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Possible Legislation

Under the new administration, the following bills will be considered by the new Congress:

Employee Free Choice Act (EFCA) – This is the card check bill that has been discussed in prior issues of ***Employee Briefs***. EFCA would eliminate secret ballot union elections and mandate arbitration of the terms of the initial union contract.

Re-Empowerment of Skilled and Professional Employees and Construction Trades (workers) Act (RESPECT) – This Act would redefine the duties of supervisors that would disqualify them from voting in an NLRB election thereby keeping them out of the union, e.g., assessing and directing work. A series of decisions (known as the **Oakwood** cases) last year by the NLRB greatly expanded and redefined the term "supervisor." Supervisory workers are not eligible to join unions. This is a companion piece to EFCA in that if passed it would broaden the number of employees eligible for union membership.

Patriot Employer Act – This Act would reward employers who remained neutral during union organizing campaigns and paid not less than 60% of employee health care premiums. Again, this Act would make it much more likely that unions would enlarge their membership.

Lilly Ledbetter Fair Pay Act – This Act would reverse a very controversial decision of the U.S. Supreme Court and would allow the filing of a charge or a lawsuit alleging pay discrimination after each pay check or retirement check. The Act would apply to Title VII, ADA and ADEA. (**NOTE**: President Obama signed the bill into law on January 29, 2009).

Equal Remedies Act and Civil Rights Act of 2008 – This Act would remove the current $300,000 statutory maximum for punitive damages under Title VII and the ADA.

Working Families Flexibility Act – This Act would permit workers to request flexible work options in order to balance the demands of their jobs and home life and would require employers to negotiate with each employee concerning the number of hours and the days of the week each employee would work and require the employer to explain in writing why the employer could not agree with the employee's position. The Act would not **mandate** that employers grant permission, but it does require them to talk to employees about flexibility and provide an explanation if denied. An employee could file a lawsuit in federal court or file a complaint with the DOL.

Fair Pay Act of 2007 – This Act seeks to address pay disparities between equivalent jobs segregated by sex, race and national origin. It would make it illegal for an employer to pay any employees in job categories dominated by any sex, race or national origin a lower wage rate than received by any employee in any other job category dominated by employees of any other sex, race or national origin.

Paraphrasing what Bette Davis said in the movie ***All About Eve*** – "Fasten your seat belts, it's going to be a bumpy ride."

FMLA

The Sixth Circuit in Davis v Michigan Bell Telephone Co found that a request for intermittent FMLA leave terminates when a new 12 month FMLA period begins. The court concluded that when an employee has been approved for intermittent leave, the leave starts on the first day of leave and ends for that same condition in 12 months. This means that the employee's request in the following year for intermittent leave for the same health problem must be evaluated anew. The issue of whether the employee has worked the requisite 1,250 hours in the prior 12 months in order to remain eligible for FMLA leave in the following 12 months must also be reexamined. The court reasoned that to not terminate the maximum 12 weeks of FMLA leave each 12 months could entitle the employee to be constantly entitled to 12 weeks of FMLA leave based on a single eligibility determination.

Arbitration

The Second Circuit in Esso Exploration et al v Taylor's Intl Serv, Ltd rejected an appeal of an arbitration award. The Appellant contended that the award should be set aside because: (1) the contract between the parties required a *de novo* review by the court; (2) the award was in manifest disregard of applicable law; (3) the arbitrator exceeded his authority in awarding damages; and (4) the award was not final and definite. The court cited the U. S. Supreme Court's ruling in Hall Street Associates that the only grounds for overturning an arbitration award are the grounds specified in the Federal Arbitration Act. The Court held that it could not vacate an award merely because it was convinced that the arbitrator made an incorrect legal ruling.

The U. S. Supreme Court heard oral arguments on December 1, 2008 in 14 Penn Plaza v Taylor, which was described in the December 2008 issue of ***Employee Briefs***. The oral argument and briefs made it clear that the heart of this case was the possible conflict between two of the Court's prior decisions. In Alexander v Gardner-Denver, the Court held that an individual employee's right to sue in court cannot be waived under a collective bargaining agreement. In a later decision, Gilmer v Interstate Lane Corp, the Court held that an individual employee could waive the right to sue in court concerning a statutory cause of action arising out of federal law. The Gilmer case did not involve a collective bargaining agreement.

Retaliation

Following the U. S. Supreme Court's decision in Burlington Northern, which broadened the standard of what constitutes retaliation, federal courts have applied the decision in other cases. In two recent cases before the Seventh Circuit, that court cited Burlington in reaching decisions. In Tate v Executive Management Services Inc, the court held that because a male employee who broke off a sexual relationship with a female supervisor when he got married and was later fired for alleged insubordination did not believe that the practice he opposed, i.e., breaking off the relationship, violated Title VII, he had not engaged in protected activity and therefore his claim of retaliation failed.

In Magyar v Saint Joseph Regional Medical Center, the Seventh Circuit reversed the decision of the trial court and held that an employee who complained about her supervisor's handling of her claim of sexual harassment, and nine days later because a revised hours schedule was posted made it impossible for the employee to continue to work, could establish retaliation. The court held that she could establish retaliation because she was essentially asking that the mishandling

of her complaint about sexual harassment, which would be a violation of title VII, not continue. The court concluded that this was protected activity.

Supremes

In 2001, the California legislature passed a bill which was signed by then governor Gray Davis. The law prohibited employers receiving state grants of more than $10,000 per year from using any of these funds to “assist, promote, or deter union organizing.” In effect, the law prohibited employers from telling their employees that the employees should vote against a union that was trying to organize the employer. The bill required the employer to be “neutral” during an organizing campaign. The law gave unions the right to sue employers to force an audit of the employer’s books and gave them the right to obtain injunctive relief and damages. Employer groups challenged the bill and a federal district court in California granted summary judgment to the employer groups on the basis that in that court’s opinion the law was preempted by the federal National Labor Relations Act.

The unions appealed to the Ninth Circuit. The Ninth Circuit reversed the decision of the District Court and held that the California law was permissible. The decision of the Ninth Circuit was appealed to the U. S. Supreme Court. In a 7 to 2 decision written by Justice Stevens, the U. S. Supreme Court reversed the Ninth Circuit. Justice Stevens wrote that the California law “impermissibly predicates benefits on refraining from conduct protected by federal labor law and chills one side of the robust debate which has been protected under the National Labor Relations Act . . . and is against congressional intent.” Chamber of Commerce v Brown.

Prior to the decision of the U. S. Supreme Court in this case, a similar law had been proposed in 15 other states. Attention now shifts to the **Employee Free Choice Act** which will be pursued in the next congress.

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