

NEW EMPLOYMENT LAWS ON THE HORIZON

By Jorge L. Capó Matos

Barack Obama and Luis G. Fortuño, as the next President of the United States and Governor of the Commonwealth of Puerto Rico, respectively, won their recent elections on platforms promising substantive “change” in a series of laws, programs, and the manner in which government is run.

Below the radar screen during their respective campaigns, were platform promises to make significant changes in certain labor and employment laws.

At the national level, the Democratic Party’s platform proposes to advance pro-union, pro-gay, plaintiff/employee and “work & family” agendas. At the local level, the New Progressive Party’s (“PNP”) platform combines proposals to overhaul Puerto Rico’s paternalistic legislation and advance labor reforms in line with recent tendencies. The PNP platform includes proposals to provide greater flexibility in working hours and employment retention laws; reforming the worker’s compensation and unemployment systems; and aligning employment discrimination laws with similar federal legislation.

The stage appears set for the enactment of new labor and employment laws that will significantly impact workplace rules. Accordingly, it is critical that HR professionals, as well as top management, remain abreast of these potential developments. Particularly at the local level, employers operating in Puerto Rico should seriously consider engaging in the legislative process through appropriate channels.

O’Neill & Borges has an active Government Affairs practice group that can assist you in monitoring these developments, as well as facilitating your input into the process. Feel free to contact us should you need assistance.

The following provides a “bird’s eye” view of the more significant employment-related proposals that are expected to be advanced by the incoming administrations. We also provide several initial recommendations on how to prepare for these potential developments.

NATIONAL LEVEL

Several of the Democratic Party’s proposals entail resubmitting bills that were unable to pass during the Bush administration.

Employee Free Choice Act (“EFCA”). This has the potential of becoming the most wide-ranging change in “traditional labor law.” Among other things, it would eliminate the secret-ballot election in union organizing campaigns and replace it with a simple “card-check” process. Employers would be required to recognize a union as the exclusive bargaining agent for its employees if the union is able to obtain “authorization cards” signed by more than 50% of the employees in the work unit. If passed, private sector employers can expect a drastic increase in union organizing and unionization rates.

Once the union is certified, the union and employer would have 90 days to negotiate a collective bargaining agreement (“CBA”). If no agreement is reached within that period, a government sponsored mediation process could be invoked. Absent an agreement, the matter would be referred to a panel of arbitrators, who would actually decide the terms of the first CBA.

Union Dues and Strike Breakers. Federal law may be amended to *invalidate* state “right to work laws,” which prohibit that an individual’s employment be conditioned to becoming a union member or paying union dues. Also, federal law may be amended to prohibit employers’ existing

right to permanently replace workers who go on strike during the collective bargaining negotiations.

Sexual Orientation Discrimination. The Employment Non Discrimination Act (“ENDA”) is expected to resurface and amend Title VII to add “sexual orientation” as a protected class. There has been some discussion on the details of such legislation, in particular whether it would also protect “transgender” and “bisexual” status.

Unionized Supervisors. The NLRB’s recent rulings that clarify the requirements for an individual to be considered “supervisor,” may be reversed by law. Unions have argued these rulings unfairly deprive employees with certain supervisory functions from being able to engage in union organizing activities or forming part of the bargaining unit. Thus, the proposal would provide a more restrictive definition of the term “supervisor,” which would dramatically increase the number of employees who would be entitled to unionize.

Employment Discrimination Enforcements. These proposals include eliminating the existing monetary damage caps under Title VII; increase penalties for Equal Pay-Act (“EPA”) violations; make it more difficult for employers to use the “bonafide factor other than sex” defense in such EPA claims; add compensatory and punitive damages to Fair Labor Standards Act claims (which can be invoked for age discrimination, as well as wage claims); prohibit employer imposed mandatory pre-dispute arbitration agreements of federal constitutional or statutory claims (unless part of a CBA); and require that disparate impact claims under the Age Discrimination in Employment Act to be analyzed under the same standards as Title VII.

Family & Medical Leave Act (“FMLA”). Existing legislation may be amended to cover businesses with 25 or more employees. Currently, the act only covers employers with 50 or more employees.

A related proposal would require employers with 15 or more employees to grant employees at least seven (7) paid days of sick leave per year, which can be carried over to the next year. While such a

proposal would have limited impact in Puerto Rico, given the existing mandatory sick leave provisions for hourly employees, such a proposal would expand entitlements to exempt employees and may require coordination of the federal and local requirements.

Workplace Flexibility. This proposal would provide employees with an annual right to request a modification in work hours, schedule or work location. It would further establish a mandatory procedure for the employer’s consideration of the request and written response. Also, if the employee is dissatisfied with the decision, a procedure for reconsideration would be regulated. Finally, the proposal would prohibit retaliation against an individual for, among other things, requesting a modification or assisting another employee in requesting a modification in work hours, schedule or work location.

WARN Act. The federal statute which presently requires 60 day advance notice in cases of “plant closing” or “mass lay-offs” could be expanded to cover employers with 50 or more employees, instead of the current 100 or more. Further, the advance notice could be expanded to 90 days.

Minimum Wage. There may be some movement to increase the minimum wage to \$9.50 per hour by the year 2010 and/or tie increases to an inflation index.

Time Period for Pay Discrimination Claims. A proposal is expected to overturn the Supreme Court’s decision, which held that the deadline for filing pay discrimination claims is measured from the date the *first* alleged discriminatory pay decision, unless there was intentional conduct. If passed, such a proposal would establish that the time limit for filing such discrimination actions would begin to run each time an employee receives a paycheck that manifests discrimination. Presumably, this would make it possible for an employee to link a series of discriminatory payments, even though the decision, upon which the payments are based, was made in the distant past.

LOCAL LEVEL

The PNP labor platform addresses both private sector and government employees. We highlight the most significant proposals impacting the private sector.

- “Employment Rules” and “Working Hours” should be amended to provide greater flexibility to address the needs of employees and employers. It is expected that these amendments would facilitate flexitime agreements, alternate work schedules, compressed workweeks and similar working time arrangements.
- Employee legislation should be revised “taking into consideration” labor reforms that have been implemented in countries with rapid increases in employment levels in the private sector. Exactly what this means is not spelled out in the platform. However, such “labor reforms” typically refer to greater employer flexibility in hiring and retention rules, as well as more flexibility in the regulation of employment contracts.
- Employment discrimination laws should be amended to prohibit discrimination on the basis of sexual orientation.
- Employment discriminations laws should be amended to promote preventive measures and harmonize the local statutory framework with similar federal laws.
- The Department of Labor’s intervention in the approval of certain employment agreements would be eliminated and replaced with “Notice of Rights” clauses.
- A significant overhaul of the Workers’ Accident Compensation system and unemployment benefits program has been proposed.
- Discharge/severance payments equivalent to the indemnity provided for under Puerto Rico’s Wrongful Discharge Act would be exempt from local income tax.

- Employment “non-competition” agreements would be regulated by law, rather than the existing general rules that were established by the Puerto Rico Supreme Court.
- A new expedited wage claim procedure is expected, which would include a mandatory mediation procedure.

RECOMMENDATIONS

Although it is impossible to predict the ultimate outcome of legislative efforts at the national and local level (particularly in light of the financial crisis that is expected to consume legislative activities at both levels), several initial recommendations can be provided for employers with operations in Puerto Rico:

1. HR professionals and top management should undertake active monitoring of these proposed legislative initiatives and evaluate how they would impact operations.
2. Employers should also evaluate how they can influence the legislative process at the federal level. Any concerns could be channeled through national organizations and/or their stateside parent or affiliated companies. Such concerns should also be directed towards Puerto Rico’s non-voting representative in Congress (the Resident Commissioner, Pedro Pierluisi); however, efforts directed towards voting members of Congress may be more effective.
3. At the local level, employers should consider actively supporting the labor reform initiatives and opposing bills that may burden operations. These efforts can be channeled through various business associations or through more focused and direct efforts.
4. Examine existing “union free” and anti-discrimination/harassment training and employee opinion survey programs, in order to evaluate their effectiveness.
5. Audit existing non-solicitation and distribution rules, electronic monitoring and discrimination/harassment policies and procedures, to ensure they are valid and promote effective preventive actions.

FINAL FMLA REGULATIONS

On November 17, 2008, the Department of Labor (DOL) published its final rule to: (1) implement the new military family leave amendments, signed into law by President Bush in January 2008, and (2) update the regulations under the 15 year-old FMLA. These revisions enter into effect on *January 16, 2009*.

There are significant changes to what already is a very technically complex and difficult statute. O'Neill & Borges is working with its clients to help them understand these changes and modify their policies and practices accordingly. We are also providing a variety of training programs and seminars addressing these changes, as they are far too numerous and complex to include in a brief summary.

The following is a very basic overview of some of areas of the law affected by the new rules.

For Military Personnel:

- Military Caregiver Leave (also known as Covered Service member Leave)
- Qualifying Exigency Leave
- Two new DOL certification forms that may be used by employees and employers to facilitate the certification requirements for the use of military family leave.

Changes to the Overall Regulations:

- Modification to penalty provisions
- Changes to how Light Duty is treated in connection with FMLA
- Waivers of FMLA rights
- Six individual definitions of "Serious Health Condition"
- Substitution of paid leave for FMLA leave
- Attendance awards
- Employer and Employee Notice requirements
- The Medical Certification process (Timing)
- Fitness for Duty Certifications

Note: Because of the general nature of this Labor Newsletter, nothing herein should be considered as legal advice or a legal opinion. For further information, please contact our labor and employment lawyers.

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