders will:

- Prohibit federal contractors from being reimbursed for expenses associated with influencing workers regarding their decisions on union representation and collective bargaining.
- Reverse an order that required federal contractors to post notice that workers could limit financial payments to unions servicing as their bargaining agent.
- Require federal contractors to offer jobs to current workers when contracts change.

Obama also named Vice President Biden as Chairman of a new White House Task Force on Middle Class Working Families.

What about the Employee Free Choice Act (EFCA)?

While President Obama's signing of the Fair Pay Act and new executive orders can be considered as a showing of his continued focus on labor matters, the actions may show his and Congress'

acknowledgement that political and legal realities would not allow passage of EFCA at this time.

Many thought that EFCA would be the Obama Administration's first priority. It certainly had Obama's support during the campaign and following his election. However, the Obama team has indicated that other important issues like the economy will take priority. High-ranking Democrats have also begun to reconsider the labor-supported bill that provides for "card check" recognition without secret ballot elections and a provision for labor agreements settled by arbitration.

Perhaps the Democratic party's reconsideration stems from heavy lobbying by the U.S. Chamber of Commerce and a unified business community. Maybe it is the result of the party's recognition that card-check recognition would not be roundly supported by the majority of American voters who treasure the opportunity to vote by secret ballot. Or it could be that the Obama Administration has begun to question whether now would be the right time for such a drastic pro-labor bill to become law.

It has been reported that the labor unions had hoped EFCA would be on the new Administration's agenda during its first 100 days. However, the likelihood of EFCA will be taken up, much less enacted, within the first 100 days appears to be diminished.

Placing EFCA on the back burner may, however, allow the new Administration time to build consensus around labor law amendments that would be less controversial, politically and legally, than card check and first contract arbitration. A political challenge could

come quickly in the form of filibuster in the Senate (the Democrats are still one vote short of the 60 needed to halt filibusters at the time of this writing.) In addition, some labor experts have propounded that a requirement to use arbitration to form an initial contract could be unconstitutional—an unlawful taking of an employer's property without its consent— and would be immediately challenged in the courts.

It has also been suggested that a labor law amendment that would accelerate the holding of secret ballot elections following the filing of union petitions to represent employees may be initiated. We all assume that organized labor will continue to pursue opportunities with an Obama Administration which it helped to elect.

TMG's Observations.

The Mickus Group recommends to its clients that EFCA, in some form, should not be counted out and that employers should continue to prepare for union-friendly during President Obama's term in office. TMG will continue to work with its clients in assessing vulnerabilities that may exist in pay practices, including the evaluation of internal and external pay equity, and other areas of employee relations. (NOTE: Employers should discuss with legal counsel their ability to conduct audits and assessments so as to protect the results with attorney client privilege).

Once vulnerabilities are identified, action plans may be developed to resolve existing worker issues and concerns. In addition to reducing vulnerability to union organizing resulting from EFCA or EFCA-like legislation, or limiting exposure to litigation emanating from fair pay and other laws expanding employee rights, a institutionalized process to identify and resolve employee issues and concerns will support employers to develop and maintain positive employee relations environments that benefit a company, its workers and its customers and clients.

Please note that TMG has developed an employer tool, the EFCA Checklist that assists employers in preparing to face union organizing in a post-EFCA world. We are making the checklist available at no charge to our clients. If you would like to receive one, please call or e-mail one of us and we will be happy to send one to you. And, as always, feel free to call if we can answer any questions or be of service.