

# PUBLICATION

---

## The Dust Has Settled – Where Do We Go From Here? What Your Company Can Expect in Our Post Election Reality

November 21, 2012

Following President Obama's win over Governor Mitt Romney, the continued Democratic majority in the Senate, and a continued Republican majority in the House, employers are reasonably wondering what impact the election will have on employment laws over the next two years. In short, we expect the Affordable Care Act (ACA) to be implemented with a number of tweaks. We further predict that controversial labor and employment legislation will go nowhere in the next Congress, leaving change in the hands of the courts and government agencies.

### Health Care Reform

The year 2014 is a pivotal year for implementation of the ACA. Employers with 50 or more full-time employees or equivalents will pay a tax if they do not offer their full-time employees (and dependents) health coverage that is both "affordable" and provides "minimum value." Accordingly, employers will soon have to determine whether they will continue to provide employees with health care coverage and, if so, how to do so. The current absence of regulatory direction on key aspects of this "Pay-or-Play" penalty renders this a difficult calculation. Accordingly, we expect relevant agencies to issue numerous ACA regulations in the coming months.

### Labor Law

Through the National Labor Relations Board's (NLRB) rulemaking and decisions, employers have experienced a dramatic shift in previously-settled law that has come to favor organized labor. We expect this trend to continue. If the President's interim appointments to the Board are upheld, we expect its scrutiny of handbooks, personnel policies and social media policies to promptly resume. We similarly expect the Board to continue to adopt a new standard for upholding the existence of micro-bargaining units, such as it did in the Specialty Healthcare dispute. Likewise, the Department of Labor (DOL) has been working on so-called "persuader" regulations, which would significantly expand the scope of employer activity and legal advice undertaken during a union organizing campaign that would trigger expansive reporting requirements under the Labor-Management Reporting and Disclosure Act. This obligation, in turn, would limit employers' ability to easily obtain legal counsel during union organizing, and thus "chill" their ability to effectively communicate with employees without fear of violating the National Labor Relations Act (NLRA). Additional areas of NLRB expansion will likely include graduate student union organizing and employee off-duty access.

### Wage and Hour Law

The DOL's "Plan, Prevent, Protect" strategy will press on. Specifically, we expect the DOL to propose rules updating employers' recordkeeping requirements under the Fair Labor Standards Act (FLSA), requiring employers to provide employees with notice about how their pay is computed and requiring them to perform a classification analysis for each worker excluded from FLSA coverage. We likewise expect to see a final rule revising the FLSA's companionship regulations for home health care workers, as well as continued aggressive enforcement of wage and hour laws.

### Equal Employment Opportunity Law

The Equal Employment Opportunity Commission's (EEOC) draft Strategic Enforcement Plan calls for it to scrutinize pre-employment screening tools such as pre-employment tests, credit checks and criminal

background checks, that may adversely impact historically underemployed groups. This Plan also targets disparate pay, job segregation, harassment, trafficking and discriminatory language policies impacting "vulnerable workers" who are unaware of their rights under the equal employment laws or who are unlikely to exercise them. Additional priorities for the EEOC include expanding the scope of the Americans with Disabilities Act (ADA) Amendments Act, Title VII coverage for LGBT employees and accommodating pregnant women or women on pregnancy leave who are denied accommodations provided to similarly-situated employees.

### **Occupational Safety and Health Law**

Employers should prepare for the Occupational Safety and Health Administration (OSHA) to complete rules requiring employers to implement an injury and illness prevention program establishing a catch-all safety and health standard which may conflict with voluntary programs already in place at a number of workplaces.

### **Employee Benefits Law**

The Employee Benefits Security Administration is expected to again propose a rule that would clarify who constitutes a "fiduciary" under ERISA when providing investment advice to retirement plans and other employee benefit plans.

### **Federal Contractors**

We expect the Office of Federal Contract Compliance Programs (OFCCP) to finalize rules requiring government contractors to establish a hiring goal of seven percent for individuals with disabilities; broaden affirmative action obligations by requiring contractors to track data and establish hiring benchmarks for veterans; and gather and report compensation data.

### **Immigration**

We expect that President Obama's reelection will prompt Congress to take up comprehensive immigration reform. In the meantime, Department of Homeland Security employer-based audits will likely continue.

For questions about these or any employment-related issue, please reach out to any of our more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.