



Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Employment Law's Future Under Obama

Law360, New York (November 20, 2008) -- With Democrats back at the helm in both the White House and Congress, 2009 could be a year of major federal legislative reform. At the same time, President-elect Barack Obama is expected to nominate one or more Supreme Court justices, facing little resistance from a largely Democratic Senate. The change in leadership might severely impact employment litigation in the United States.

What Will Congress Do?

A number of employment law reform measures successfully passed through the House of Representatives in 2007 and 2008 only to be blocked in the Senate by Republican filibusters. Now, with a sweeping Democrat majority in both the House and the Senate — and no threat of a Presidential veto — it would not be surprising if these measures become law in the next two years.

One of the first steps in altering employment litigation in the United States may be the elimination of statutory caps on damage awards under Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Americans with Disabilities Act (the “ADA”).

Currently, plaintiffs suing under Title VII and the ADA are entitled to recover a maximum of \$300,000 in compensatory and punitive damages from employers with more than 500 employees. President-elect Obama has co-sponsored and promised to sign into law legislation, such as the Equal Remedies Act of 2007, which seeks to eliminate the statutory damages cap in Title VII and ADA cases.

The Lily Ledbetter Fair Pay Act is another bill a Democratic Congress will consider in 2009. If passed, this legislation would overturn the Supreme Court’s recent 5-4 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074, which held that the deadline for filing pay discrimination claims with the Equal Employment Opportunity Commission (the “EEOC”) is measured from the date of the first allegedly discriminatory pay decision.

The proposed law would toll the deadline each time an employer issued the plaintiff a paycheck that was the product of a past discriminatory pay decision. After passing in the House, the Ledbetter bill died in 2008 when Senate Republicans blocked consideration of the measure, with President George W. Bush promising a veto.

Now, there may be enough senators to force consideration of the legislation, and, with no veto threat, we may well see the Lily Ledbetter Fair Pay Act signed into law in 2009.

The Paycheck Fairness Act, which passed in the House in 2008, may come to the fore in 2009 as well. If enacted, the legislation would significantly alter federal pay discrimination claims. Among other things, the Paycheck Fairness Act would make punitive and compensatory damages available under the Equal Pay Act of 1964 (the "EPA") without requiring proof of discriminatory intent.

The legislation would also make it easier for plaintiffs to become parties to class action lawsuits under the EPA by requiring plaintiffs to "opt-out" of such lawsuits, rather than "opt-in" as under current law.

We can also expect continued interest in legislation banning discrimination on account of sexual orientation at the federal level. The Employment Non-Discrimination Act ("ENDA") would amend Title VII to make sexual orientation discrimination unlawful under federal law.

Like the Ledbetter Act, ENDA passed in the House but died in the Senate. President-elect Obama has made his support for the bill abundantly clear, stating he will pass ENDA on his website.

In the 1990s, we saw a steep increase in workplace law claims after the Civil Rights Act of 1991 provided greater relief to plaintiffs who filed lawsuits under the employment discrimination provisions of Title VII — most notably, by granting plaintiffs the right to a trial by jury. W

While federal employment law reform will undoubtedly increase employment litigation over the next few years, employers in many states will be largely unaffected by changes at the federal level. States such as California, Colorado and New Jersey, as well as many others, already ban sexual orientation discrimination in the employment context, and a number of states allow for unlimited compensatory and punitive damages in all types of employment discrimination cases.

For states with less progressive employment laws, however, the impact of federal legislation will be more profound.

What About The Supreme Court?

While President-elect Obama will certainly play a role in shaping the future of the United States Supreme Court, that role may be limited to preserving the Court's current ideological structure.

After eight years with a Republican president, more liberal justices like John Paul Stevens, 88, and Ruth Bader Ginsburg, 75, can now retire without setting the stage for a conservative overhaul of the Court.

Assuming President-elect Obama faces little opposition from the Senate, he will most likely appoint new Justices who would interpret the law much like their predecessors. Thus, the Court's ideological slant will remain the same — split down the middle with four liberal justices, four conservative justices and Justice Anthony Kennedy, 72, as a swing vote.

If Obama gets the chance to appoint a third Supreme Court Justice to replace either Justice Kennedy or one of the conservative justices, however, we could see a significant shift in the playing field. It is unlikely that one of the conservative Justices, such as Antonin Scalia, 72, or Clarence Thomas, 60, will retire while Obama is president.

It is interesting to note that while some expected a more employer-friendly Supreme Court after George W. Bush appointed John Roberts Chief Justice and replaced Justice Sandra Day O'Connor with Justice Samuel Alito, the Roberts Court handed down four pro-employee decisions last term, none of which the Court decided by a 5-4 vote.

The Court ruled 7-2 that a formal "charge" of discrimination to the EEOC is not essential to satisfy regulatory requirements under the Age Discrimination in Employment Act ("ADEA"). *Federal Express Corp. v. Holowecki*, No. 06-1322 (Feb. 27, 2008).

In another 7-2 decision, the Court held that a Reconstruction-era civil rights statute prohibiting race discrimination permits retaliation claims even though the law does not explicitly provide for a retaliation cause of action. *CBOCS West, Inc. v. Humphries*, No. 06-1431 (May 27, 2008).

The same day as *Humphries*, the Court ruled 6-3 that federal employees who complain about age discrimination are protected from retaliation under the ADEA. *Gómez-Pérez v. Potter*, No. 06-1321 (May 27, 2008).

Finally, in *Meacham v. Knolls Atomic Power Laboratory*, 06-1505 (June 19, 2008), the Court ruled almost unanimously that an employer bears the burden of proving a "reasonable factor other than age" in disparate impact ADEA cases. These decisions would likely come out the same if decided in 2009 with new liberal Justices on the bench and the Court may look to these holdings as guidance in interpreting future federal employment law claims.

Do not forget that President-elect Obama also will be responsible for appointing a number of judges to preside over federal trial courts across the country. These appointments may have a significant effect on adjudication of employment disputes.

With a more liberal federal bench, we are likely to see more expansive interpretations of federal employment laws, greater deference to plaintiffs and fewer employer-friendly summary judgment rulings.

While we may not know which laws will pass through both houses of Congress, who will be appointed to the Supreme Court, or how new appointees in federal courts across the country will interpret the nation's employment laws, one certainty is that the results of the 2008 election will have a profound effect on employment litigation in the U.S. for years to come.

Vincent A. Cino is a senior partner in Jackson Lewis LLP's Morristown, N.J., office and is the firm's national director of litigation.