



Inside This Issue

EFCA: Bracing Yourself for the Rising Tide of Union Organizing

The 2008 elections are creating "the perfect storm" for the most fundamental change ... [more](#)

A Sneak Peek at Possible New Employment Legislation

While the Employee Free Choice Act is the most serious concern for America's employers, it is only one ... [more](#)

Civil Rights for the Modern Era: The Genetic Information Nondiscrimination Act Becomes Law

In what is commonly referred to as the first major civil rights bill of the new century, GINA is a new federal law ... [more](#)

ADA Amendments Act of 2008 Broadens Definition of Disability

The ADA Amendments Act of 2008 was signed into law by the President, and expands ... [more](#)

Bailout Package Includes Several Employment Provisions

The rollercoaster ride on the U.S. financial markets over the last several weeks has been at the forefront ... [more](#)

EFCA: Bracing Yourself for the Rising Tide of Union Organizing by [Todd P. Photopoulos](#)

The 2008 elections are creating "the perfect storm" for the most fundamental change to the nation's labor laws since first enacted 73 years ago, according to National Labor Relations Board Member Wilma Liebman. The proposed law is called the Employee Free Choice Act (EFCA), and aims to re-write the process for unionization. Senator Mike Enzi (R-Wyo.) described the proposed legislation as a "blueprint for the most radical and unwarranted change in employee and management relations in over half a century." Surprisingly, this proposed fundamental change in the law is receiving very little attention in the media, and many companies of all sizes are unaware of the significant ramifications these changes pose to their operations. Senator Obama pledges if elected President to push passage of EFCA within his first 100 days in office. Given the likelihood of electing a Democratic President and Democratically-controlled Congress, chances are considerable that the Employee Free Choice Act, in some form, will be adopted in 2009.

- [▶ About Butler Snow](#)
- [▶ L&E Group](#)
- [▶ Latest News](#)
- [▶ Contact Us](#)

BUTLER SNOW has been a leading presence in the legal community for more than 50 years. With more than 150 attorneys, the firm provides a broad range of services to clients on a regional and national basis from its offices in Jackson and Gulfport, Mississippi, Memphis, Tennessee and the Greater Philadelphia area.

© 2008 WORKPLACE is published by Butler, Snow, O'Mara, Stevens & Cannada, PLLC. WORKPLACE is intended for general informational purposes only and is not intended to be comprehensive with respect to the subject matter. WORKPLACE is not intended to create an attorney-client relationship with any user. WORKPLACE is not designed or intended to provide legal or other professional advice, as any such advice requires the consideration of the facts of the specific situation. The listing of attorneys or areas of practice does not indicate any certification of expertise.

If you no longer wish to receive this publication, please respond to this e-mail and type "Remove from Mailing List" in the subject line.

FREE BACKGROUND INFORMATION IS AVAILABLE UPON REQUEST.

Elimination of the Secret Ballot Election

As proposed, EFCA would fundamentally change the way unions organize and are granted status as the exclusive bargaining representative for employees. Under current law, a union must first obtain the signatures of at least 30% of a proposed bargaining unit of employees before it will even be permitted to file a petition with the National Labor Relations Board for an election. Typically, a secret ballot election would then be conducted by the NLRB within 45 to 60 days. At this election, employees are able to cast a ballot in a private voting booth, much like the voting booths millions of Americans will be using in the national elections next month. At the polling site, the employee, free from intimidation and coercion, privately marks either "Yes" or "No" on the ballot to the question of whether he or she wishes to be represented by the union for purposes of collective bargaining. That ballot is then placed in a ballot box free from any identifying information so neither the employer or the union know how the employee voted. Importantly, during this 6 to 8 week average campaign period, both the employer and the union are given the opportunity to communicate with employees about the pros and cons of joining a union. Much like the debates millions of Americans are seeing on the national election, the employees are provided with information from both sides so that they can make an informed and reasoned decision.

Under the so-called the Employee Free Choice Act, however, there would be no secret ballot election, and employees would be making their decision to be represented by a union in most circumstances without input from their employer about the ramifications of joining the union. Under EFCA, a union would be appointed as the exclusive bargaining agent for the employees if the union was able to provide the NLRB with union authorization cards signed by more than 50% of the employees in the employer's bargaining unit. Conceivably, the union could collect all of these union authorization cards without the employer even becoming aware that an organizing campaign was underfoot. More problematic is the fact that there would be no control against coercion, intimidation or misrepresentation by union organizers as they target employees to get cards signed. Simply put, this legislation would eliminate the secret ballot election and an employer's opportunity to meaningfully communicate with its employees about the ramifications of unionization. Unfortunately, many of today's employees are woefully ignorant of the risks of unionization and could be easily misled. EFCA would dramatically increase union winning percentages.

Government Mandated Arbitration to Determine First Contract

More disturbing is EFCA's proposal for mandatory arbitration of first contracts if the parties fail to reach agreement within 120 days. On average, it takes about 13 months for an employer and a union to negotiate their first contract. Under EFCA, if an employer did not agree with a union's demands for a first contract within 120 days, the government would appoint an arbitrator who would have the power to tell the employer exactly what the first contract would be. This of course would include a significant operational impact on the employer, including rates of pay, health and other benefits, and possible mandatory participation in union pension plans (many of which have been failing and are in dire need of a cash infusion). No one knows who these arbitrators would be, or the extent of their power under this proposed bill. If culled from the usual lists of labor arbitrators, they would tend to favor union interests. In all likelihood, a union would have little to no incentive to negotiate reasonably during the first 120 days, knowing that an arbitrator would quickly be brought in to force a favorable contract on the employer. In other words, the government would in many instances be imposing union contract terms on U.S. employers.

Current Status

While EFCA is not likely to be enacted in the exact form that it exists now, there is a significant likelihood that some form of pro-labor legislation will be passed within the first six months of 2009, making it easier for unions to organize. EFCA has significant support. The House passed the bill in March 2007 by a vote of 241-185, and fell short by only 9 votes in the Senate. Sixty votes in the Senate are needed to prevent limiting debate under the Senate's cloture rule. Unions have placed substantial bets on the outcome of the presidential election, with some estimates finding that unions like the Service

Employees International Union have invested over \$150 million into the present campaign.

Protecting Yourself

In light of this "perfect storm" climate, employers would be well-advised to take stock in their current management policies to make sure they are not leaving themselves vulnerable. With only about 9% of the current private workforce in the United States unionized, many managers are simply uninformed about unionization, or the signs to look for to detect and respond to a union card signing campaign. Employers also should be looking at employment policies, such as their off-duty access, solicitation, and email usage policies. Now is also a good time for addressing concerns about problem employees or dysfunctional managers as both can foster conditions ripe for union organizing drives. An ounce of prevention is certainly worth a pound of cure, and an investment in union-avoidance training, policy review, and basic management training could help avoid big problems in 2009.

[back to top](#) 

A Sneak Peek at Possible New Employment Legislation

by [Todd P. Photopulos](#)

While the Employee Free Choice Act, described above, is the most serious concern for America's employers, it is only one of several workplace laws being proposed. Many of these laws could become a reality if the Democrats gain control of both Congress and the White House. The following is a brief description of these proposed workplace laws.

The Healthy Families Act

This bill was co-sponsored by Senator Obama and would require employers with at least 15 employees to provide seven days of paid sick leave per year. This legislation would obviously create significant costs for employers, not to mention the loss of employer flexibility.

The Lilly Ledbetter Fair Pay Act

This bill is aimed at reversing a recent United States Supreme Court ruling and would make it easier for employees to sue for alleged pay discrimination. Under current law, an employee must file a Charge of Discrimination with the Equal Employment Opportunity Commission within three-hundred days of the alleged discriminatory act in most jurisdictions in order to preserve their ability to file a lawsuit under the federal anti-discrimination laws. (This time period is shortened to 180 days for the handful of states that do not have state civil rights agencies). In *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), the Supreme Court ruled that the time limits for filing a discrimination charge with the EEOC starts to run when the employer makes the discriminatory decision about the employee's compensation, not each time the employee receives a paycheck affected by the discrimination. This legislation would amend the federal discrimination statutes to provide that the charge-filing periods would be triggered when an employee is affected by application of a discriminatory compensation decision or practice. In other words, each time an employee receives a pay check or a pension payment, the time period for filing a claim would be restarted. Senator Michael Enzi (R-Wyo.) has argued against the legislation, expressing his concern that it would lead to large amounts of litigation and create "massive new opportunities to sue." Like the Healthy Families Act, this bill has a reasonably good chance of becoming law if Obama wins and the Democrats have strong gains in the Senate. In April 2008, the bill fell just four votes short of the sixty votes needed to proceed with floor debate and action on the bill.

The Civil Rights Act of 2008

This bill provides a whole host of potential problems for employers. The most troubling part of this proposed legislation is the elimination of caps on

compensatory and punitive damages awarded in discrimination cases. Under current law, federal anti-discrimination statutes put a cap on compensatory and punitive damages depending on the size of the employer. Eliminating this cap would result in the possibility of huge damage awards against employers. This in turn would further encourage plaintiff's lawyers to begin focusing more attention on discrimination claims. The bill would also eliminate pre-dispute arbitration agreements which have become popular in recent years. The bill would also allow plaintiffs in wage and hour lawsuits to recover compensatory (e.g., emotional distress) and punitive damages in addition to back pay. This of course would also encourage plaintiff's lawyers to file wage and hour lawsuits against employers by making such claims potentially more lucrative. This legislation was introduced in both houses of Congress this year, and Senator Obama was a co-sponsor in the Senate.

Patriot Employer Act

This bill, also co-sponsored by Senator Obama, would provide tax breaks to companies that keep jobs in the United States, maintaining their corporate headquarters in the United States, pay a certain level of wages, and pledge to remain neutral during union organizing drives. To earn the tax incentives, employers would also have to pay at least 60% of the healthcare premiums of its employees, prepare workers for retirement, and support workers who served in the military.

The Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers Act (RESPECT Act)

Under federal labor law, unions cannot organize supervisors. In 2006, the National Labor Relations Board issued three significant decisions clarifying the definition of supervisors to make clear that front-line supervisors were indeed members of management and not eligible for union membership. Organized labor is hoping that this proposed legislation would reverse that trend and allow unions to collect millions of dollars in union dues from supervisors. The RESPECT Act would remove from the definition of "supervisor" the duties of assigning and responsibly directing other employees. The legislation would also require that to be considered a supervisor, the employee must "hire, transfer, suspend, layoff, recall, promote, discharge, reward, or discipline other employees" for a **majority** of their work time. This change would eliminate the supervisory status of a significant proportion of supervisors under the labor laws. (Big labor estimates this number to be as high as 8 million people.) If enacted, front-line supervisors would in all likelihood be eligible for voting and membership in unions. This would also significantly undermine an employer's ability to discipline front-line supervisors since they would be covered under the union contracts which typically require "good cause" language for disciplinary actions.


The Working Families Flexibility Act

This act would provide employees with an annual right to apply to their employer for a modification of the work hours, schedule, or work location. In other words, employees would be allowed to request, and employers would be required to consider, flexible work terms and conditions. The act would require the employer to meet with the employee and discuss the issue within 14 days. Fourteen days after the meeting, the employer would be required to provide the employee with a written decision regarding the requested modification. If the modification (such as Fridays off of work or being allowed to work from home) is denied, the employer would be required to state the grounds for the denial and may propose an alternative modification. If the employee is dissatisfied, the employee could request reconsideration, and the employer and the employee would then have to hold another meeting to discuss the request for reconsideration. An employee would have the right to have the employee's representative (such as a co-worker, lawyer or other counselor) present at both meetings. The law would also make it unlawful for an employer to interfere with the employee's attempt to exercise rights under the Act, or to retaliate against the individual for requesting a modification in their schedule. Employees could file complaints with the Wage and Hour Division of the Department of Labor, and violations could result in fines up to \$5,000 per violation, plus the awarding of other equitable relief deemed appropriate by the Department of Labor. This "relief" could include reinstatement, promotion, back pay, and government mandated changes to the terms and conditions of employment. This legislation was co-sponsored

by Senators Barack Obama, Hillary Clinton, Christopher Dodd, and Edward Kennedy.

Conclusion

Regardless of who wins the presidential election, it is extremely likely that significant workplace legislative changes will occur in 2009. For instance, President Nixon, a conservative Republican, signed the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and other bills expanding employee rights. President George H. W. Bush also signed civil rights legislation in 1990 and 1991. Current President George W. Bush recently signed significant amendments to the ADA and the FMLA, as well as the Genetic Information Non-Discrimination Act. We will continue to monitor all of the proposed legislation in upcoming editions of Workplace.

[back to top](#) 

Civil Rights for the Modern Era: The Genetic Nondiscrimination Act Becomes Law

by [Graham W. Askew](#)

In what is commonly referred to as the first major civil rights bill of the new century, the Genetic Information Non-Discrimination Act of 2008 ("GINA") is a new federal law that protects Americans from being treated unfairly because of differences in their DNA that may affect their health. GINA was signed into law by President George W. Bush on May 21, 2008. Proponents of GINA contend that the law is needed to help ease concerns about discrimination that might keep some people from getting genetic tests that could benefit their health. GINA also enables people to take part in research studies without fear that their DNA information might be used against them in health insurance or the workplace. GINA will certainly produce considerable litigation as the boundaries of the new legislation are determined.

Title I - Health Insurance

Title I of GINA is modeled after the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and regulates group health plans and issuers of health insurance. It becomes effective on May 21, 2009, and prohibits group plans and health issuers from:

- Adjusting premium or contribution rates for the group on the basis of the genetic information of individuals in the group;
- Requiring or requesting that an individual or family member undergo a genetic test; Requesting, requiring or purchasing genetic information for underwriting purposes or prior to enrollment in the plan; and
- Using or disclosing genetic information for underwriting purposes.

Importantly, GINA does not prevent an issuer of health insurance from increasing the premium charged to a group health plan based on the manifestation of a disease or disorder of an individual. Nor does GINA prevent a group health plan or issuer from obtaining and using the results of a genetic test in deciding whether to pay a claim.

Title II - Employers

Title II of GINA is modeled after Title VII of the Civil Rights Act of 1964 and regulates employers, employment agencies, labor organizations and training/apprenticeship programs controlled by joint labor-management committees. It becomes effective on November 21, 2009, and prohibits employers from:


- Discriminating on the basis of genetic information, without regard to

how the information is derived by the entity in question, in hiring, termination, compensation and other personnel actions such as promotions, classifications and assignments;

- Requiring genetic testing, or purchasing or collecting genetic information under most circumstances;
- Disclosing genetic information under most circumstances; and
- Maintaining any genetic information received by the employer with confidentiality and disclosing it only to the employee.

Impact of the New Law

While regulations have yet to be implemented, employers should be looking at their policies and practices now to ensure they will be in compliance. Employers should take precautions to ensure that they do not inadvertently request or receive genetic information about their employees. This may include taking such actions such as revising medical request forms to make clear that they are not requesting genetic information. It is unclear how far the definition of "genetic information" will reach, but it can include maintaining information on whether an employee or family members of the employee have a history of a disease or disorder. To the extent that genetic information is received, it should be kept in the employee's medical file as is currently the practice under the Americans with Disabilities Act ("ADA"). Employers should also take steps to insure that managers and supervisors are not making employment related decisions based on genetic information. Keeping such information out of the hands of front line supervisors who do not need to know this type of information can certainly help insulate employers from GINA discrimination claims in the future.

[back to top](#) 

ADA Amendments Act of 2008 Broadens Definition of Disability by [Carlyle C. White](#)

The Americans with Disabilities Act Amendments Act of 2008 was signed into law by President George W. Bush on September 25, 2008, and expands the definition of a disability under the Americans with Disabilities Act by overturning a series of U.S. Supreme Court decisions that narrowly construed the definition starting in 1999. The Act becomes effective January 1, 2009. The ADA Amendments make clear that the definition of "disability" must be construed in favor of broad coverage for individuals to the **maximum extent** permitted by law.

Construction of "Substantially Limits"

The major changes made to the ADA were largely a reaction by Congress to U.S. Supreme Court decisions that had required courts to consider "mitigating factors" to determine whether someone was "disabled." Congress found the standard created by the Supreme Court in *Sutton v. United Airlines, Inc.* (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* (2002) unnecessarily limited an individual's ability to obtain coverage under the ADA. For example, under these decisions a person with insulin-controlled diabetes would not be considered disabled.

Under the ADA's amendments, the determination of whether an individual's impairment is a disability should not require extensive analysis by the courts. Rather, the amendments declare that mitigating measures, such as prosthetics, hearing devices or medication, must not be considered when determining whether an impairment substantially limits a major life activity. The use of ordinary eyeglasses or contact lenses, however, will still be considered as a mitigating measure. Employers should know that qualification standards and employment tests based on an individual's uncorrected vision may not be used, unless it is shown to be job-related for the position and a business necessity.

The amendments also protect persons with conditions like epilepsy, diabetes, or cancer, by declaring an impairment that is episodic or in remission is still a disability if it would substantially limit a major life activity when active. Finally, an impairment that substantially limits one major life activity need not limit other major life activities to be considered a disability.


Clarification of Major Life Activities

The Act leaves unchanged the basic definition of a disabled individual, who is one that has: (a) a physical or mental impairment that substantially limits a major life activity; (b) a record of such impairment; or (c) is being regarded as having such an impairment. The amendments provide an extensive, non-exhaustive list of examples considered to be "major life activities." Besides general activities previously recognized, the amendments identify activities such as caring for oneself, performing manual tasks, bending, learning, reading, concentrating, thinking, and communicating are included. In addition, major bodily functions are now included within the definition of a major life activity. The amendments state that functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions are to be considered major life activities.

Reduced Requirements for "Regarded As" Prong

The "regarded as" prong in the definition of disability has been relaxed by the amendments to broaden protection to individuals who are only "perceived" as being disabled. An individual must merely establish that the unlawful discrimination was based on a "perceived impairment," despite whether the impairment limits or is perceived to limit a major life activity. Significant to employers, the amendments establish that individuals covered solely under the "regarded as" prong are not entitled to a reasonable job accommodation.

Additionally, ADA discrimination claims based on impairments that are transitory and minor do not meet the "regarded as" definition. The amendments define such impairments as those having an actual or expected duration of six months or less.

[back to top](#) 

Bailout Package Includes Several Employment Provisions


by [Todd P. Photopulos](#)

The rollercoaster ride on the U.S. financial markets over the last several weeks has been at the forefront of the nation's attention, culminating in the \$700 billion financial sector bailout package signed by President Bush on October 3. While many aspects of how this legislation will be implemented are yet to be decided, the legislation does contain several interesting employment-related provisions.

The bill was offered as a rider to the House-passed mental health parity legislation. That law would amend the Employee Retirement Income Security Act and the Public Health Service Act to prohibit employer group health plans from adopting mental health treatment limitations, financial requirements, or out of network coverage limitations unless comparable limitations and requirements were adopted for medical and surgical benefits. Employers with 50 or fewer employees are exempted, however, from these parity requirements.

The bailout law also caps tax deductions for executive compensation and bonuses at \$500,000 for a company's top three officials to insure that "bad actors" are not rewarded by Congress' bailout of the financial markets. The intention is to prevent companies taken over by the federal government from giving executives exorbitant "golden parachute" severance packages. If the Treasury Department takes an equity position worth \$300 million or more in

a company, then senior executives in the company would be prohibited from receiving severance pay. For executives still allowed to receive severance benefits under the law, those executives will face a 20% excise tax on payments once he or she reaches a \$500,000 threshold, with the tax being due if the executive leaves for any reason other than standard retirement.

[back to top](#) 

Contact Us



• **Todd P. Photopulos** is an attorney in the firm's [Labor and Employment Group](#). His practice is concentrated in the areas of employment litigation, traditional labor issues and business immigration. Todd can be contacted via e-mail at todd.photopulos@butlersnow.com. He is licensed to practice in Tennessee.



• **Graham W. Askew** is an attorney in the firm's [Labor and Employment Group](#). His practice is concentrated in the areas of employment litigation, traditional labor law and business immigration. Graham can be contacted via e-mail at graham.askew@butlersnow.com. He is licensed to practice in Tennessee.



• **Carlyle C. White** is an attorney in the firm's [Labor and Employment Group](#). His practice is concentrated in the areas of employment litigation and traditional labor law. Carlyle can be contacted via e-mail at carlyle.white@butlersnow.com. He is licensed to practice in Tennessee.