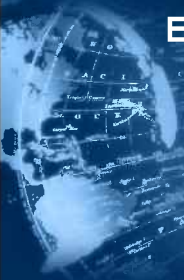


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Employment Law Changes That Could Affect Your Business

Presented by
D. Albert Brannen

October 28, 2009

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Today's Agenda

- New laws
- New enforcement strategies
- Proposed laws could bring major workplace changes
- What should employers do?

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New Laws/Rules Require Immediate Changes

- ADA Amendments Act
- American Recovery and Reinvestment Act (COBRA Subsidy)
- Service Member Family Member Leave
- New FMLA Regulations
- 4 New Executive Orders
- ARRA/COBRA subsidy
- 8 Supreme Court employment cases last term

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Changing Enforcement Strategies

- New President & Vice President
- New Secretary of Labor
- New NLRB Chairman
- Budget increases
- **Expect**
 - changes in enforcement strategies!
 - less compliance assistance!



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What's Likely To Change At The NLRB?

- Employer e-mail systems
- Weingarten rights for non-union employees
- Back pay for salts
- Permanent replacements
- Suits against unions



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How Employee Claims Get Litigated Could Change

Arbitration Fairness Act Of 2009

- No pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of
 - Employment, consumer, or franchise dispute
 - Dispute arising under any statute intended to protect civil rights
- Validity or enforceability of agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator

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Proposed Laws Signal Changes In Every Area Of Employment Law

- Leave
- Labor
- Safety & Health
- Discrimination
- Wages & Benefits
- Plant Closing Laws



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Proposed Leave Law Changes

- Paid Vacation Act (paid vacation)
- Healthy Families Act (paid sick time)
- Balancing Act of 2009 (more FMLA rights)



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Paid Vacation Act

Amends FLSA to require employers to provide minimum of one (1) week paid vacation to employees

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Healthy Families Act

Allows employees to earn up to 56 hours per year of paid sick time to address their own health needs and health needs of their families

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Balancing Act Of 2009

- Incorporates provisions for
- Family and Medical Leave Insurance Act
 - Family and Medical Leave Enhancement Act
 - FMLA Inclusion Act
 - Family Fairness Act
 - SAFE Act
 - Domestic Violence Leave Act

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Balancing Act Of 2009

- Applies to employers with 15 or more employees
- 12 weeks paid leave
- Parental involvement leave
- Domestic violence

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Family Leave Insurance Act Of 2009

Would establish a Family and Medical Insurance program, mandatory for certain covered employers, which would:

- Entitle eligible employees to Program benefits that include specified percentages of their daily earnings for 12 workweeks of leave under FMLA during any 12-month period
- Authorize any employer to establish a voluntary plan meeting specific criteria
- Specify prohibited acts by an employer and penalties for violations

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FMLA Enhancement Act Of 2009

Amends FMLA to

- Cover employees at worksites employing more than 25 employees
- Allow employees to take parental involvement leave to participate in or attend children's or grandchildren's educational and extracurricular activities
- Clarify that leave may be taken for routine family medical needs, to assist elderly relatives, and for other purposes
- Allow employee to elect, or employer to require, substitution of any paid or family leave or paid medical or sick leave of employee for any leave provided under FMLA
- Impose on employee requesting leave certain notification requirements

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FMLA Inclusion Act

Amends FMLA to permit leave to care for same-sex spouse, domestic partner, parent-in-law, adult child, sibling, or grandparent with serious health condition

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Family Fairness Act Of 2009

- Reduces FMLA eligibility requirements
- employee eligible for coverage if employed for at least 12 months by a covered employer

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Security and Financial Empowerment Act (SAFE)


Sets forth entitlement standards and implementation guidelines for employee use of emergency leave to address domestic violence, dating violence, sexual assault, or stalking (domestic or sexual violence)

- Victims of domestic or sexual violence may substitute existing leave for emergency leave
- Prohibits discriminatory employer practices against victims of domestic or sexual violence

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Proposed Labor Law Changes


- RESPECT Act
- Patriot Corporations of America Act of 2009
- Working Families Flexibility Act
- Employee Free Choice Act



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RESPECT Act


- Changes NLRA definition of "supervisor"
- Worker must spend a majority of hours on "supervisory duties"
- Deletes key words from the definition of "supervisor"
- Dramatically changes the way employers communicate with employees



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Patriot Corporations Of America Act

- "Patriot" employers are those who:
 - Pay at least 60% of medical insurance
 - Provide a pension plan
 - Don't outsource overseas
 - Agree to "neutrality" in union drives
- Reward is a 1% tax credit



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Working Families Flexibility Act "Union of One" Law

Authorizes employee to request from employer a change in terms or conditions of employee's employment if request relates to:

- Number of hours the employee is required to work
- Times when the employee is required to work
- Where the employee is required to work

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Employee Free Choice Act EFCA

1. No more secret-ballot elections
 - Unions would gain recognition through card check
2. Changing the rules of bargaining
 - Mandatory mediation after 90 days
 - Interest arbitration after 120 days
3. Increasing penalties against employers
 - Treble back-pay damages
 - \$20,000 fines
 - Injunctive relief

SECTION 550

WHICH RELATES TO THE PROVISIONS OF SECTION 550 OF THE ACT, THE FOLLOWING PROVISIONS SHALL APPLY:

IF THE EMPLOYER HAS A CONTRACT:

IF THE EMPLOYER DOES NOT HAVE A CONTRACT:

IF THE EMPLOYER HAS A CONTRACT:

IF THE EMPLOYER DOES NOT HAVE A CONTRACT:

IF THE EMPLOYER HAS A CONTRACT:

IF THE EMPLOYER DOES NOT HAVE A CONTRACT:

A BILL

TO AMEND THE ACT TO PROVIDE FOR THE

ESTABLISHMENT OF A NATIONAL BOARD OF

LABOR RELATIONS AND TO AMEND THE

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What Have Union Leaders Said About EFCA?

EFCA is the "most important labor legislation since 1935 (Wagner Act)."

John Sweeney, President, AFL-CIO

EFCA would cause unions to "grow by 1.5 million members a year, not just for five years but for 10 to 15 straight years."

Andy Stern, SEIU President

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What's The President Said About EFCA?

"Unions are not the problem...they are part of the solution."

Barack Obama, U.S. President

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What Is Likely To Change?

Ongoing discussions about compromises

- "Quickie" secret-ballot election (from 5 to 21 days)
- Unions could get equal access to employer premises
- Modified bargaining process
- Required timetables
- Monetary penalties

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How Could EFCA Impact Employees?

Employees could lose the right to


- Vote in a secret-ballot election
- To have input into the decision to unionize
- Make a choice without pressure or coercion
- Change their minds after signing a union card
- Be informed in a pre-election campaign
- Speak for themselves
- Decertify a union after 1 year



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**How Could EFCA Impact Employers?
By Changing How Cards Are Used**

- Employers may get stuck with a union before learning of union organizing
- Employers could lose the right to educate employees
- Employers will need to invest resources in union avoidance



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**How Could EFCA Impact Employers?
By Changing The Rules Of Bargaining**

- Time frame for bargaining would shrink dramatically
- Employers would effectively lose the right to say "no"
- Employers would have to compromise
- Arbitrators could impose wages, benefits, and terms of employment
- Unions could "guarantee" a first contract
- Parties would be "stuck" for 2 years

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**How Could EFCA Impact Employers?
By Increasing Penalties**

- Unions could harass employers with charge-filing
- Employers might be afraid to speak out against unions
- Uneducated employees might make bad choices
- Those employers who choose to fight need to invest resources



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Some Things Won't Change

- What employees think about unions
- Why employees turn to unions
- How unions get employees to sign cards



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So, What's The Bottom Line?

- Avoiding talks about unions & waiting for rumors of union activity or a Labor Board petition is no longer acceptable
- Employees & companies won't get a second chance
- Penalties will be much higher
- Employers need to be "pro-employee" and to start educating managers, new hires, and employees ASAP!

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Proposed Safety & Health Law Changes

- Protecting America's Workers Act
- Corporate Injury Illness And Fatality Reporting Act
- Others target specific issues/industries
 - Nurse And Healthcare Worker's Protection Act
 - Worker Protection Against Combustible Dust Explosions And Fires Act



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Protecting America's Workers Act

- Covers 8.5 million more workers
- Increases penalties
 - Criminal charges
 - Minimum \$50,000 for deaths
- Protects whistleblowers
- Enhances public's right to know
- Signals stricter enforcement



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Proposed Discrimination Law Changes

- Title VII Fairness Act
- Employment Non-discrimination Act (ENDA)



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Title VII Fairness Act

Amends ADA and Title VII to delay start of time period for filing charges of employment discrimination until aggrieved person has, or should be expected to have, enough information to support a reasonable suspicion of discrimination

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Employment Non-Discrimination Act (ENDA)

Prohibits discrimination on the basis of sexual preference or gender

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Proposed Wages & Benefits Law Changes ("Maximum Wage Laws")

- Executive Pay Capped Deduction Act
- Excess Pay Shareholder Approval Act
- Corporate and Financial Institution Compensation Fairness Act



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Executive Pay Capped Deduction Act

- Would prohibit employers from deducting "excessive compensation" (> 100x average pay)
- Would require more reporting on pay

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Excess Pay Shareholder Approval Act

- Applies to publicly traded companies
- Would require shareholder approval for "excessive compensation"
- Would require information to be contained in proxy statements

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Corporate and Financial Institution Compensation Fairness Act

- Applies to publicly traded companies
- Gives shareholders a nonbinding vote on executive comp
- Similar to TARP

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Proposed Plant Closing Laws

- Alert Laid Off Employees in Reasonable Time Act
- FOREWARN Act



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Predictions

- Some of these laws will pass
- NOW is the time to "get ready"
- Be proactive, not reactive
- Respond promptly with changes to policies and procedures
- Regardless of which laws get passed, **EXPECT CHANGE**

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What Should Employers Do?

1. Express your opinions to your representatives
2. Hire the "right" employees
3. Review pay practices
4. Update written policies
5. Develop a "Communications and Education Program"
6. Make "fair" employment decisions
7. Solve employee problems
8. Emphasize safety
9. Secure your property & information
10. Monitor off-site union activity
11. Prepare for contingencies!

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How Do You Track Proposed Legislation? www.govtrack.us

The screenshot shows the GovTrack.us website interface. At the top, there are navigation links: Track, Research, Blog, Watch, About, Give, Log In, and a Bill Search field. Below the navigation is a banner for GovTrack.us with the tagline "a live project to track Congress". The main content area is titled "Search Legislation" and includes instructions on how to use the site. There are two main search sections: "Session of Congress" with a dropdown menu set to "111th Congress (2009-10)" and "Bill Number/Keywords" with a text input field. A "Browse Search" section is also visible, explaining how to use the site's search engine. At the bottom of the screenshot, the Fisher & Phillips LLP logo and contact information are displayed.

Thank You!

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