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ASK THE EXPERTS

What upcoming legislation is causing employer stress?

Joseph W. Gagnon,
Attorney,
Fisher & Phillips LLP:

The Arbitration Fairness Act will void all pre-dispute agreements to arbitrate claims arising out of the employment relationship. And this will adversely affect employers that require employees to sign an arbitration agreement when they are hired. Many employers prefer arbitration because it's generally faster and less expensive than litigation.

While the employer and employee remain free under the Act to agree to arbitration after a dispute arises, this is far less likely to occur. The Arbitration Fairness Act will increase litigation as arbitration falls by the wayside. The Act may also make it more likely that the employee will prevail.

The Patriot Employer Act would allow an employer to be designated a "Patriot" employer and receive a tax break if it agrees to maintain headquarters in the United States, pay 60 percent of employee health care premiums, provide a qualifying pension plan for employees, compensate each employee at a certain wage level, avoid increased outsourcing of work overseas and (perhaps most significantly) maintain a neutral position with respect to a union campaign to organize its work force. The amount of the tax break? One percent.

Many of these requirements may be hard for any business to meet, particularly in these difficult times. Beyond any routine cost-benefit analysis, however, employers should understand the effect of the agreement to remain neutral in a union campaign.

When an employer takes a neutral position during a union campaign the union wins 90 percent of the time, primarily because the employees no longer have access to information about the downside of unionizing. Unions are generally more successful in campaigns targeted at relatively smaller employers.

A designated Patriot employer may be tempted to advertise its status as a way to attract customers, but doing so will also identify the employer as an easy target for union organizers.

Brent E. Dyer and Daryl Bailey,
Attorneys,
Looper Reed & McGraw PC:

Since President Obama signed it into law on Jan. 29, the Lilly Ledbetter Fair Pay Act has gotten the Chicken Little treatment from employment lawyers. Despite what you may have heard, however, the sky is not falling on employers because of the Ledbetter Act.

Dyer

In May of 2007 — less than two years ago — the U.S. Supreme Court decided Ledbetter v. Goodyear Tire and Rubber Co. In that decision, the U.S. Supreme Court held that employees must file a charge with the EEOC within 300 days of receiving the first paycheck in which they were paid less than their counterparts of the opposite sex.

Bailey

For the most part, the Ledbetter Act simply changes the law back to what nearly everyone thought it was two years ago: That employees must file a claim with the EEOC within 300 days of receiving their last paycheck.

To be sure, the change is substantial, but it is unlikely to result in the "tidal wave" of litigation that some have been predicting.

To put this issue into perspective, look at the historical filings of Equal Pay claims with the EEOC. Between 1997 and 2006, Equal Pay filings averaged about 1.2 percent of the EEOC's total workload. In 2007, the number dropped to 1 percent.

The Ledbetter Act will probably cause that percentage to increase, but it is unlikely that it will go any higher than 1.6

percent, which was the 11-year high point for Equal Pay filings reached in 2000.

A much more significant development on the legislative horizon is the Employee Free Choice Act, which would allow unions to use a card-check process instead of secret ballot elections to obtain authorization to represent employees. Unions have been trying to get the legislation passed for years, and it may have a real chance of becoming law in 2009.

If it does pass, there will almost certainly be a spike in union organizing activity — even in traditionally union-resistant states like Texas.

Employers should not become too distracted by the changes that have come out of the Obama administration to date, however.

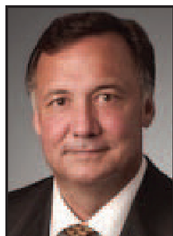
The two most significant legal developments for employers in 2009 were actually signed into law by President Bush in 2008. An amendment to the Family Medical Leave Act creates substantial new obligations with regard to leave for members of the military and their families.

Major changes to the Americans with Disabilities Act also became effective at the beginning of the year and will radically affect which employees are classified as "disabled."

DAVID FARIAS/HBJ

Kevin Troutman, left, and Joe Gagnon, right, both lawyers with Fisher & Phillips LLP, explain de-tails of the Paycheck Fairness Act to a group of Houston employers and HR specialists. The fi rm was one of several holding forums to explain and answer questions about proposed employment legislation.

Hurlie H. Collier,
Attorney,
Baker and Hostetler LLP:



The Employee Free Choice Act has been a priority of organized labor for nearly a decade. On March 10, the controversial EFCA was introduced in both the U.S. Senate and House of Representatives.

EFCA would amend federal labor laws, significantly impacting how employers address union organizing activity.

As has been reported widely in the media, EFCA allows unions to become employees' bargaining representatives on the basis of a "card check" process, thereby depriving employees of the right they presently have to vote in secret-ballot elections.

Experience with union card-check recognition in the United States and other countries reveals that it will be much easier for unions to organize if employees are denied their right to a secret ballot.

Currently, unions in the U.S. may have 80 percent of union cards signed going into an election, yet they still lose half of the elections because it is an established fact that employees sign the cards to avoid peer pressure and then express their true desire when voting in private.

EFCA will pose a significant threat to the rights of employees and employers throughout the private sector. Some of the specific targets which will be under siege if EFCA is signed into law include small businesses; "hot industries" that are already targets of organized labor such as health care, communications, utilities and transportation; and employers with large concentrations of employees, such as those in the manufacturing, retail and service industries.

Supporters of EFCA claim the legislation would make it easier for employees to organize, which they believe would lead to greater protections for workers. Opponents argue that the bill would violate workers' rights and cause substantial economic harm to businesses and consumers.

Congress is split on EFCA, mainly along party lines — with Democrats for the most part favoring the legislation and Republicans generally opposing it.

Nancy Patterson,
Partner,
Morgan, Lewis & Bockius LLP:

The Employee Free Choice Act, if enacted, would bring about the most sweeping changes in federal labor law since the passage of the original National Labor Relations Act in 1935. This proposed law will have a far-reaching and dramatic impact on American business and the daily operation of the American workplace.

EFCA is federal legislation intended to revitalize the country's labor movement by making it easier for employees to form a union and exercise its bargaining power. It promises to change the law in two specific ways favorable to unions. First, it makes it easier to create a union as the certified bargaining representative for a group. Second, it changes the process by which an initial con-

tract is negotiated by the union and the employer.

The new law would establish specific time lines by which the parties must meet and commence negotiations. Specifically, an employer would be required to meet with the union and begin bargaining no more than 10 days following receipt of a written request to bargain from the union. If the parties are unable to reach agreement on the terms of a collective bargaining agreement after expiration of 90 days of the commencement of the bargaining, either party may notify the Federal Mediation & Conciliation Service, a government agency, and request mediation.

If mediation is not successful within 30 days after the request, FMCS will refer the dispute to an "arbitration board." for binding arbitration. There are no limits in the law on the terms an arbitration panel can impose, other than the arbitrated decision.

The bill must pass both houses of Congress and be signed by the President. There is currently no timetable for this action, but the Obama administration has made EFCA's passage a priority.

What is certain is that interest groups will spend millions of dollars in lobbying and if passed, this law will have a dramatic effect on American businesses.

Michael Kelsheimer,
Attorney,
Looper Reed & McGraw PC:

Effective Jan. 1, 2009, the Americans with Disabilities Act Amendments Act rewrites the meaning of "disability" under the ADA, reversing the U.S. Supreme Court's narrowing trend of what qualifies as a disability. The Amendment Act significantly widens what is considered a "disability," radically changing what employers must consider a disability. Over the last 15 years, the Supreme Court increasingly limited what qualifies as a "disability" under the ADA.

The Amendment Act specifically reverses the Supreme Court's interpretation, reopening the meaning of "major life activity" to include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." Additionally, major life activities now include major bodily functions such as the operation of the digestive system, brain or reproductive systems.

The Amendment Act also states that a person is disabled even if he or she is in remission from the disability or has an intermittent recurring condition. Finally, employers may no longer consider most mitigating aids (such as a cane or medicine) when determining disability.

For example, if an employee has arthritis but is able to work without problems when taking medicine, he is still disabled even though the medicine allows him to do his job.

What employers need to know: Do not consider a person's disability in hiring, firing, promoting, training and maintaining them. Do not consider a person's outward appearance or actions alone as an indication of disability, because the employee may be taking medicine that hides the condition.

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