EPSTEINBECKERGREEN | TAKE 5 VIEWS YOU CAN USE

LABOR AND EMPLOYMENT

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1. Enforcement Themes for 2011 – A Deputized Workforce and Energized Agencies to Step Up and Refer Out

The 2011 landscape is a product of ground laid before the start of the year. The landmark financial reform legislation and U.S. Department of Labor ("DOL") initiatives indicate a sampling of new considerations and challenges for employers.

While certain employee-protective legislation was not passed in significant respects, one "sound" from 2010 that is likely to resonate throughout the business community in 2011 relates to bounty awards and protections against retaliation for whistleblowing. The bounty awards introduced in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") in July 2010 received substantial, deserved attention. Dodd-Frank brings expanded employee protections against retaliation and the prospect of sharing 10 percent to 30 percent of certain sanctions imposed by the Securities and Exchange Commission ("SEC") or the Commodity Futures Trading Commission ("CFTC"). For details, s*ee* The Sounds of New Whistleblower Awards and Protections under the Dodd-Frank Wall Street Reform and Consumer Protection Act (originally published by Bloomberg Finance L.P.).

If whistleblowing becomes more shrill in 2011, it may be attributable in some measure to Dodd-Frank's policy choices. Instead of positioning the SEC and CFTC as compliance partners of businesses having compliance programs, Dodd-Frank creates a structure where potentially enormous awards are available to individuals who are quickest to supply those regulatory and enforcement agencies with original information that leads to a successful judicial or administrative action resulting in monetary sanctions exceeding $1,000,000. Reporting internally has no comparable payoff – irrespective of how established and effective corporate channels otherwise had been or could be. Administrative agency rulemaking will need to cope with that inherent tension created by Dodd-Frank.

Administrative agency activism in the employment context was seen elsewhere in procedures adopted during 2010. In April, the DOL launched its "We Can Help" nationwide campaign, led by the department's Wage and Hour Division, to "help connect America's most vulnerable and low-wage workers with the broad array of services offered by the Department of Labor," accompanied by "a special focus" on certain industries and having a declared intent to "address such topics as rights in the workplace and how to file a complaint with the Wage and Hour Division to recover wages owed." Also in April 2010, the DOL announced a sweeping new program of regulatory and non-regulatory initiatives, called "Plan/Prevent/Protect," to address wage and hour, safety, and other obligations.

Following those ambitious April launches, on December 13, 2010, the DOL announced an "unprecedented collaboration" between its Wage and Hour Division and the American Bar Association's Standing Committee on Lawyer Referral and Information Service. In introducing the program, the DOL cited limitations on its own resources and capacity to assist. By terms of this "Bridge to Justice" collaboration (http://www.dol.gov/whd/resources/ABAReferralPolicy.htm), individuals will be given a toll-free number to contact the newly created ABA-Approved Attorney Referral System. While the referral system could enhance enforcement efforts where completed investigations indicate probable merit in Fair Labor Standards Act and Family and Medical Leave Act matters that the DOL has declined to pursue, the program also may be utilized well before any such determination is possible. The DOL's announcement of the program explains that a complainant will be provided the referral system's toll-free number at any of four stages:

1) The complaint intake stage, if an individual decides not to file a complaint or expresses a preference to pursue a private right of action;
2) The complaint review stage, if the reviewing DOL manager determines, based on the Wage and Hour Division's national and regional priorities and the office's current resources and workload, that giving the complainant the referral system's toll-free number provides the worker with the quickest access to justice;
3) After an attempt at conciliation, if the employer refuses to remedy a violation but, based on the same criteria used at the complaint review stage, the DOL manager decides that giving the complainant the referral system's toll-free number is a better option than further investigating or litigating the complaint; or
4) After an investigation, if the case is not resolved through settlement, the Wage and Hour Division may decide, often in consultation with the DOL's Office of the Solicitor, to leverage the resources of the private bar by providing the complainant the referral system's toll-free number.

Depending upon the stage at which the referral occurs, it may be aided by additional information about the complaint and the DOL's attempts at conciliation – or even a statement of violations found, the amount of back wages believed to be owed, and a form that will allow complainants or the authorized attorney representative "to quickly obtain certain items from the investigation case file."

Whether employees will pursue available, effective internal channels to raise matters of concern remains to be seen. But Congress and administrative agencies have offered expanded alternatives and supportive resources that employers need to factor into their own programs and related orientation, training, investigation, decision-making, and communications processes.

2. A Different House for Employees and Organized Labor

"Job creation and American competitiveness" are the principles hailed by Congressman John Kline as "vital national priorities," as he contemplated the 2011 Republican majority in the House of Representatives and his Chairmanship of the re-named House Education and Workforce Committee (known in the last congressional session as the House Education and Labor Committee).

Stating that he favors fostering "an environment of certainty that will give families, businesses, and entrepreneurs the confidence to spend, hire, and invest," Chairman Kline said that the federal government "cannot legislate and regulate our way to job creation." Priorities identified for the Education and Workforce Committee in the 112th Congress include:

- Giving employers the certainty, flexibility, and freedom to create jobs;
- Conducting robust oversight of education and workforce programs across the federal

government to protect students, families, workers, and retirees;
- Modernizing and streamlining training programs to help job-seekers get back to work; and
- Pursuing education reform that restores local control, empowers parents, lets teachers teach, and protects taxpayers.

Missing from the list of priorities are recent congressional staples, among them:

- **Employee Free Choice Act**, which would have substantially altered such National Labor Relations Act cornerstones as secret ballot elections conducted in laboratory conditions; election campaigns in which employers could exercise a statutory right to express and disseminate views, arguments and opinions; and collective bargaining where neither a union nor an employer is required to agree to any proposal or make any concession.
- **Paycheck Fairness Act**, which would have amended the Equal Pay Act by limiting bases of bona fide pay differentials between men and women to those that the employer can defend by demonstrating that they are job-related and consistent with business necessity – adding a remedy of uncapped compensatory and punitive damages.
- **Employment Non-Discrimination Act**, which would have banned discrimination, and limitations, segregation, or classification of employees and applicants, on the basis of actual or perceived sexual orientation or gender identity.
- **Protecting Older Workers Against Discrimination Act**, which would have amended the Age Discrimination in Employment Act to overturn the "but for" test, upheld by the U.S. Supreme Court in *Gross v. FBL Financial Services, Inc.* Under the proposed legislation, plaintiffs would carry their initial burden in age discrimination cases by demonstrating that:
    - an impermissible factor was a motivating factor for the practice complained of, even if other factors also motivated the practice, or
    - the practice complained of would not have occurred in the absence of an impermissible factor.
- **Employee Misclassification Prevention Act**, which would have amended the Fair Labor Standards Act to require notice of status and rights as an employee *or* independent contractor, together with recordkeeping requirements for non-employees who perform labor or services for remuneration and a special penalty for misclassifying employees as non-employees – reinforced by a rebuttable presumption of employee status if the person making payments to the individual fails to keep records or provide notice.

A shift in congressional realities and priorities makes passage of certain legislation less likely. As a result, the extent to which the executive branch and administrative agencies might advance policy within permissible interpretive and rulemaking bounds could become increasingly important in 2011.

3. The National Labor Relations Board Signals Expanded Union Access to Physical Premises and Electronic Communications

In 2011, more is likely to be seen of organized labor, even as the number of employees belonging to unions in the *private sector* workforce hovers at approximately 7.1 million, or 6.9 percent. The impact of organized labor in the economy, the media, and political discussion may not fully take account of the fact that the percentage of union membership in the private sector during 2010 compares unfavorably to that in the public sector (7.6 million workers comprising 36.2 percent). Moreover, independent contractors (estimated by the Bureau of Labor Statistics in 2005 at 10.3 million, or 7.4 percent of the *total* U.S. workforce) outnumber the private sector unionized workforce.

It remains to be seen whether unions will have elevated success in organizing and winning

elections, and at the bargaining table. But there are clear indications that the current National Labor Relations Board ("NLRB") is considering actions that would aid unions by removal of previously respected barriers to employer property and communications systems. Some of those barriers are physical, and some are electronic.

The door to electronic access was opened wider with an October 2010 decision in which the NLRB determined that the traditional posting of remedial notices in "conspicuous" places where notices to employees customarily are posted should be interpreted to include electronic communications platforms: e-mail, intranet, Internet, and other electronic means customarily used by an employer in communicating with its employees.

Electronic dissemination of remedial orders may be a precursor and prelude to expanded NLRB resort to electronic communications systems and networks. Already in the pipeline is NLRB consideration of the extent to which employee expressions on social networks constitute protected activity. And the NLRB's technological outreach is further evidenced by its invitation in a pending case "for all interested parties to file briefs regarding the question of what legal standard the Board should apply in determining whether an employer has discriminated against nonemployee union agents seeking property access." While immediate attention may focus on "access," the operative word going forward may be "property," as that term is reexamined and updated in an environment that is increasingly electronic.

A physical backdrop to the NLRB's exploration of new boundaries and contours for electronic property and space is its August 2010 decision involving a union's protest that construction contractors performing work at certain sites were paid substandard wages and benefits. At two medical centers, 16-foot-long banners declared "SHAME," while a banner at a restaurant urged customers not to eat there. The NLRB held that such displays are not coercive and, therefore, not unlawful. The bounds for extrapolating the NLRB's latest stance on bannering to electronic media are yet to be explored.

4. Dodd-Frank Brings Diversity into Sharper Focus for Organizations Contracting with Federal Financial Agencies

Organizations contracting with federal financial agencies, and their contractors, will encounter new scrutiny of their diversity programs and accomplishments during 2011. A feature of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires each agency to adopt procedures prescribing that a contractor shall ensure, to the maximum extent possible, the fair inclusion of women and minorities in the workforce of the contractor and, as applicable, subcontractors.

The reach and anticipated impact of the diversity initiative is evident from the federal agencies having responsibility for programs and the types of organizations impacted by those programs. Agency directors of the Department of the Treasury, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, each of the Federal Reserve banks, the Federal Reserve Board, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Securities and Exchange Commission, and the Bureau of Consumer Financial Protection are charged with developing standards for increased participation of minority-owned and women-owned businesses in the programs and contracts of the agency, including standards for coordinating technical assistance to those businesses. The provision, set forth in Dodd-Frank Section 342, applies to "all business and activities of the agencies at all levels, including in procurement, insurance, and all types of contracts."

A "minority-owned business" is one in which more than 50 percent of the ownership or control is held by one or more minority individuals and more than 50 percent of the net profit or loss accrues to one or more minority individuals. A women-owned business has comparable features of ownership and share of net profit, with an additional requirement that a significant percentage

of senior management positions is held by women.

Contractors failing to make a good faith effort to include minorities and women in their workforce may be subject to contract termination, further investigation by the DOL's Office of Federal Contract Compliance Programs, or other appropriate action.

5. A Fast Lane and Some Speedbumps on the Road as Telecommuting Becomes More Mainstream

Telecommuting has gained favor over the years in certain private sector industries and geographic areas. With the Telework Enhancement Act, signed by President Obama on December 9, 2010, the federal government has entered the telecommuting arena, setting mandates and parameters for programs that create eligibility and assure that participating employees suffer no adverse treatment or consequences in their performance appraisals, work requirements, or other acts involving managerial discretion. Federal agencies are required to (1) establish a policy under which eligible employees may be authorized to telework; (2) determine eligibility for telework participation; and (3) notify all employees of the agency of their eligibility to telework.

As defined in the Telework Enhancement Act, the term telework refers to a work flexibility arrangement under which an employee performs the duties and responsibilities of his or her position, and other authorized activities, from an approved worksite other than the location from which the employee would otherwise work.

For a variety of reasons, working from home or close by has appeal to employees and employers, alike. But before adopting the federal government's legislated endorsement of remote work locations for its own employees, private sector employers should weigh some significant practical considerations for themselves and those they hire. The ability to manage, supervise, and instruct, as well as monitor and evaluate work performance and efficiency, cannot be of the same quality outside a controlled workplace as inside.

Some questions employers should address prior to embracing telecommuting – especially across state lines – are:

- How will work time be recorded beyond the customary start and stop times entered electronically or in writing? Homeworkers, in particular, may have more distractions from family, friends, visitors, and even domestic pets, than those working in a conventional, controlled workplace with other co-workers and direct supervision. Even while performance and output may not be impaired or diminished, the ability to measure compensable time with any precision could be difficult. The task is compounded by the need for accurate, reliable records of hours for overtime compensation of nonexempt employees.

- How will safety in the workplace be managed, and who will bear responsibility for it? Will the employer be responsible for ensuring a safe work environment; and if so, will it have rights to access and control the remote workplace?

- Which individuals or classifications of workers should be excluded from telecommuting? Among factors to be considered are the value of direct supervision and interaction, maintaining security and confidentiality, and individual disciplinary or work habit issues.

- Will the employer's engagement of an employee in a state where it otherwise has no activity be considered to be doing business in the state, subjecting the employer to registration or taxation issues or other business and employment considerations within that jurisdiction? Particularly as states look for bases to raise revenue and protect

residents, it may be more likely that outside businesses will be subjected to the jurisdiction of the telecommuting employee.

- Will the state where the employer is based assess income taxes on nonresident telecommuting employees who have no other connection to the state?

The telecommuting road may become more heavily traveled, but having a reliable roadmap before embarking on the journey may help avert unwanted detours and expensive breakdowns and repairs.

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