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Contacts

If you have questions or would like more information, please contact any of the attorneys listed at the end of this Alert. Hunton & Williams' [labor and employment law practice](#) covers the entire spectrum of labor and employment litigation, arbitration, administrative practice before the NLRB, EEOC, and the DOL, federal contract compliance, wage-hour standards, workplace safety and health standards, workers' compensation, contractual rights and remedies, Sarbanes-Oxley and whistleblower claims, workplace investigations and client counseling under federal and state labor and employment laws.

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The Obama-Biden Administration's Effect on the American Workplace

The Obama-Biden administration is poised to have a profound effect on the American workforce. The sheer number of bills that were introduced, sponsored, co-sponsored or publicly supported by President-elect Obama while in the Senate is a clear indication that the American workforce is ripe for change in 2009. The question for businesses across the country is what will be the immediate ramifications of the legislation on their workforce and bottom line.

The following is a short synopsis of the current pending legislation and its status on the Hill:

Employee Free Choice Act (HR 800/S 1041)

The Employee Free Choice Act ("EFCA") would allow unions to bypass the secret-ballot election process and become the certified bargaining representative of any "appropriate unit" of employees if a majority of the employees sign authorization cards in support of the union. The EFCA does not require a union to notify an employer of an organizing campaign, meaning a union could "win" representation before an employer even became aware of the unionization effort. The act also calls for "interest arbitration" if the union and employer cannot agree upon the terms of the first collective bargaining agreement. If a contract is not agreed upon in 90 days, either party can request federal mediation. If an agreement still is not reached after 30 days of mediation, an arbitration panel would resolve any disputes, permitting a third party to set the proper wages, benefits, and terms and

conditions of employment. Decisions of the arbitration panel would be binding for two years and neither companies nor employees could appeal the arbitrators' ruling. The act also would provide for liquidated damages of three times back pay, plus civil penalties, if employers were found to have committed unfair labor practices during elections or first contract bargaining. The EFCA has no corresponding increase in penalties for violations by a union.

The EFCA passed the House, but the Senate fell just 9 votes short of the 60 votes necessary for cloture in June 2007. The EFCA has overwhelming support among the Democratic party, including the support of President-elect Obama who co-sponsored the Senate version of the bill and during his campaign frequently championed the need to pass the act. It is expected that the EFCA will be reintroduced in Congress early next year.

RESPECT Act (S 969/HR 1644)

The "Re-Empowerment of Skilled and Professional Employees and Construction Trade workers" ("RESPECT") Act would amend the National Labor Relations Act ("NLRA") to greatly narrow the definition of "supervisor" under the NLRA and greatly expand the number of employees eligible to unionize. RESPECT would exclude as supervisors those employees whose only supervisory duties are to "assign" and "direct" other employees, and would permit only those employees who engage in managerial duties "for a majority of the individual's work time" to

be classified as a supervisor. Thus, even a store general manager might not qualify as a supervisor, if he or she spends significant time in no supervisory duties, as newly defined by RESPECT. In short, under RESPECT, a manager who does not meet the new test would be able to join a union and could be involuntarily included in a collective bargaining agreement. The employer also could not call on such a manager to assist in delivering the company's message during a union campaign.

The RESPECT Act was approved by the House Committee on Education and Labor in September 2007. A Senate version (S 969), co-sponsored by President-elect Obama, was introduced and referred to the Committee on Health, Education, Labor and Pensions in March 2007.

Independent Contractor Proper Classification Act of 2007 ("ICPCA") (S. 2044)

The ICPCA, introduced by then-Senator Barack Obama in September 2007, would amend the Revenue Act of 1978 to require employers to treat misclassified independent contractors as employees for employment tax purposes upon a determination by the Secretary of the Treasury and would eliminate the "industry practice" defense to misclassification. The ICPCA also would allow workers to seek a determination of their employee/independent contractor status from the Secretary of Treasury and would prohibit employers from retaliating against workers for seeking such a determination. The act also would require employers to notify independent contractors of tax obligations, the labor and employment protections that do not apply to them as independent contractors, and the right to seek a status determination. Under the ICPCA, the IRS would be required to communicate claims of misclassification to the DOL for investigation under the wage and hour laws. The ICPCA has been referred to the Senate Committee on Finance.

Employee Misclassification Prevention Act ("EMPA") (S. 3648)

The EMPA, co-sponsored by then-Senator Obama in September 2008, would amend the Fair Labor Standards Act to provide penalties for employers who misclassify workers as independent contractors, including civil penalties and liquidated damages. The EMPA also would require employers to notify workers of their classification as either an employee or an independent contractor, of the Department of Labor's website for employee rights, of the address and phone number for the local Department of Labor ("DOL") office, and of their right to contact the DOL if they believe they have been misclassified. The EMPA also would require that 25 percent of wage and hour audits conducted by the Department of Labor focus on potential violations of the EMPA. The EMPA has been referred to the Senate Committee on Health, Education, Labor and Pensions. The House version of the act (H.R. 6111) was referred to the House Subcommittee on Income Security and Family Support.

Employment Non-Discrimination Act (HR 3685)

This bill would amend the Civil Rights Act of 1964 to prohibit discrimination in employment on the basis of an individual's actual or perceived sexual orientation. The ENDA also would require employers to provide reasonable access to adequate facilities that are not inconsistent with the employee's identified gender. The ENDA was passed by the House in November 2007 by a substantial margin, but has not been considered in the Senate. President-elect Obama pledged his support for the ENDA during his campaign. His website states that he will "pass the Employee Non-Discrimination Act to prohibit discrimination based on sexual orientation or gender identity or expression."

Lilly Ledbetter Fair Pay Act (S 1843/HR 2831)

This legislation is an effort to overturn the Supreme Court's May 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* requiring a plaintiff to file suit within 180 days of the decision resulting in discriminatory pay. The Lilly Ledbetter Fair Pay Act would institute a "Paycheck Rule," under which the time limit for filing a charge would "restart" with each paycheck received. The bill also would allow family members of employees and others "affected by" alleged discrimination to file a claim. HR 2831 passed the House in July 2008. As with the Employee Free Choice Act, the Senate failed to get the 60 votes necessary to consider the law in April 2008 (56-42 vote). President-elect Obama was a co-sponsor of this bill, he voted in support of it in the Senate, and his campaign website refers to this legislation as a "must pass." In fact, Lilly Ledbetter was featured in one of President-elect Obama's commercials during the campaign. With the Democrats having picked up additional Senate seats in the recent election, the Ledbetter Fair Pay Act is likely to pass in the next session of Congress.

Paycheck Fairness Act (S 766/HR 1338)

This legislation would amend the remedies provisions of the Equal Pay Act to prohibit retaliation, increase penalties and authorize the Secretary of Labor to seek additional compensatory or punitive damages. The act requires employers to affirmatively demonstrate that a pay differential is not based on gender. It would also increase litigation by automatically including employees as part of a class action, unless an employee specifically opts out. By contrast, the current process requires an employee to opt in to be included in a collective wage action under the EPA. Further, it would allow for unlimited compensatory and punitive damages for private-sector employees, even in cases where no intent to discriminate

was established. The Paycheck Fairness Act was co-sponsored by then-Senator Obama and has been referred to the Committee on Health, Education, Labor and Pensions.

Fair Pay Act of 2007

(S. 1087)

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This legislation would require employers to pay employees in a job dominated by employees of a particular sex, race or national origin at the same wage rate as employees in an “equivalent” job that is dominated by employees of the opposite sex or a different race or national origin. The Fair Pay Act also would allow plaintiffs to pursue Rule 23 “opt-out” class actions, rather than applying the “opt-in” collective action scheme that applies to FLSA and Equal Pay Act claims. Finally, the act would allow for unlimited compensatory and punitive damages for private-sector employees without a showing of intent to discriminate by the employer. The Fair Pay Act was co-sponsored by then-Senator Obama and has been referred to the Committee on Health, Education, Labor and Pensions.

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