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OBAMA VICTORY PRIORITIZES LABOR AND EMPLOYMENT LAW ISSUES

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President-Elect Barack Obama's Presidential election victory this week will likely result in fundamental changes in the relationship between employer and employee in the labor, employment, immigration, and employee benefits contexts. In addition, the struggling economy, with its attendant layoffs, wage freezes and benefits cutbacks, will also create legal issues for employers.

Obama Victory Will Change Employer Landscape

President-Elect Obama's victory combined with changes in the composition of the Senate will likely mean significant changes in several aspects of the employer-employee relationship. During the campaign President-Elect Obama advocated the expansion of labor, employment, and employee benefits laws. The potential changes could include:

- Passage of the Employee Free Choice Act, which, in short, would allow employees to choose union representation through authorization cards rather than secret ballot elections; require all first-time collective bargaining negotiations to proceed to binding arbitration after negotiations have been ongoing for more than 120 days; and impose significant civil penalties against employers found liable for certain unfair labor practices;
- An expansion of the Family and Medical Leave Act to include employers with 25 or more employees (down from 50), and inclusion of elder care and participation in academic activities as permissible reasons for leave;
- A requirement that "large employers" (as yet undefined) offer a minimum 7 days paid sick leave per year;

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- A “fair share” contribution (a percentage of wages paid) for large employers who do not offer health insurance for employees;
- Implementation of changes to the Americans with Disabilities Act substantially enlarging coverage;
- An increase in EEOC enforcement of antidiscrimination law, as EEOC funding is increased;
- Reversal of existing law which allows permanent replacement of striking employees;
- A legislative reversal of NLRB decisions which expanded the definition of exempt “supervisors” under the National Labor Relations Act;
- A legislative “reversal” of the Supreme Court *Ledbetter* decision, which would have the effect of allowing female victims of pay discrimination a longer statute of limitations in which to file claims;
- Expansion of federal antidiscrimination law to outlaw sexual orientation and gender identity discrimination;
- Enforcement of the Genetic Information Nondiscrimination Act of 2008 (outlawing employer or health plan discrimination on the basis of genetic information);
- An increase in the federal minimum wage to \$9.50 per hour by 2011, and subsequent indexing of the minimum wage to inflation;
- An increase in visa quotas, allowing more immigrants to enter the U.S. on work visas;
- Enhanced enforcement of USERRA (armed services reemployment rights);
- A requirement that employers not offering retirement plans allow for employee enrollment (via payroll deduction) in IRA accounts.



Economic Volatility Will Cause Change

In addition to political changes, the current economic volatility creates its own changes in the employer-employee relationship. MHTL has observed that in past times of economic uncertainty, employment related litigation increases as terminated/laid off workers seek redress from former employers. Layoffs especially tend to implicate age discrimination concerns, and benefit cutbacks often implicate ERISA protections.

Statistics confirm our experience. The most recent EEOC data, from FY 2007, indicates that employment discrimination filings rose by 9% over FY 2006 - the largest increase since the early 1990's (which was, not coincidentally, also a time of significant economic volatility). The EEOC noted a nearly 15% increase in age discrimination filings over the same period. Studies have shown a significant correlation between the unemployment rate and discrimination suits.¹

Along with discrimination suits, laid off workers and their attorneys will be scrutinizing employers' compliance with the WARN Act and COBRA provisions. After the recent stock market debacle, the plaintiffs' bar is already reviewing whether plan sponsors (or their advisors) breached fiduciary duties regarding investment management.

Employers dealing with the effects of economic volatility should be on the lookout for the following:

- Claims under the Older Workers Benefit Protection Act;
- Claims under COBRA;
- Discrimination suits regarding layoffs or selective wage freezes;
- ERISA fiduciary suits;
- WARN Act notification compliance;
- Increased ADA requests for accommodation regarding mental health issues such as depression or substance abuse.

¹ "The Changing Nature of Employment Discrimination Litigation," 43 Stan. L. Rev. 983 (1991).



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As you navigate the maze of the changing employer/employee landscape, now, more than ever, it is critical to obtain sound legal advice. Murphy, Hesse, Toomey & Lehane, LLP, is ready to assist you in any area relating to labor, employment, immigration and the employer/employee relationship.

MHTL brings substantial experience to the table. We have over 150 years combined experience representing private and public employers before federal and state courts and agencies. This uniquely enables us to quickly and efficiently devise strategies for your particular situation. Additionally, we have guided clients through economically volatile times in the past and can provide practical advice to minimize exposure when the litigation inevitably increases.

For questions about pending or proposed laws or regulatory enforcement priorities, and how they will affect your operations, please contact Arthur Murphy, Katherine Hesse, Nan O'Neill or Geoffrey Wermuth or the attorney assigned to your account.

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