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## LEGISLATIVE PRIMER

HERE'S A LOOK AT WHAT THE OBAMA ADMINISTRATION MAY HAVE IN STORE FOR EMPLOYERS IN 2009

**T**his has been a banner year for political types. With Sen. Barack Obama's election to the presidency and the Democrats gaining at least 20 seats in the House and at least five seats in the Senate, the Obama administration promises to bring dramatic change to the workplace.

Whether the changes promised during the campaign will hold up to the weighty reality of a recession remains, of course, to be seen. Having said that, Obama vowed to effect a comprehensive and fundamental shift in the employment landscape. As Inauguration Day looms, employers would do well to use the last few weeks of the Bush administration to review the implications of anticipated legislation and prepare for likely change.

What does the Obama administration hold in store for employers? Here are a few of the legislative highlights we're likely to see early in 2009.

■ The Employee Free Choice Act. Few bills have generated as much debate in recent years as the EFCA. If passed, this bill promises to fundamentally alter labor-management relations. For starters, unions would be able to bypass the current secret-ballot election procedure supervised by the National Labor Relations Board — instead becoming a certified bargaining representative through a “card check” recognition procedure. In addition, a federally appointed arbitration panel would draft the first collective-bargaining agreement if the parties couldn't or didn't agree within the specified time frame.

The EFCA is the stepsister to the Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers (RESPECT) Act. This legislation has the potential to create a more favorable landscape for union organizing by expanding the current category of union-eligible employees and by limiting management's



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John T. Palter

ability to use supervisors to communicate the company's viewpoint.

Keep in mind that unions typically form in response to employee perceptions of lack of dignity and respect. If this may be the case in your shop, consider conducting focus groups to address employee concerns. Consider, too, that, policies such as restricting bulletin board, e-mail and building access may limit on-the-job, union-related dialogue initially — but if those policies are deemed unreasonable, communications can and will go underground.

■ The Fair Pay Act of 2007 and the Lilly-Ledbetter Fair Pay Act. The existing Equal Pay Act requires a claimant to demonstrate that he or she is paid less than someone of the opposite sex performing the same job. Anticipated updates to the bill would expand the universe of potentially comparable employees to include those who perform equivalent jobs and would prohibit discrimination between individuals of different races or national origin.

Although the proposal would still allow employers to differentiate among workers based on seniority, merit or quality and quantity of production, aggrieved employees would be given the choice of filing with the Equal Employment Opportunity Commission, or filing directly in federal court.

President-elect Obama is also likely to push for passage of the Lilly-Ledbetter Fair Pay Act, which extends the deadline to file Title VII pay-related claims to 180 days (300 days in Texas)

after receiving any paycheck affected by a discriminatory pay decision, no matter how far in the past the act of discrimination occurred. This act would require that employers create systems to ensure that all performance-related actions are documented and retained for years after the employee leaves the company.

What's the best way for employers to respond? Start by reviewing the demographics of your pay scales in light of job requirements, run a reasonableness test across all grades of pay — and take a close look at exceptions. Then, take a look at your company's document-retention policies with an eye to keeping full and comprehensive records from the start of employment to at least seven years after the employee leaves.

■ The Employee Misclassification Prevention Act. This proposed legislation increases penalties and enforcement actions against employers who misclassify employees as independent contractors to avoid payroll taxes and benefits. The bill imposes fines of up to \$10,000 per violation for employers who repeatedly or willfully misclassify workers. Even if this bill is not passed, companies should review their independent contractor agreements to verify that they comply with current law.

Whether any of these bills will ultimately become law remain to be seen. In any event, it's good advice to clean and polish your employment house before the Obama administration is ushered in. As another popular Democratic agent of change, John F. Kennedy, once said, “The time to repair the roof is when the sun is shining.”

**PALTER** is a trial lawyer and managing member of Riney Palter PLLC ([www.rineypalter.com](http://www.rineypalter.com)). Contact him at [jtpalter@rineypalter.com](mailto:jtpalter@rineypalter.com).