Impact of the 2012 Elections

Presented By:

Ilyse W. Schuman
Littler Mendelson, P.C. • Washington, DC
202.423.2223 • ISchuman@littler.com

Michael J. Lotito
Littler Mendelson, P.C. • San Francisco
415.677.3135 • MLotito@littler.com
Agenda

- Election Results
- Political Environment
- Health Care Reform
- EFCA 2.0 – Labor Law Forecast
- EEOC Forecast
- DOL Forecast
- Immigration Reform
- What do these changes mean for employers?
Four More Years
2012 Election Results:
The more things change......

- Senate
- House
113th Congress
Senate

- 55 Democrats (+2)
- 47 Republicans (-2)
113th Congress
House of Representatives

- 233 Republicans (-2)

- 193 Democrats (+7)

* 9 races still undecided
Political Environment

Compromise or Gridlock
• With Republican-controlled House and Democrat-Controlled Senate ≤ 60, controversial labor and employment legislation is unlikely to pass in the 113\textsuperscript{th} Congress (possible exception for immigration reform)
• BUT, with increased seats in Senate, Democrats may be more aggressive
• As a result of legislative gridlock, Administration turns to agencies to try to achieve labor and employment agenda
• Aggressive enforcement and rulemaking activity by the NLRB, DOL and EEOC
The Affordable Care Act

- Patient Protection and Affordable Care Act - signed by President Obama on March 23, 2010, amended by the Health Care and Education Reconciliation Act of 2010
ACA Is Here to Stay

- June 28, 2012: the Supreme Court upheld the ACA – virtually in its entirety
- November 16, 2012: Reelection of President Obama secures ACA political future
- Some employers may have suspended or postponed compliance decisions awaiting the Court’s ruling and election
- NOW: Employers and plan sponsors must review and accelerate their compliance efforts and make difficult decisions they may have been putting off in anticipation of the ruling
What Does the ACA Mean for You?

- Are you in compliance?
- Will you play-or-pay in 2014?
- Will you change your benefits/workforce structure?
- How will you control health care costs?
- What is the financial impact on your company and your employees?
- What is your holistic HR strategy?
ACA: What’s Next?

- Flurry of regulatory activity
- State vs. Federal exchanges
- Legal challenges remain
- Oversight hearings and battle over funding in House
- We will keep you informed
EFCA 2.0: Labor Law Developments at the NLRB and DOL
Labor Takes Credit: Pushes Agenda
RFCA is still dead for the 113th Congress

- Labor unions seeking other means to achieve objectives of EFCA through regulations or administratively through the Department of Labor or National Labor Relations Board
- Will unions attempt to organize now that election season is “over”
NLRB: What Happens After November?

- 2 Democratic members are challenged on basis of “recess” appointments
- Brian Hayes’ (R) term expires on 12-16-12
- Mark Pearce’s (D) term expires on 8-27-13
  - 3-0 Board until then
  - No incentive for WH to fill vacancies before then
“Final” Quickie Election Rule

- Shorter elections place severe limitations on the ability of employees to get the complete story
- By deferring eligibility disputes, employees may be misled as to the scope of the voting unit
- Union decides who they want to represent
  - Union can gerrymander the unit to the extent of organizing and employer bears burden to prove unit is not appropriate
- Procedurally difficult to challenge units
- Gives regional directors largely unreviewable power

**Status:** Rule held invalid for lack of quorum. On hold pending appeal - Anticipate continued efforts to shorten election time
Section 7 Rights

- **NLRB:** Expansive view of NLRA Section 7 rights implicates union and non-union facilities

- **Scrutiny of:**
  - handbooks and personnel policies
  - Social media policies

- **Expect continued NLRB challenges and court appeals**
NLRB – What’s Next?

- Continue to litigate the “quickie election” rule
  - May adopt even more sweeping changes originally proposed

- Continue to litigate NLRB poster rule

- Expand on the “micro unit” concept announced in Specialty Healthcare
THE DOL: Proposed Rule “Persuader” Activities

Additional Statutory Requirements: Employers and outside labor relations consultants to file disclosure reports as to any arrangement involving retention to persuade employees regarding union organizing or collective bargaining

- Employer report – LM-10
- Labor consultant reports – LM-20 and LM-21
  - LM-21 requires a reporting of all receipts from all employers for “labor relations advice or services”
- All reports are public and available online
The Advice Exemption

- “Nothing contained in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer ...”

- “Advice” has been broadly defined – Status quo for 50 years
  - Providing strategies and materials, or revising the same, are advice
  - Employer must retain the freedom to accept or reject the advice
  - No direct contact with employees
Effectively eliminates the “advice” exemption

Persuader activity if consultant’s activity on behalf of employer in whole or in part have the direct or indirect object to persuade employees concerning their rights to organize or bargain collectively

If you cannot separate the advice from its effects, then it is not exempt “advice” – and you must report

Traditional guidance received by employers in connection with union organizing efforts is no longer considered advice

Goes beyond union organizing to all protected concerted activities
Promoting Employer Silence

- Has a chilling effect on employer speech, and the ability to inform employees of their rights
- Limits access to competent counsel to advise on communications and develop strategies during organizing efforts
- Raises risks that conduct/speech will be unlawful
- Ultimately impacts the ability of employees to make an informed decision about unionization
- Has no impact on union propaganda
EFCA 2.0 - Labor Law Reform without Congress

Put the pieces together

- **NLRB Election Rules**
  - Faster elections – Less time to communicate

- **NLRB Notice**
  - Describes rights and gives specific examples of unlawful conduct

- **NLRB Decisions/Specialty Healthcare**
  - Micro Units

- **DOL Proposed Advice Narrowing**
  - Chills employer free speech
EEOC Forecast
Employer Screening

- EEOC has examined employer use of criminal and credit history, unemployment status
- April 25, 2012, EEOC issues updated guidance on criminal history
  - Employers should make “individualized assessment”
ADA/Leaves of Absence

- EEOC did not issue guidance on leaves of absence/reasonable accommodation under the ADA as expected
EEOC — What to Expect

- More investigations involving groups of employee
  - EEOC focus on “systemic litigation”
- Expanded scope of investigations
- Sub-regulatory guidance
EEOC Strategic Plan: 2012-2016

- Background on development of EEOC’s Strategic Plan

- Key Elements:
  1. “Combat employment discrimination through strategic enforcement” - Systemic investigations and related litigation
  2. “Prevent employment discrimination through education and outreach”
  3. “Deliver excellent and consistent service through a skilled and diverse workforce and effective systems”

- Timetable – Enforcement Plan anticipated prior to end of Nov. 2012
Draft Plan Issued Sept. 4, 2012 -- National Priorities Based on the following criteria:

- Issues that will have broad impact because of the number of individuals or employers affected.
- Issues involving developing areas of the law, where involvement by the leading governmental agency charged with enforcing employment anti-discrimination laws is appropriate;
- Issues affecting workers who may lack an awareness of their legal protections, or who may be reluctant or unable to exercise their rights;
- Issues involving discriminatory practices that impede or impair full enforcement of employment anti-discrimination laws; and
- Issues that may be best addressed by the EEOC given its access to data and research.

See http://www.eeoc.gov/eeoc/plan/sep_public_draft.cfm
Nationwide Priorities (Per Draft Strategic Enforcement Plan):

- Eliminating Systemic Barriers in Recruitment and Hiring (e.g. screening practices)
- Protecting immigrant, migrant and other vulnerable workers.
- Addressing Emerging Issues (ADA, LGBT coverage, pregnancy/disparate treatment)
- Preserving Access to the Legal System (e.g. retaliatory actions; overly broad waivers; settlement provisions that prohibit filing charges with EEOC)
- Combating Harassment (e.g. race, color, sex, ethnicity, age, disability and religion)

See http://www.eeoc.gov/eeoc/plan/sep_public_draft.cfm
DOL UPDATE
Department of Labor

- DOL is “back in the enforcement business”
- “We Can Help”
- “Plan/Prevent/Protect”
Targeting Employee Misclassification

- FY 2012 Budget Request - DOL sought an increase of $46 million for “misclassification initiative”
- FY 2013 Budget Request - $4 million/35 investigators for WHD and $10 million for ETA for state grants
- DOL memorandums of understanding with IRS and states to combat misclassification
- Legislation to changes to Section 530 safe harbor likely to be reintroduced
IC Misclassification

- The Wage & Hour Division is conducting self-directed investigations in industries that frequently use independent contractors:
  - Construction
  - Janitorial
  - Home Health Care
  - Child Care
  - Transportation and Warehousing
  - Poultry and Meat Processing
  - Landscaping
  - Professional and Personnel Services
FLSA: “Right to Know”

- DOL is planning rulemaking to update employer recordkeeping requirements under the Fair Labor Standards Act (FLSA)
- Would require employers to conduct classification analysis, notify workers of their status as exempt v. non-exempt, and to provide information regarding hours, how pay was computed and whether the proper wages and overtime were paid
- Proposed rule originally scheduled for release in August 2010 then October 2011 release, now TBD
Proposed Rule – FLSA Companionship Services

- December 15, 2011 - DOL issued proposed rule that would revise the FLSA’s companionship and live-in worker regulations to limit the types of duties that render a home caregiver exempt from FLSA requirements

- Third-party employers, including in-home staffing agencies, would not be entitled to claim the exemption
FMLA Proposed Rule

- Implements statutory changes to military exigency and caregiver leave
- Implements FMLA amendments in Airline Flight Crew Technical Corrections Act
- Reverts to pre-2009 rules on intermittent leave
  - FMLA leave available in shortest period of time employer uses to account for leave
  - Narrow interpretation of physical impossibility to return to work mid-shift
Wage and Hour: Enforcement Initiatives

- More Directed Investigations
- IC Misclassification
- “Fissured” Industries
- Low Wage Industries
- Government Contractors
OSHA Regulatory Agenda

- **OSHA proposal to issue an injury and illness prevention program (I2P2) rule**
  - The rule would include planning, implementing, evaluating and improving processes & activities that protect employee safety & health

- **June 22, 2011 – OSHA issued proposed rule to amend the injury and illness recording and reporting requirement**
  - Employers currently must report, within eight hours, all work-related fatalities and in-patient hospitalizations of three or more employees
  - The proposed rule would require employer to report to OSHA, within eight hours, all work-related fatalities and all work-related in-patient hospitalizations; and within 24 hours, all work-related amputations

- **MSD Recordkeeping**
  - OSHA temporarily withdrew its proposal to restore a column to the OSHA Injury and Illness (Form 300) Log that employers would use to record work-related musculoskeletal disorders (MSD) to “seek greater input from small businesses on the impact of the proposal”
  - FY 2012 Appropriations rider to prevent OSHA from implementing rule
April 26, 2011 - OFCCP issued proposed rule to revise the regulations implementing the nondiscrimination and affirmative action provisions of the Vietnam Era Veterans Readjustment Assistance Act.

August 10, 2011 - OFCCP published ANPRM to solicit public input on the agency’s development and implementation of a new compensation data collection tool.

- Collected data may be used to identify potential problems of compensation discrimination that warrant further review or evaluation by OFCCP or contractor self-audit.

December 9, 2011 - OFCCP issued a proposed rule to federal contractors and subcontractors to conduct more substantive analyses of recruitment and placement of disabled workers.

OFCCP plans to issue proposed sex discrimination guidelines.
OFCCP: What to Expect

- Finalize proposed regulations, significantly increasing compliance costs
- Continued aggressive, hard-line approach to compliance
- Deference to field personnel
- Demand information that may not be relevant to compliance
Immigration Reform

- Did the election open the door for comprehensive immigration reform in the 113th Congress?
What’s Next?

- Fiscal Cliff?
What’s Next?
FY 2013 Budget

- Federal government is operating under a “continuing resolution” until March
- Unclear what will happen next:
  - Individual agency budgets passed
  - Omnibus appropriations bill
  - Another CR
Questions and Answers
Ilyse W. Schuman
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