



**EPSTEIN BECKER GREEN**

# **THE CHANGING FACE OF CHANGE, A MID-TERM REVIEW OF OBAMA AND THE NEW CONGRESS**

**EMPLOYMENT LAW ISSUES  
EMPLOYERS SHOULD BE MOST  
CONCERNED ABOUT IN 2011**

**CIC-SHRM  
SPRINGFIELD, ILLINOIS**

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**EBC** 

# Introduction

- Labor law 101
- What's been the big story of past two years?
- What do you see out there?
- What are your concerns?

# Washington Post – January 17, 2011

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- **“Significant labor law changes will bypass Congress”**
- **“When President Obama took office in early 2009, many expected significant legislative changes in the area of traditional labor law to facilitate union organizing in the private sector. But the new Republican majority in Congress on the one side and the Democrats’ simple Senate majority and presidential veto pen on the other make passage of sweeping legislation like the Employee Free Choice Act -- or for that matter the converse Secret Ballot Protection Act -- all but impossible.”**
- **“Employers should still expect significant changes, however, as the president will instead advance his regulatory agenda administratively through the National Labor Relations Board (NLRB) and the issuance of executive orders. If you’re running a nonunion workplace today, these developments will make it easier for unions to organize your employees. Regardless of one’s personal feelings about unions or union representation, there’s no question that this increased government oversight, regulation and involvement will have a significant impact on large and small businesses alike.”**

# Washington Post – bottom line:

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- “Employers cannot afford to presume that a split government means they do not need to prepare for significant changes in the area of traditional labor law. There will still be plenty of significant regulatory changes courtesy of the White House and the NLRB.”

# Change, it's a'coming – wait! It's here!!

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- NLRB decided 118 cases in August (Schaumber's term expired)
- Illustrate stark pro-union switch
- A few illustrations
  - Different application of facts to law
  - Reconsider prior precedent
  - Rule-making



# Uncharted Waters

- “The Board is taking startlingly aggressive positions aimed at augmenting union power in an effort to make unionizing easier... The new majority appears prepared to take American labor law into uncharted waters.”
  - Peter C. Schaumber, former Chairman, NLRB, September 16, 2010

# Union organizing and election conduct

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- Increased scrutiny of employer conduct
- Shortly after union campaign, employer held “focus meetings” discussing work-related concerns
- Obama Board held employer unlawfully solicited grievances, and directed a new election
- ***Practical Tip:*** Holding periodic meetings with employees for the stated purpose of discussing work-related concerns can help employers maintain open lines of communication with employees. Moreover, if a campaign is initiated, employers with a past practice of discussing work-related concerns with employees can continue to meet with employees and address their concerns in a legal manner.

# Protected Activity

- An employee may lose protection under the Act where behavior exceeds certain behavioral limitations
- The Obama Board: Employees protected notwithstanding their profanity and threats directed at management

# Protected Activity

- Employee unlawfully terminated even though he responded to a warning by saying: “I’ve been out of work for a year if I get laid off it’s going to get ugly and you better bring your boxing gloves” and “[I have] been out of work for 8 months and it is going to get ugly.” Kiewit Power, 355 NLRB No. 150 (2010).
- Employee unlawfully terminated despite calling the company’s owner a “f’ing m\*\*\*\*\*,” a “f’ing crook” and “an a\*\*\*\*\*,” and also saying that, if he was fired, “the owner would regret it.” Plaza Auto Center, 355 NLRB No. 85 (2010).

# Facebook Firing

- Employee unhappy that her supervisor would not let a union representative help her prepare a response to a customer's complaint about her work
- Employee then mocked her supervisor on Facebook, using several vulgarities to ridicule him, and writing "love how the company allows a 17 to become a supervisor" — 17 is the company's lingo for a psychiatric patient
- Also used other names
- Employee suspended, then terminated

# Facebook Firing

- NLRB said company “maintained and enforced an overly broad blogging and Internet posting policy” that contained several unlawful provisions.
- Lafe Solomon (NLRB acting general counsel), in *NY Times*: “whether it takes place on Facebook or at the water cooler, it was employees talking jointly about working conditions... and they have a right to do that.”

# Anti-union Animus

- Under prior precedent, a low-level supervisor's antiunion sentiments did not provide evidence of an employer's discriminatory motive. See Wild Oats Markets, 339 NLRB 81, 88 n. 10 (2003) ("Because [the supervisor had] no involvement in the decision to sell the store, his statements to the employees do not establish an unlawful motive").
- However, under the Obama Board, antiunion comments from a low-level supervisor who was not personally involved in the employer's decision not to hire certain employees could be used to infer that the employer had an unlawful motive. TCB Systems, Inc., 355 NLRB No. 162 (2010).

# Compound Interest

- In Kentucky River Medical Center, 356 NLRB No. 8 (October 22, 2010), the Obama Board overturned a decades-long practice of awarding simple interest on awards and holds that going forward, interest on backpay and other monetary awards will be compounded daily.

# Electronic Notice Posting

- In a 3-1 decision, the Board held that employers who customarily communicate with their employees electronically will be required to post remedial notices either through email or an internet site in addition to posting a paper notice. J. Picini Flooring, 356 NLRB No. 09 (October 22, 2010).

# Graduate Students

- Under Bush Board – graduate students not employees
- Obama Board – recently reversed the dismissal of a petition by NYU grad students, ordering the regional director to develop an evidentiary record
- Surely portends the reversal; Chicago Regional Director Joe Barker said “probably will be found to be employees”

# NLRB to Reconsider Precedent

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- The Board granted review and invited interested parties to file briefs in two cases in which it will consider overruling precedent
- Dana case – After voluntary recognition, required notice to advise employees of their right to file a decertification petition within 45 days.
- Obama Board likely to overturn, hold voluntary recognition immediate bar to decert petition

# NLRB to Reconsider Precedent

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- UGL-UNICCO, 355 NLRB No. 155 (2010)
  - Involves a new employer's acquisition of a unionized business where it recognized the union, but did not assume the contract.
- The current rule, is that the new employer's recognition of the incumbent union will not bar an otherwise valid decertification petition
- Obama Board likely to implement a "successor bar" to a voluntarily recognized union, granting a reasonable period of time for bargaining without challenge to its representative status

# NLRB to Reconsider Precedent

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- Obama Board signals it will likely be granting union organizers the right to enter an employer's premises to conduct union organizing activity
- Roundy's Inc., 356 NLRB No. 27 (November 12, 2010)
- Union distributed handbills in front of 26 grocery stores, employer expelled them

# NLRB to Reconsider Precedent

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- Board upheld ALJ determination that employer did not have sufficient property interest at 23 of the properties
- Notably, in 2 stores, the ALJ found that the company had discriminated unlawfully in its treatment of union handbillers as compared to other groups and individuals who had been allowed to use company property for their solicitations.

# NLRB to Reconsider Precedent

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- The company had permitted solicitation by the Salvation Army, Boy Scouts, Girl Scouts, the Veterans of Foreign Wars and Shriners, as well as for various other civic, political or charitable solicitations.
- The company also allowed members of the public to use company-maintained in-store bulletin boards to solicit items for sale or to advertise community or organizational events.
- Note – detrimental vs. positive

# NLRB to Reconsider Precedent

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- Board has now withheld judgment on the 2 cases, and called for amicus briefs on standard to apply
- *Roundy's* presents the question whether a retail property owner may discriminate lawfully against non-employee solicitors handbilling on its premises because of the content of the message they seek to communicate – or whether tolerating solicitation on private property for *any* purpose (except perhaps for the rare charitable request) deprives the employer of the right to bar it for *all* purposes, including union-encouraged consumer boycotts.
- *Register Guard* also under consideration

# New Sheriff in Town

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# Lafe Solomon

- Lafe Solomon with wife at Brown University Reunion



# Lafe Solomon Takes Command

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- Named Acting General Counsel in June
- Nominated by President Obama to full term on January 5, 2011
- Big focus on 10(j) of NLRA
  - How Lafe Solomon has ruined my life

# Lafe Solomon Takes Command

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- September 2010
- Acting General Counsel Solomon established an expedited process for complaints seeking federal court Section 10(j) injunctions in cases involving allegedly discriminatory discharges of employees during union organizing campaigns.
- “Nip in the bud” cases
- Termination during union organizing campaign

# Nip in the Bud Expands

- Because the “impact” of such practices by employers during union organizing is “so severe,” Solomon has instructed the NLRB’s enforcement offices to seek the following remedies in addition to Section 10(j) federal court injunctions for discharges:
  - Reading (not merely posting) to employees, presumably by a company executive if he or she was involved in a violation, of notices to employees concerning the details of a company’s violation of the NLRA and the company’s intention not to repeat such action;
  - Access by the union to the company’s bulletin boards, including electronic bulletin boards, to communicate concerning the union and issues in the organizing campaign; and
  - Access by the union to employees’ names and addresses earlier and for a longer period of time than is normally required when a petition for representation is filed by a union.

# Changing the rules of the game

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- Joe Barker, NLRB Region 13 Director:
  - “Changing the rules of the game”
  - Must justify not seeking 10(j) relief in NIB cases
- Solomon wants RD’s to seek “a minimum” of three weeks backpay if settled, and one year backpay if litigated (both regardless of mitigation interim earnings, etc.)
- Board less likely to defer to arbitration, wants more control over remedies

# Merry Christmas!

- December 20, 2010
- Solomon: the “serious effect” of other violations “cannot be overlooked.”
- Among the other violations he lists are:
  - “TIPS” (i.e., threats, interrogation, promises, and spying),
  - “solicitation of grievances” and
  - “any employer conduct that interferes with employees’ ability to communicate between themselves and with a union that has a damaging impact on employee free choice.”
  - It is worse, writes Solomon, if high ranking company officials are involved or if the employer acts “swiftly” in response to a union campaign.

# Merry Christmas!

- If the NLRB determines “that an employer’s unfair labor practices have had such a severe impact on employee/union communication that bulletin board access and names and addresses are insufficient to permit a fair election,” the enforcement office is instructed to seek the following additional remedies against the employer:
  - Union access to nonwork areas on the employer’s property during employees’ nonwork time;
  - Union access to the employer’s property to respond to any employer address on the subject of representation; and
  - Affording the union the right to deliver a speech to employees at an appropriate time prior to the election.

# NLRB Rulemaking

- December 22, 2010 notice states the Board “**believes that many employees protected by the NLRA are unaware of their rights under the statute. The intended effects of this action are to increase knowledge of the NLRA among employees, to better enable the exercise of rights under the statute, and to promote statutory compliance by employers and unions.**”
- Employers who communicate electronically will have to email notice
- Failure to post 11x17 poster of rights would be a ULP
- Refusal to post evidence of “unlawful motive in a case in which motive is an issue.”
- Petition filed in 1993

# NLRB Rulemaking

- Rulemaking is very rare at the Board, not used in more than a decade
- Trial balloon for more significant rulemaking, i.e. “quickest elections”
- Change elections from 38-42 days to 5-10 days
- They called us crazy...

# Rulemaking to Impose EFCA?

- Senator Orrin Hatch, August 2, 2010:
  - “They’ve got people on the [NLRB] right now that think they can do through regulation, by the board, that which can’t get through the Senate[.]”
- Board member Mark Pearce (former union attorney) noted in September 2010 that the median time-period for an election after the filing of a petition was 38 days during the past year
- Pearce said the NLRB should seek to make election periods **“as brief as possible”**
- Alluded to the Canadian system as a model-elections within five to ten days after the filing of a petition

# EFCA to be imposed by NLRB?

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- Obama's labor-friendly NLRB could promulgate rules that achieve EFCA's goals and more:
  - Shortened union elections;
  - Electronic posting (in addition to physical posting) of unfair labor practice violations;
  - Earlier union access to employees' personal contact information;
  - Restrictions on an employer's ability to communicate information regarding the negative aspects of unionization to employees;
  - The use of an appointed mediator to settle "first contracts"; and
  - Increased access for union organizers to an employer's place of business and employer-maintained electronic technology (websites, email, etc.).

# Department of Labor gets in on the Act

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- Eff. 1-1-11, DOL does away with Form T-1
  - Detailed how union trusts (usually used to hold strike funds) spent the money
  - In past, has been found to sponsor NASCAR races or fund receptions at political conventions or in Las Vegas
- Previously, DOL had held off on new reporting requirements at end of 2009
- Would likely show financing of ACORN, other “rights” groups, with forced dues

# Department of Labor gets in on the Act

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- Previously, DOL had done away with tougher disclosure requirements on LM-2
- LM-2 shows generally where forced dues are spent
  - In Colorado, Union president paid wife and son six-figure salaries, lost in election after disclosed
- In December 2009:
  - “OLMS will refrain from initiating enforcement actions against union officers and union employees based solely on the failure to file the report required...”

# EMPLOYEE CREDIT PRIVACY ACT

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- Effective 1-1-11, pre or post employment credit checks, with some exceptions, are banned in Illinois



# EMPLOYEE CREDIT PRIVACY ACT

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- Employer is an individual/entity that permits one or more persons to work
- Excluded
  - Banks and S&Ls
  - Insurance/surety businesses
  - State law enforcement units
  - State/local govt. that requires credit report
  - Debt collectors



# EMPLOYEE CREDIT PRIVACY ACT

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- Basic prohibitions:
  - Refuse to hire/discharge because of credit history
  - Inquire about an applicant/employee's credit history
  - Order/obtain an applicant/employee's credit report from a CRA

# EMPLOYEE CREDIT PRIVACY ACT

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- Prohibitions of the Act do not apply if a satisfactory credit history is a BONA FIDE OCCUPATION QUALIFICATION (“BFOQ”)



# EMPLOYEE CREDIT PRIVACY ACT

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- BFOQs
  - Bonding is legally required
  - Job involves custody/unsupervised access to cash/assets of \$2,500 or more
  - Job involves signatory power over assets of \$100 or more
  - Managerial position involving control over the direction of the business
  - Position involves access to sensitive information (personal, confidential, financial, trade secrets, st./nat'l security)

# EMPLOYEE CREDIT PRIVACY ACT

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- How does this square with the FCRA?
  - Nothing in the ECPA prohibits an employer from conducting a background investigation as permitted under the Fair Credit Reporting Act as long as it does not contain information on credit history



# EEOC AND CREDIT CHECKS

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- EEOC challenging the use of credit history as a hiring factor
  - Potential disparate impact claims
  - Females and minorities have poorer credit history than white males
  - If significant numbers of rejections, employer must show BFOQ
  - EEOC focusing on systemic discrimination

# EEOC AND CREDIT CHECKS

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- When can you consider the results of a credit check?
  - When the job involves the opportunity to steal or manipulate accounts
    - Cashier
    - Delivery person
    - Baggage handler
    - Controller
    - Accounts payable clerk/supervisor

# CREDIT CHECKS – Other risks

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- Risks to employers who do not do credit checks for sensitive positions
  - Negligent hiring
    - Apartment building superintendent with keys
    - Health care workers in patient areas
    - Plant security personnel
    - Anyone with unsupervised access to money/property

# Illinois Human Rights Act

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- **BIG CASE:**
- *Sangamon Cty Sheriff's Dept. v. The Illinois Human Rights Comm'n*, 233 Ill.2d 125 (2009).
- Under IHRA, an employer is strictly liable for harassment by a supervisor, any supervisor
- Different from Title VII – only if authority to directly affect victim's employment

# Illinois Human Rights Act

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- Employer responsible for harassment of its supervisor “regardless of whether it was aware of the harassment or took measures to correct the harassment.”
- IHRA provides: “It is a civil rights violation....[f]or any employer ... to engage in sexual harassment; provided, that an employer shall be responsible for sexual harassment of the employer’s employees by nonemployees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures.”

# Illinois Human Rights Act

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- Supreme Court ruled 4-2 that:  
“Section 2-102(D) is unambiguous. Under the plain language of the statute, an employer is liable for the sexual harassment of its employees. Where the offending employee is either a ‘nonemployee’ or ‘non-managerial or non-supervisory employee,’ an employer is responsible for the harassment only if it was aware of the conduct and failed to take reasonable corrective measures.”

# Illinois Human Rights Act

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- Who is a supervisor?
- The IHRA does not define the terms “manager” or “supervisor”; indeed, those terms are not even used in the Act.
- No clear standard in caselaw
- Factors include hiring and firing authority, part of management in company documents, attend management meetings, schedule, counsel, evaluate or discipline employees
- In any event, does not have to directly supervise

# VESSA

- Illinois Victim's Economic Security and Safety Act ("VESSA")
- Provides protections to employees who are, or whose family or household members are victims of domestic or sexual violence
- However, unlike FMLA, VESSA provides leave to employees immediately and does not require a minimum length of service.

# VESSA

- VESSA applies to employers:
  - 50+ employees – 12 weeks leave in 12-month period
  - 15-49 employees – 8 weeks leave in 12-month period
  - Employers may **not** require employees to substitute available paid or unpaid leave for VESSA leave.
  - As a result, the employee could take his or her VESSA leave and then “tack on” any earned vacation or PTO time.
  - But, can’t take VESSA, then FMLA

- VESSA leave may be taken to:
  - (1) permanently or temporarily relocate;
  - (2) seek medical or psychological attention;
  - (3) obtain victim services;
  - (4) participate in safety planning or other actions to increase the safety of the victim;  
and
  - (5) seek legal assistance or remedies to ensure the victim's safety, including time off for civil or criminal hearings.

# VESSA

- Employee must be restored to the same or an equivalent position upon return from leave
- Health care coverage must be provided to an employee on VESSA leave, like FMLA
- Like ADA, an employer is required to provide reasonable accommodations, unless it shows undue hardship
  - Reasonable VESSA accommodations include
  - “Transfer, reassignment, or modified schedule, leave, a changed telephone number or seating assignment, installation of a lock, or implementation of a safety procedure” in response to an actual or perceived threat.
  - Also, assistance in documenting domestic or sexual violence that occurs at the workplace or in a work-related setting.

# VESSA – What to do

1. Review the new law, as amended, and become familiar its provisions.
2. Train your managers and supervisors on the new law so that they can be familiar with what to do, and how to respond, when circumstances occur giving rise to VESSA leave.
3. Review and modify your existing VESSA policies to incorporate the new law.
4. If you do not have a written VESSA policy (for example, because you were previously not a covered employer), you should have a VESSA policy drafted and distributed to your workforce, as well as incorporated into your employee handbook.
5. Post the updated VESSA poster by the Illinois Department of Labor, in a conspicuous location at your worksite, along with the other federal and state-mandated labor law posters.

# Concluding Remarks

Thank you for your attendance & participation

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