RIPPLE EFFECTS OF POLITICAL POWER SHIFT CONTINUE TO REVERBERATE IN WISCONSIN WORKPLACES

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The major shift in political power that occurred during the 2008 elections and extended from the White House down to state and local legislators is likely to have a pronounced and long lasting impact on Wisconsin workplaces. The historic power shift was fueled, in part, by a grass roots movement of the working class who perceived that big business and its executives were receiving an unfair portion of the profits while the workers were being deprived of the means to achieve the "American dream." This philosophical foundation is now revealing itself in a variety of new state and federal workplace legislation, the appointment of new pro-employee leaders of key federal enforcement agencies, increased funding for those agencies, and the anticipated appointment of Judge Sonia Sotomayor, which could drastically change the "lean" of the historically conservative Supreme Court.

This article summarizes the current status of some of the new state and federal legislation that Human Resource professionals may be administering in upcoming years.

1. WFEA Amendments: One major change is presented by amendments to the Wisconsin Fair Employment Act, which were signed into law by governor Doyle on Monday, June 8, 2009. The amendments now allow employees to seek compensatory damages (such as emotional distress) and punitive damages for violations of the WFEA, and to pursue those damages in state courts. Prior to passage of the Amendments, those types of damages were only available for federal employment law violations.

The impact of these amendments are likely to be extensive. First, it may result in many more cases against employers being venued in state courts, as opposed to federal courts which are viewed as more conservative and whose rules are often perceived as more favorable to employers. Second, it will, for the first time, make these damages available for categories of discrimination not covered by federal law, such as sexual orientation, arrest and conviction record, marital status, use or non use of lawful products, and others. Third, some state law definitions, such as "disability", are construed much more broadly than the federal counterpart, thus the extension of greater damages to these classifications will increase exposure to Wisconsin employers. Fourth, employers may now face penalties under state law and another set under federal law, possibly for the same decisions.

The new damages have statutory caps depending on the number of employees. Employers with under 15 employees would not be subject to the new damages, those with 15 to 100 have their punitive/ compensatory exposure capped at $50,000, those with 101 to 200 are capped at $100,000, those with 201 to 500 are capped at $200,000 and those with over 500 are capped at $300,000.

2. Expansion of Unemployment Eligibility. The federal stimulus package would provide the state with up to $89.3 million if Wisconsin amends its unemployment rules to allow benefits for workers who quit their jobs because their spouse relocates, to take care of ill relatives, or if they fear domestic violence. Unemployed workers in certain job training programs would also receive an additional 26 weeks of benefits. Opponents of the new legislation which has been proposed to secure the stimulus funding argue that the broader unemployment eligibility rules will impose long term financial obligations on the state and employers long after the stimulus money has been exhausted.

3. Paid Vacation Act: Federal legislation has been introduced which would, for the first time, require employers to provide paid vacations to workers. The law would apply initially to employers with more than 100 workers, who would have to provide at least one week of paid vacation to all full time and part time employees after completing their first year of work. On the third anniversary of the law, this obligation would increase to two paid weeks to all employees after their first year of work, and would expand coverage to employers with only 50 or more employees (who would have to provide one week of paid vacation to all full time and part time employees).

4. Paid Sick Leave: Federal legislation known as the "Healthy Families Act" would also require employers to provide paid sick days. Under this bill, employers would have to provide up to 7 paid sick days per year to be used by employees for absences for their own or for their families' illnesses. Medical certifications could be required if the absence is for more than 3 consecutive days. The bill contains extensive definitions, posting requirements, procedures, restrictions and remedies, and could impose additional administrative burdens on HR staff on top of the present FMLA forms and procedures.

In addition to the federal legislation, some municipalities across the United States have attempted to pass their own "sick leave" legislation, including Milwaukee. In November, residents of the City of Milwaukee voted in favor of a referendum providing for sick leave for employees working within the city limits. The Milwaukee law would have required employees working in the city receive up to one hour of paid sick leave for every 30 hours worked in the city. Employees of companies with fewer than 10 workers would have received up to five sick days, and those working for larger companies would have accrued up to nine days. A Milwaukee County judge last week declared the proposed sick leave law to be unconstitutional. However, 9to5, National Association of Working Women, has already announced that it intends to file an appeal of the decision so we will need to continue to follow this issue.

Most employers already provide varying levels of vacation, PTO, or sick pay to their employees. The new paid vacation and paid sick day legislation would remove "free market" forces, which currently compel employers to provide such benefits as are necessary to attract the types of workers needed for the job, and move toward government-controlled wage and benefit obligation imposed on employers regardless of what the market would otherwise dictate, similar to what exists in many European countries. While supported by current political winds, once these types of legally mandated benefits are imposed upon employers there is almost no feasible way to ever reduce or remove them due to the political repercussions of proposing such reductions or removal. This type of legislation represents a dramatically new level of government involvement with business operations and a challenging development for free market enterprises.

5. Paycheck Fairness Act: Following passage of the Lily Ledbetter Fair Pay Act, Congress has now begun to consider a companion Act, the Paycheck Fairness Act. This would continue the expansion of remedies to workers who receive disparate rates of pay. The Act would prohibit employers from restricting workers from sharing information about pay rates, reduce the factors that employers can rely on to vary wages from one worker to another, and provide for compensatory and punitive damages.

This Act would provide significant burdens on HR staff, particularly recruiters and those charged with compensation programs. Currently, workers' pay can vary for a variety of reasons, such as their education, prior experience, seniority, cost of living in the local area, unique knowledge or skills, past wage levels, the degree of "need" of the employer at the time of recruitment, the salary demanded by the job candidate, and other factors. It could become significantly more difficult to substantiate lawful differences in pay rates under this new legislation. This, in turn, would necessitate more frequent and extensive internal wage audits and potentially more costly payrolls (if the employer decides to "level

wages" which requires lower paid employees to receive pay increases, as pay reductions to satisfy unlawful disparities is not allowed.)

6. Arbitration Fairness Act: In April, 2009, the U.S. Supreme Court held that an arbitration clause in a collective bargaining agreement could preclude an employee from pursuing age discrimination claims outside of arbitration. Most courts had previously held that such arbitration clauses could not deprive employees of their right to pursue such claims before the EEOC and federal juries. A bill has now been introduced to overturn the Supreme Court decision. The legislation, known as the "Arbitration Fairness Act" would prohibit mandatory arbitration clauses in employment, consumer, and franchise agreements. This would significantly alter current employer-employee relationships, many of which are governed by contractual arbitration clauses. It could increase the cost and publicity of employment litigation and delay resolutions, thus increasing exposure to back pay and other damages.

7. Protecting America's Worker's Act of 2009: This Act would increase penalties and fines under OSHA, require additional OSHA investigations, provide more protection for employees who decline to perform tasks they deem to be "hazardous" or who report injuries, allow employees to challenge OSHA if OSHA fails to pursue citations or imposes a fine that the employee feels is too low. Once again, the legislation represents a significantly enhanced exposure to employers, which will necessitate increased budgets for safety and risk prevention.

8. Tax Equity for Health Plan Beneficiaries Act of 2009: Reflecting a broader acceptance of "non-traditional" families, this Act would afford the same tax protection for employer-sponsored medical benefits which cover "domestic partners" as afforded to coverage of employees and spouses. Currently, the tax code does not exclude employer coverage of "domestic partners" from taxation. If the new legislation is passed, the premiums for such coverage could be deductible and the benefits could be provided by employers on a pre-tax basis. Similar modifications would be made to rules for cafeteria plans, VEBA plans, Health Savings Accounts, Flexible Spending Accounts, and Health Reimbursement Arrangements.

These are only a portion of the pending state and federal legislation which reflect the new political philosophy of the new majorities in those governing bodies. Certainly the Employee Free Choice Act looms as perhaps the most significant potential change of all. Proponents of that Act continue to work on variations with the hope of completing passage yet this year. The list is certainly to get longer, as many of the above Acts were introduced within the course of the past few weeks, and additional legislation, continuing the expansion of worker's rights and privileges, is sure to be proposed.

The challenges to HR professionals in response to these laws will be many. Uppermost will be education and understanding of the new laws as they are passed, closely followed by internal auditing, internal modifications and internal training. HR staff should immediately make the organization's budget managers aware of the pending legislation and the potential financial impact of passage. Failing to anticipate these changes could result in an inability to adjust in a timely fashion, leading to potentially disastrous results. It is going to be an interesting summer.

If you have any questions regarding the content of this article or would like to speak to an attorney regarding other employment law matters, please contact one of our employment team attorneys at (920) 437-0476 or via email at the following email addresses:

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