



Labor & Employment

From new proposed employment-related legislation, to changes in leadership and policies in federal agencies, employers can expect to encounter a myriad of changes and challenges in 2010.

Credit Checks

Companies are increasingly conducting credit checks as part of their pre-employment background screening. Many employers believe that an applicant with a poor credit history may be more inclined to steal or misappropriate sensitive customer information (e.g., credit card information). Employers are generally aware that they must comply with the Fair Credit Reporting Act and similar state laws in conducting credit checks, but many are unaware of the potential for liability under Title VII whenever an applicant is denied employment because of poor credit history. Under Title VII, applicants can challenge facially neutral employment practices (such as credit checks) if those practices have a “disparate impact” on members of certain groups (e.g., racial or ethnic minorities). If an applicant proves that a screening practice disproportionately eliminates employment opportunities for members of his or her group, the employer can avoid Title VII liability only if it can demonstrate that the screening practice is “job related for the position in question and consistent with business necessity.”

The EEOC is beginning to scrutinize employer credit check practices and their potential for disparate impact on certain groups. We expect to see increasing litigation over this issue, particularly in light of the fact that many more people in this economy have poor credit histories due to mortgage-related issues or job losses.

The Department of Labor’s New Enforcement Policies

U.S. Secretary of Labor Hilda Solis recently announced that “the Department of Labor is back in the enforcement business.” These changes are a departure from the compliance assistance policies of Solis’ predecessor, Elaine Chao. Of particular significance, the Secretary announced that the DOL has hired 250 new wage and hour investigators, a staff increase of more than one third, to handle complaints of alleged wage and hour violations. In early 2010, the DOL will launch a new national public awareness campaign titled “We Can Help” to inform workers about their rights. As a result of these changes, employers should expect more wage and hour complaints and investigations by the DOL in 2010.

Similarly, the Occupational Safety and Health Administration (OSHA) under Solis’ leadership initiated a national emphasis program on recordkeeping to address the accuracy of injury and illness data recorded by employers. A November 2009 report from the Government Accountability Office suggests there is widespread underreporting of employee injuries and illnesses. This new program scrutinizes business records such as employee medical records, workers’ compensation records, payroll/absence records, incident reports, company first aid logs, and the like, to determine if the employer’s injury and illness records are accurate or reflect underreporting of injuries and illnesses. Secretary Solis also announced plans to hire 100 new OSHA inspectors in 2010. Employers should expect an aggressive, “enforcement first” approach from the DOL in 2010.

Employee Free Choice Act (EFCA)

In 2009, many predicted Congressional passage of the Employee Free Choice Act (EFCA), a bill that would supplant union elections with “card check” recognition, require that an arbitrator set the terms of the first collective bargaining agreement if the company and the union could not reach agreement soon after union recognition, and enhance the penalties for employer unfair labor practices. EFCA encountered significant resistance in the Senate, however, with several Southern Democratic senators opposing passage of the bill in its current form. Because EFCA lacked the 60 votes necessary to overcome a Republican filibuster and because of the time and resources committed by the Senate toward passage of the health care bill, EFCA did not reach the Senate floor in 2009.

In 2010, we expect that labor leaders will exert significant pressure on Congress to pass at least a modified version of EFCA. Based on the current political landscape, with Democrats expected to lose seats in Congress in the 2010 mid-term elections, union leaders likely believe that 2010 is a “now or never” moment for passage of EFCA. Business groups, however, have lobbied strongly against EFCA, and the argument that the bill is a “job killer” resonates strongly with the electorate in today’s economy. Given the political landscape, we do not expect EFCA to pass in its current form, but there is a significant possibility that Democrats could muster a 60-vote majority to support a modified version of EFCA, one that perhaps substitutes expedited union elections for card-check recognition but retains the enhanced penalties for employer unfair labor practices during an election campaign. It remains to be seen how a “modified EFCA” addresses the issue of first-contract arbitration, an idea bitterly opposed by business.

Worksite Enforcement Actions By Immigration and Customs Enforcement

Immigration and Customs Enforcement (ICE) recently announced a shift in focus from worksite raids to employer I-9 audits and began investigations of thousands of businesses as part of its strategy to focus on employers rather than the individuals who are working in this country illegally. As recently as November 2009, ICE announced 1,000 new I-9 audits against employers. As a result of this new initiative, employers can expect ICE to conduct more I-9 audits in 2010, which may result in fines or criminal actions against the employer for violations.

Paid Sick Leave

Employers may be required to provide seven days of paid sick time per year under a bill introduced in Congress, titled the Pandemic Protection for Workers, Families, and Businesses Act (H.R. 4092/S. 2790). Under the proposal, most employers with 15 or more employees would be required to provide full-time employees with paid sick time off due to a contagious illness, or to care for a child with a contagious illness. Part-time employees would be entitled to a pro-rata share of paid sick days. The proposal makes clear that state and local paid sick leave laws providing a greater amount of paid leave remain in force.

If the Act becomes law, employers’ existing paid time off (PTO) policies may need to be modified. According to the bill, employers who already provide seven days of paid sick leave that “may be used for the same purposes and under the same conditions as the purposes and conditions [covered in the legislation] shall not be required to provide additional paid sick time. . . .” It is unclear what effect the legislation would have on PTO plans that allot a certain amount of time off without specifying the permitted purposes of use.

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