

## The Obama Administration's Labor and Employment Law Agenda

**Presented by:**

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## AN OVERVIEW

THE OBAMA LABOR AGENDA

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## The Obama Agenda Labor Law Proposals

1. **The Employee Free Choice Act** – Card Check – Mandated Interest Arbitration
2. **Respect Act “Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers” Act** – Supervisor exemption from union organizing
3. **Patriot Employers Act** – “Neutrality” in union organizing

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## Obama/Pelosi Agenda Employment Law

1. **Lilly Ledbetter Fair Pay Act** - Expands Employer liability under Title VII, ADA, Rehab Act and ADEA
2. **Equal Remedies Act and Civil Rights Act of 2007, 2008, or 2009** – Removes damages cap of \$300,000, Limits mandatory arbitration in employment agreements, Increases plaintiff's attorney fee recovery
3. **Fair Pay Act of 2007** - Comparable Worth

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## HEALTH, SAFETY AND OTHER

1. **Working Families Flexibility Act** - Mandatory negotiation of employees requests regarding: Hours of work, Times, Location
2. **Healthy Families Act** – Mandates seven paid sick days, 15 employee threshold
3. **Independent Contractor Status** – several bills
4. **WARN Act Amendments**
5. **OSHA Reform**: Penalty increases

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## WHAT HAS HAPPENED SO FAR – THE FIRST 40 DAYS

- **Lilly Ledbetter Fair Pay Act**
  - Reversed Supreme Court decision – each paycheck can constitute separate instance of discrimination (pay claim based on race, sex, age, disability)
  - Passed overwhelmingly – perceived sense that conservative Supreme Court was not being fair to the little guy.

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## WHAT HAS HAPPENED SO FAR – THE FIRST 40 DAYS

- Obama Executive Orders
  - Notification of Employee Rights Under Federal Law
    - Government contractors must post notice advising employees of right to organize (also rescinds Bush notice on *Beck* rights).
  - Non-Displacement of Employees Under Service Contracts
    - Predecessor's employees employed in Government Service Contract must be hired – eliminating right to separately interview and make independent decision on hiring.
  - Cost of Persuading Employees Disallowed
    - Costs including legal fees in connection with Union organizing activity not reimbursable.

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## WHAT HAS HAPPENED SO FAR – THE FIRST 40 DAYS

- Obama Executive Orders, cont'd.
    - Promoting Use of Project Agreements
      - "Encourages" Federal agencies to mandate PLA's on large construction projects involving Federal monies.
- (Question – impact given stimulus package)

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## EFCA – The Most Revolutionary Proposal Since the Enactment of the National Labor Relations Act

- Organized labor is pushing the Employee Free Choice Act (EFCA):
  - Introduced in the House (HR-800) by Rep. Miller and passed by vote of 241-185 on March 1, 2007
  - Introduced in the Senate (S-1041) by Senator Kennedy on March 29, 2007-- **but killed by a Senate filibuster.**

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## EFCA

- Impact of the Election on EFCA's Passage:
  - Increased Democratic majority in the House (255 out of 435 seats),
  - Increased Democratic majority in the Senate (58 out of 100 seats, with 1 race pending),
  - President Obama

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## EFCA

- What does EFCA provide?
  - Recognition without an election: Upon filing of a petition, if NLRB finds that majority of employees have signed "valid" authorizations, it shall certify the union as the employees' representative without an election.

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## EFCA

- Expedited Bargaining:
  - Within 10 days of receiving a request to bargain over an initial contract, the parties must meet to begin negotiations.

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## EFCA

- Expedited mediation:
  - If no agreement after 90 days of bargaining, either party can request mediation by FMCS.

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## EFCA

- Binding Interest Arbitration
  - If no agreement within 30 days of mediation request, FMCS must refer the matter to binding arbitration of an initial 2-year agreement.

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## EFCA

- Enhanced Penalties for ULPs
  - Treble damages for violations of Section 8(a)3 (discrimination in hiring or tenure),
  - Monetary penalty of up to \$20,000.00 per violation for interference with employee rights

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## EFCA

- Common Criticisms of EFCA
  - Employees often coerced into signing cards
  - Employees often don't understand what cards say
  - Employees are often unaware of the costs or benefits of joining a union
  - How long will a signed card be valid?
  - No chance for employer to tell its side of the story

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## EFCA

- Impact in Our Industry
  - Construction Industry Proviso remains, but voluntary recognition to change from 8(f) to 9(a) would become mandatory
  - Binding arbitration – need to ensure that third party arbitrator is CIR, otherwise could wreak havoc in our industry
  - Increase in monetary fines for employers only
    - Treble back pay / civil penalties up to \$20,000 per employer violation

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**THE LIEBER ALTERNATIVE to EFCA  
(Don't Kill the Baby Because You're Drowning –  
Sounds Better than Don't Throw the Baby Out with  
the Bathwater)**

## In Lieu of EFCA

1. Make interest arbitration a mandatory subject of bargaining
2. No permanent replacements for 30 days
3. Reinstate §8(a)(3) terminated employees upon issuance of decision by ALJ
4. Seven board members and the Board cannot operate with less than three members
5. Eliminate test of certification ULP – upon refusal to bargain following Board certification, NLRB immediately petitions for enforcement

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## ADDITIONAL LABOR LAW PROPOSALS

### **RESPECT ACT: “Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers” Act**

- Attempt by organized labor to overturn current labor law decisions expanding the number of employees considered to be “supervisors” under the NLRA
- Since “supervisors” are excluded from coverage under the NLRA, unions view these decisions as limiting their potential membership

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## ADDITIONAL LABOR LAW PROPOSALS (cont’d.)

### **RESPECT ACT:**

- *Oakwood Healthcare* trilogy – who represents interests of employer?
  - authority to assign
  - authority to responsibly direct
  - use of independent judgment in exercise of authority
- Bill would delete “assign” and “responsibly direct” from definition of supervisor.

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## ADDITIONAL LABOR LAW PROPOSALS (cont’d.)

### **PATRIOT EMPLOYERS ACT:**

- Tax credits for employers who:
  - are “neutral” in union organizing campaigns
  - maintain headquarters in U.S.
  - pay at least 60% of health care premiums
  - maintain or increase number of full time U.S. workers relative to workers outside U.S.
  - provide employees with certain levels of compensation and retirement benefits

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## DISCRIMINATION AND LITIGATION

### **EQUAL REMEDIES ACT AND CIVIL RIGHTS ACT OF 2009?:**

- removes Title VII damages cap of \$300,000
- outlaws mandatory arbitration in employment contracts
- stiffen penalties Equal Pay Act violations
- provide for enhanced damages in FLSA cases
- reduced burden for recovery of attorney’s fees

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## HEALTH, SAFETY AND OTHER

### **WORKING FAMILIES FLEXIBILITY ACT:**

- would apply to employees working 20 hours per week and 1,000 hours per year, *and* employers with 15 or more employees
- based on European leave models
- mandates 1 on 1 negotiations over individual employee requests regarding modification of hours of work, schedule, work location
- if employer request denied, employer must state the basis therefore
- contemplates “Title VII style” protection from retaliation

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## HEALTH, SAFETY AND OTHER

### **HEALTHY FAMILIES ACT:**

- mandates 7 paid sick leave days
- 15 employee threshold

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## HEALTH, SAFETY AND OTHER

### INDEPENDENT CONTRACTOR STATUS:

#### Various proposals to address "employee misclassification"

- Independent Contractor Clarification Act of 2007
- Employee Misclassification Prevention Act
- Tax payer Responsibility, Accountability, and Consistency Act of 2008

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## HEALTH, SAFETY AND OTHER

### WARN ACT:

- Lower employment threshold to cover smaller businesses (50 employees)
- expand definition of "Mass layoff" and plant closing by reducing employee threshold from 50 affected employees to 25
- increase notice period from 60 days to 90 days
- enhanced damages to provide for double back pay and benefits for up to 90 days

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## HEALTH, SAFETY AND OTHER

### OSHA REFORM:

- Promulgation of new ergonomics regulations
- increase civil penalties (increase from \$70,000 to \$100,000 for "repeat" and "willful" violations, increase from \$7,000 to \$10,000 for "serious" and "other than serious" violations)
- increase OSHA criminal penalties (\$250,000 fine, 10 year – 20 year prison for willful violators (serious bodily injury))

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