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Shifting Gears

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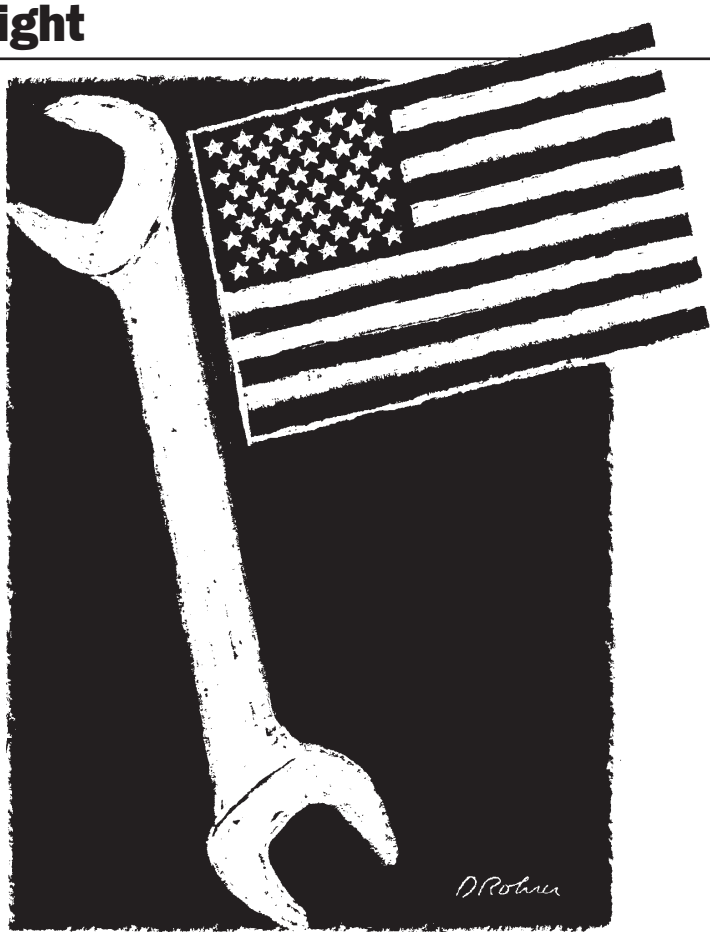

President Barack Obama, supported by a strong Democratic majority in Congress, has set in motion unprecedented legislative and regulatory change in employment and labor law. Combined with the worst economic conditions in 70 years, the stage is prepared for a once-in-a-generation change in labor, employment and benefit law.

With the added impact of technology and global workforces, the list of potential and expected changes is all-encompassing: global HR compliance, downsizing, benefit regulation, health insurance reform, family responsibility challenges, the rise of "workplace bullying" claims, employee privacy, mandatory arbitration agreements, workplace safety, health care and aggressive wellness programs, employment law and wage and hour class actions, LGBT rights and immigration reform.

National Labor Relations Act Overhaul

The pending legislative and regulatory overhaul of the National Labor Relations Act is the most significant pending development in traditional labor law during the past 70 years. Although organized labor represents only 7.5 percent of the private sector workforce, it has great influence with the current administration and the Democratic majorities in Congress, particularly given the hundreds of millions of dollars directed by organized labor into Democratic campaign coffers during the 2008 election cycle. The No. 1 objective of labor is to streamline and facilitate the organizing of the vast numbers of unrepresented employees.

The initial, proposed reform consisted of three elements: union recognition through a card check process; required arbitration if an employer and the newly certified union do not reach a collective bargaining agreement within a specified time period (mandatory "interest" arbitration); and the major expansion of the National Labor Relations Board's (the administrative agency that enforces the act) powers for remedying and penalizing employer unfair labor practices.

To the surprise of many, efforts to pass the Employee Free Choice Act in its original form have failed. Employers and employer organizations succeeded in arousing strong public support for keeping some form of secret ballot elections. But this was merely round one of the battle over the legislation.

Round two is now taking place regarding mandatory "interest" arbitration. Such a provision would fundamentally change labor law, authorizing an arbitrator to force acceptance of new wages, benefits and working conditions in a first contract. Marketplace forces would be replaced with attorneys and arguments. Facing a threatened constitutional challenge and growing resistance, round two may also fail.

Nonetheless, a reinvented Employee Free Choice Act is taking form as Senate Democrats are expected to propose a compromise bill. The proposed deal is expected to replace card check provisions with a secret election within a shortened timeframe, perhaps as little as five to 10 days from the date of filing a petition. Quick elections would provide only limited time for unprepared employers to form effective counter-campaigns. Accordingly, non-unionized employers should immediately begin preparing for the new election paradigm in which education of employees before organizing starts is the only realistic response to a potential organizing threat.

Other possible, but still unconfirmed, provisions of the bill include: denying employers the ability to call mandatory meetings during work time to discuss unionization issues, requiring employers to provide union agents with full access to the workplace following a petition or at least the ability to communicate with employees in the same manner as the employer, and requiring employers to provide the union its employees' names and contact information immediately upon the filing of a petition. Accordingly, the compromise bill, even without card check recognition and "interest arbitration,"

would dramatically change the rules for union organizing, creating the most significant changes in 70 years. The question for employers is not whether they can stop these changes from occurring, but rather how drastic the changes will be and when they will occur. In the end, no change to the rules of organizing is an unacceptable result for organized labor.

While this legislative battle unfolds, major regulatory reform is already on the horizon. When Obama was inaugurated, only two of the five National Labor Relations Board positions were filled. He immediately appointed Wilma Liebman as the new chair. Liebman is a highly qualified labor law expert who sharply disagreed with many of the board's decisions during the Bush years, testifying in Congress that certain decisions were extreme. In her new role, Liebman has publicly made the case for utilizing regulatory rulemaking as a method of making major policy changes quickly. Historically, the board has used case law to incrementally make policy based on the facts of each case.

Obama recently nominated Craig Becker, Mark Pearce and Brian Hayes as board members. Two of the three currently represent organized labor. Should they be approved by the Senate, substantial change is likely. There are dozens of important decisions handed down during prior administrations that would come under review. Indeed, even some of the potential changes in a compromise Employee Free Choice Act bill, particularly with regard to union access to the workplace and employees, could come about as a result of board action if not included in whatever legislation is eventually voted on by Congress.

Out of the deepest downturn in a generation, major changes should be expected. After the 2001 recession, 30 percent of the returning workforce included "contingent workers." When the dust settles, these workers will likely constitute approximately 50 percent of the returning workforce or approximately 25 percent of the total workforce. The coming economy demands greater efficiency and a flexible "just-in-time" workforce. Since the 1990s, MIT's Sloan School of Management has modeled such a workforce moving from project to project and arriving by 2015. The great recession has accelerated its arrival. Microsoft exhibits this change, confirming it has 96,000 regular employees and 88,000 contingent workers.

In the past, two major obstacles slowed the movement toward the contingent workforce model. First, employees depended on employer-provided insurance benefits. Clearly, this has been changing and may be replaced with an entirely different alternative with the health reform bill working its way through Congress. Second, employees depended on the employment environment to fulfill many of their social needs. MySpace, Facebook, and LinkedIn are now meeting this need to be part of a community. A contingent worker can comfortably transition to a new project and bring with her friends and resources through social networks.

This change has major impact on labor, employment and benefit law. Workplace privacy, protection of trade secrets, union organizing, and benefits now require employers' attention. This upfront preparation promotes legal compliance, reduces litigation, and can actually improve productivity.

Executive Compensation

Regulating executive compensation and bonuses is undergoing profound change driven by the economic crisis. Nine banks taking bailout funds announced they paid $33 billion in bonuses in 2008. This is just the latest in a stream of such disclosures by companies saved from bankruptcy by government funds. Public anger is red hot.

The government is quickly responding to public demand. Obama recently announced a comprehensive plan for regulatory reform for financial institutions, including regulation of executive compensation. Likewise the House Financial Services Committee just sent "say-on-pay" legislation to the House floor. Not to be outdone, the Treasury Department issued stringent interim rules limiting executive pay for companies that receive funding under the Troubled Asset Relief Program. The Securities and Exchange Commission also proposed rules that would increase disclosure of executive pay for public companies.

Even the courts appear to be aware of public opinion. Earlier this year, the Delaware Chancery Court allowed a "corporate waste" claim, based on a company's approval of a multimillion-dollar retirement package for its former CEO. While recognizing that the corporate waste test was a difficult hurdle, the court refused to dismiss the claim.

The executive compensation rules for both public and private organizations are changing. It is essential that organizations and their management become informed and anticipate this change. While the new rules will be complex and subject to interpretation, one generalization may be helpful: The more executive compensation is tied to measurable performance goals and objectives, the more likely it will be defensible.

With these three mega-trends and dozens of other new developments, employment, labor and benefit lawyers will continue to be in high demand now and during the recovery.

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