



## **2011 Legislative Overview: "The Legislators" vs. "The Regulators"**

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Now that the dust has settled on the 2010 Midterm Congressional elections, for human resource professionals, the 112<sup>th</sup> Congress may be remembered as much for employment legislation that will *not* become law as for any new employment law initiatives. Numerous legislative initiatives supported by the Obama Administration, and feared by many employers, will have no chance of becoming law this year (the prospects of passing the Employee Free Choice Act, Paycheck Fairness Act or significant workplace safety legislation have all but vanished). Despite, or perhaps because of, the anticipated lack of federal *legislative* employment-related activity, federal *regulatory* initiatives continue to gain momentum and will ensure that human resource professionals will still have plenty of things to keep them awake at night.

With the Ohio legislature and the Ohio executive offices now firmly in Republican control, employment-related legislation introduced in Columbus this year (and Executive Orders) will be dramatically different from initiatives introduced in recent years. Republic-controlled state legislatures and executives will: 1) challenge federal health care mandates (Ohio's newly elected Republican Attorney General recently joined the opposition to such mandates); 2) promote initiatives mandating secret ballot union elections; 3) provide additional protections for gun owners and/or concealed carry permit holders; and 4) reduce or cap state pension fund contributions and benefits. States and municipalities will continue to debate whether to add to the ever-growing list of protected classes, i.e. sexual orientation and gender identity and expression.

### **Federal Legislation**

Many Obama supported employment initiatives failed in 2010. Among the casualties were: 1) the Employee Free Choice Act ("EFCA"), the Employment Non-Discrimination Act ("ENDA"), the Byrd Miner Safety Act of 2010, Protecting America's Workers Act ("PAWA"), and the Paycheck Fairness Act. The above initiatives, or derivations thereof, are unlikely to muster much support in the 112<sup>th</sup> Congress.

On December 22, 2010, Congress approved a 2% payroll tax cut and extended both the Section 127 tax exclusion for employer-provided educational assistance and unemployment insurance (which was extended another 13 months). It remains to be seen whether there will be further unemployment extensions beyond 2011.

Instead, we will likely see the introduction of federal legislation aimed at:

- Repealing all or parts of the Patient Protection and Affordable Care Act;
- Mandating secret ballot union elections;
- Prohibiting federal bailouts of state pension funds (Congressman Jason Chaffetz (R-UT) recently introduced a House Resolution to this effect).

### **Federal Regulatory Initiatives**

In contrast, federal agencies such as the Department of Labor and its divisions, the Equal Employment Opportunity Commission and the National Labor Relations Board have, and will continue to, increase rule-making and enforcement efforts. 2010 was a record year for the number of charges filed with the EEOC and the amount of

money recovered by the EEOC from employers (over \$400 million). The EEOC is currently hiring more investigators. The number of investigations by OSHA and citations issued to employers were also record highs. In 2011, we can expect the following:

- New ADA regulations from the EEOC;
- Continued OSHA emphasis on enforcement with employers seeing increased citations and increased fines;
- Increased Wage and Hour and IRS emphasis on investigating employee misclassification issues;
- EEOC focus on "systemic" discrimination targeting employer pay practices;
- Dramatic shifts in NLRB precedent which will pave the way for increased union organizing (the NLRB has already issued a proposed rule requiring employers to post notices informing employees of their right to organize under the NLRA).

### **Ohio Legislative Initiatives**

Governor Kasich has already made national headlines by proposing dramatic changes to Ohio public sector collective bargaining. Given this, we will certainly see Executive Orders and proposed legislation addressing public sector union issues. Some current proposals or proposals expected in the not-too-distant future include:

- Legislation to limit the applicability of all or parts of the federal Patient Protection and Affordable Care Act (see, H.B. 11);
- Legislation protecting and/or expanding the rights of gun owners and holders of concealed carry permits;
- Significant employment law reforms which could include:
  - Reduction in statute of limitations for employment-related claims (currently at 6 years for discrimination claims)
  - Elimination of individual supervisor liability for employment discrimination claims (consistent with federal law in the Sixth Circuit)
  - Damages caps (analogous to Title VII's caps)
- Legislation limiting unionization for certain public sector financed employees and restrictions on public sector union employees' ability to strike;
- Legislation mandating secret ballot union elections;
- Legislation focused on assisting small businesses. (See, Governor Kasich's Executive Order 2011 – 01K "Establishing the Common Sense Initiative.")

Throughout the course of this year, we will be providing updates on various federal and Ohio legislative proposals and regulatory initiatives. Hold on to your hats. We're in for another wild ride!

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