



## POLITICAL CHANGE FROM NOVEMBER ELECTIONS BEGINNING TO IMPACT HUMAN RESOURCES

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Last November, state and federal legislatures experienced another sweeping transfer of power, mirroring the enormous political change that occurred two years earlier with the election of President Barack Obama. This time, much of the momentum for the power shift stemmed from business and labor-related issues. Prominent among these issues were an adverse reaction to national health care reform, the perception that government was growing beyond reasonable budgetary restraints, and that the expanding government was ineffective in creating new jobs or reversing the recession. Many of the laws, regulations, and executive orders issued during the first two years of the Obama administration were viewed as anti-business and seen as creating impediments to economic growth. The question most HR professionals are now asking is how much impact the November elections will have on the new obligations imposed during the last two years.

During the first month of 2011 we have indeed witnessed some efforts to scale back some employment and benefit -related laws. However, other developments continue to expand HR obligations.

- **Efforts to Reverse Health Care Reform:** Attacks against the health care reform legislation have been mounted in several different settings. The House of Representatives, with its new Republican majority, voted to repeal the entire law. The vote was largely symbolic as there will likely not be enough votes for repeal in the Senate, nor enough votes to override the veto which President Obama has promised. However, President Obama has agreed to meet with ranking Republican legislators to discuss possible modifications to health care reform to make it more workable for businesses and to those opposed to the more controversial clauses (such as the requirement that all citizens be required to purchase medical coverage). It remains to be seen what, if any, changes will result from these conversations.

President Obama's willingness to discuss amendments to the health reform law may reflect his fear that the legislation will be repealed by court action. Two federal courts have recently held that some or all of the legislation is unconstitutional. Similar cases are pending in other courts. Ultimately it is predicted that the issue will be decided by the United States Supreme Court, which still has a conservative majority of justices (although this perception may not always be true, as will be noted later in this article). If the law is found unconstitutional, and is not amended in the meantime, President Obama could face the loss of one of his key political platforms and presidential achievements.

Wisconsin's new governor has authorized the state attorney general to join other states in pursuing litigation to declare the legislation unconstitutional. Stay tuned....

- **Wisconsin's Elimination of Health Savings Account Taxes.** In one of his first acts, newly elected Governor Scott Walker signed a law eliminating Wisconsin state taxes on employee contributions into Health Savings Accounts. Wisconsin was one of the few states which imposed state taxes on such accounts, which was considered an impediment to what is now an increasingly common employee benefit. Health Savings Accounts, used in connection with high deductible medical benefit plans, allow employers to save money through lower cost medical plans (which result from the high deductibles and the more educated use of medical services by participants who now bear more of the initial costs of medical care). Employees are able to bank tax-free contributions to HSA accounts and are able to take the balance of the accounts with them when they leave employment.

The rapid introduction and passage of the HSA tax repeal legislation reflects the new Republican majorities in both houses of the Wisconsin legislature. Governor Walker has promised to introduce additional "business-friendly" legislation during his term.

- **Expansion of Scope of Retaliation Protection.** While Congress and state legislatures were reviewing methods of improving business and employment climates, the normally conservative United States Supreme Court issued a decision in January which significantly expanded the legal protections offered to employees. In Thompson v. North American Stainless, a female employee filed a claim against her employer for gender discrimination. Approximately three weeks later, the company fired the employee's fiancé, who worked at the same company. The fiancé had never filed a claim against the company, had never "opposed any unlawful practice" had not testified as a witness in his fiancé's case, nor engaged in any other activity "protected" by the anti-retaliation provisions of Title VII. He was simply engaged to the employee who was asserting legal rights.

After being fired, the fiancé sued the company, claiming that, despite the absence of any "protected activities," he was unlawfully retaliated against because of his fiancé's legally protected actions. The trial court and court of appeals dismissed his case, on grounds that Title VII does not offer retaliation protections based solely on the individual's "relationship" to another person who is engaging in a protected activity. On January 24, 2011, the U.S. Supreme Court unanimously reversed and reinstated the fiancé's case.

According to the Supreme Court, allowing an employer to fire a co-employee with a close relationship to an employee who is engaging in a protected activity (such as asserting rights to be free from gender discrimination) could dissuade employees from asserting their legal rights. Recognizing that it was charting new territory, the Court refused to draw a bright line concerning who might have a "close relationship" to a person engaging in a protected activity. Instead, the Court declared that "firing a close family member will almost always rise to that level, while a mere reprisal on a mere acquaintance will almost never do so."

The decision creates a significantly larger "pool" of employees who are now covered by the anti-retaliation protections of Title VII. Moreover, the ambiguities contained in the Court's definition of who is now "protected" will create new litigation issues and headaches for employers. In the future, HR professionals should carefully evaluate discipline and termination decisions to make sure that "associational" retaliation is not occurring in connection with the decision.

- **Proposal to Require Non-Union Employers to Post Rights to Join Unions:** In late December the National Labor Relations Board published its intent to require all employers, both union and non-union, to post a written Notice advising employees of their rights to form a union under the National Labor Relations Act. The proposed notice has been roundly criticized as being one-sided. For example, while informing employees of selected rights under the NLRA, it does not include information on how to decertify a union, how to withdraw from a union, how to pursue a claim against a union for failure to fairly represent employees, or how to object to union dues. The proposal appears to be another effort by an unelected federal agency to achieve political goals that President Obama has been unable to secure through legislation. With the demise of efforts to pass the Employee Free Choice Act, union proponents are vigorously seeking other avenues to increase unionization of non-union employers.

The national SHRM organization has issued an “Action Alert” requesting all SHRM members to send comments objecting to the new Poster. Comments are due by February 22, 2011 (unless extended) so time is of the essence. The national SHRM website ([www.shrm.org](http://www.shrm.org)) has sample language to use for your comments, or you can be original. Comments are to be submitted by clicking on [www.Regulations.gov](http://www.Regulations.gov) . (When you get into the site, type the following as the “ID”: NLRB-2010-0011-0001 Then scroll down to the proposed rule and click on “Submit Comments”.)

As you can see, while there are early indications that the fall elections will have some favorable impact on employers, there are still many new challenges to address in the upcoming year. 2011 certainly promises to be another exciting journey for HR professionals.

Additional information on any of the above topics may be obtained by contacting the author at [grobe@lcojlaw.com](mailto:grobe@lcojlaw.com) or at (920) 437-0476.