



Four More Years! Labor & Employment Law Scrutiny & Enforcement Will Grow

by Matt Lynch and Bob Sebris

No "winds of change" swept over us during the November 2012 elections. To the contrary, the results in Washington, D.C. and Olympia reinforced current politics in our nation's capitol and our statehouse. By maintaining Democrat control in the Governor's mansion and the legislature, and by reelecting President Barack Obama, our electorate has endorsed the current power dynamics. The impact on the workplace—labor and employment law matters—may not just mean "more of the same." Instead, employers will have to gird themselves for "*much more of the same.*"

Organized labor clearly helped deliver these election outcomes. Similarly, special interest groups that favor more intrusive employment rules and requirements mobilized their voter base to affect election outcomes. For the next four years at the Federal and State level, the legislative and enforcement powers of government will seek to deliver for its "constituencies" in the workplace arena. The proof is the signs and signals coming out regularly since the election.

The Obama NLRB. The pro-Labor bent of the Obama National Labor Relations Board will continue, and even more aggressive steps will be taken, with no stone unturned. Examples: The December 2012 reversal of *50 years* of NLRB precedents related to the termination of payroll union dues deduction following the expiration of a labor contract, and the creation of a new rule prohibiting employers from unilaterally imposing significant discipline of employees while negotiating a first contract with a union. In addition to ongoing pursuit of the NLRB workplace posting rule, more "micro unit" decisions in bargaining unit cases, and the pending "quickie" election rules—all designed to lead to easier representation wins for unions—expect more NLRB initiatives to overturn current precedent that is not favorable to organized labor. Challenging the long-held principle of *stare decisis* in NLRB cases, the Board recently held in December that NLRB members could raise issues and arguments in cases that had not been raised by the parties in litigation—so the Democrat-dominated NLRB could on its own initiative reassess longstanding precedent. Consequently, look for NLRB decisions and rules creating greater pressure for faster NLRB representation elections, expansion of *Weingarten* rights to the non-union workplace, more union access rights to employer property (including email systems), more "social media" litigation, weakening of the NLRA's supervisor definition, as well as other inroads. While the Employee Free Choice Act (EFCA), with its "card check" process to replace representation elections, had no traction in 2009 at the start of the Recession, expect Labor to push for NLRB changes to make organizing easier and quicker.

Equal Employment Opportunity. In the enforcement arena, the Equal Employment Opportunity Commission (EEOC), the Washington State Human Rights Commission (WSHRC), and local city counterparts will likely be more aggressive in complaint investigation and initiation. The Office of Federal Contract Compliance Programs (OFCCP) will continue to try and expand affirmative action requirements on federal contractors and subcontractors, with aggressive enforcement action. In addition, more local initiatives pushed by "social justice" groups such as "Working Washington" will emerge. Witness the City of Seattle mandatory paid sick leave ordinance. Recently a "strategic enforcement plan" was issued by the EEOC for its goals and priorities through 2016: (1) eliminating recruitment and hiring barriers, (2) protecting immigrant, migrant and other vulnerable workers, (3) addressing emerging and developing employment law issues, (4) enforcing equal pay laws, (5) preserving access to the legal system, and (6) preventing harassment through systemic enforcement and outreach. Bottom line: Expect more aggressive government enforcement.

Department of Labor Initiatives. Aggressive safety and health guidelines will be stressed by agencies supporting labor union concerns, whether this be "ergonomics," "inherently safer technology" (IST), or other work safety "theories" at the Federal or State levels. Immigration enforcement related to the workplace will continue to be stressed. For the last several years "wage and hour" cases have been increasing—both U.S. Department of Labor (DOL) and Washington Department of Labor Industries cases and plaintiff class actions. Litigation challenging independent contractor status, "exempt" employee classifications, "regular rate" determinations, and work "off the clock" (meal periods and rest periods) is growing more frequent.

CONCLUSION—Preventive Practices & Counsel Audits. As an employer, the Government is not your friend—and increased Government scrutiny is inevitable. To avoid becoming entangled in costly and financially-daunting investigations and enforcement actions, focus on:

- **Sound Policies & Procedures.** Reassess Employee Handbooks and Human Resources (HR) policies and programs. Periodic review by experienced counsel reduces legal risks.
- **Audit.** Review employment practices related to hiring, discipline, terminations, classifications, meal/rest periods, and other HR protocols. Consider engaging counsel to conduct or supervise such audits to cloak them in appropriate "attorney-client" or "work product" privilege protections, so that "smoking gun" evidence is not inadvertently created to be used against you.
- **Management Team.** Reconfirm the "Management Team" based on legal definitions down to the lowest supervisors [*e.g.*, NLRA §2(11)]. These individuals are your agents and front line of defense against union organizing and avoiding illegal employment actions. Be comfortable with the quality and authority of individuals in these roles.
- **Training.** Training of supervisors and managers is critical for sound preventive practices. Whether you consider anti-harassment, union avoidance education, or other preventive education programs, managers and supervisors will serve your mission best if they understand the legal minefields and have been schooled in problem prevention. Consultants and attorneys offer efficient and effective programs to help reduce risks.

Opportunity time is now. There is no doubt that government scrutiny and enforcement related to the workplace will continue to grow over the next four years. Manage your risk by taking timely steps now.

*This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations. For more information on this subject, please call Sebris Busto James at (425) 454-4233.

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