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The midterm elections radically changed the composition of Congress and the balance of power in Washington. With Republicans taking control of the House of Representatives and increasing their numbers in the Senate, what can employers expect in the new political landscape?

## How Will the Midterm Election Results Impact Labor & Employment Policy?

By Ilyse Schuman and Jay Sumner

Tuesday's historic election radically changed the composition of Congress and the balance of power in Washington. While a few election results are still trickling in, Republicans are projected to gain around 60 seats in the House of Representatives, regaining majority control. Democrats will still control the Senate, albeit with a much slimmer margin. Senate Republicans will increase their numbers from 41 to 47 seats, with the outcome of the race in Washington still uncertain. Whether the shift in power in Congress produces compromise or gridlock remains to be seen. What is clear is that this new political landscape will necessarily alter the Obama Administration's labor and employment agenda.

The following is an outlook of what employers can expect during the remaining weeks of the 111th Congress and the next Congress. Controversial labor and employment legislation introduced during the current Congressional session will not survive a Republican-controlled House and closely divided Senate. Accordingly, the Administration is likely to turn its attention from Congress to the federal agencies to achieve its labor and employment agenda. As the Administration increases its reliance on regulations to advance its agenda, employers could see a flurry of activity by the Department of Labor (DOL), National Labor Relations Board (NLRB) and Equal Employment Opportunity Commission (EEOC) coupled with a continued focus on enforcement. However, employers can also expect greater Congressional oversight of the agencies' actions by House Republicans who will hold committee gavels and craft appropriations bills to fund the agencies.

### Health Care

Many Republican candidates used the repeal of the Affordable Care Act as their main campaign platform. Legislation to repeal the health care reform law could pass the Republican controlled House early in the next Congress. However, a total repeal is unlikely given that Senate Democrats would no doubt filibuster such an attempt and President Obama still holds veto power. Moreover, some provisions of the bill that have already been implemented – such as the expansion of dependent care coverage

and ban on preexisting condition exclusions for individuals under age 19 – have received popular support. Therefore, expect a more piecemeal attempt to dismantle or modify the legislation. For example, both parties have tried to repeal or amend the Affordable Care Act provision requiring all businesses, charities, and state and local governments to file 1099 forms if they purchase \$600 or more in goods from another business after December 31, 2011. It is likely that this issue – which both the business community and the IRS consider a huge tax reporting burden – will quickly resurface when the 112th Congress convenes. Broader changes to health care reform will be more difficult as legislators debate what structure should replace the current law.

While repeal of the health care reform law is unlikely, Congress has other options to challenge the implementation of the law. Another method of crippling the health care law without actually repealing it is to deny funding to the agencies tasked with implementing many of the Act's provisions. In response to the election results, Roll Call reports that likely future House Majority Leader Eric Cantor (R-VA) has said that he "want[s] to see a defund vote go across the floor as soon as possible." Such a vote, if it were to occur, would be largely symbolic, given Senate Democrats' ability to filibuster and the President's inevitable veto. Now that the Republicans enjoy a House majority, Republicans also have the option of refusing to approve any appropriations bill that includes funds to carry out portions of the Act. By the same token, it is possible that Senate Democrats could similarly refuse to consider any appropriations bill that *does not* include health care funding, setting up a showdown between the two bodies.

Even without altering the law, House Republicans could aggressively challenge implementation of the law by holding oversight hearings. The Congressional Review Act is another tool Republicans may seek to use to overturn health care regulations. The battle over health care reform will not be limited to Washington. As Republican gains on November 2 extended to governorships and state legislatures around the country, state challenges to implementation of the Affordable Care Act could increase. Whatever the approach, in both Washington and state capitals the Affordable Care Act will face certain attack in the coming months. The law's impact on employer-sponsored health care will be at the forefront of the debate.

## Labor Law

Despite large Democratic majorities in the House and Senate during the 111th Congress, organized labor failed to see its top legislative priority advance. Labor's key legislative aim – passing the beleaguered Employee Free Choice Act (EFCA) – never had a legitimate hope of passage in the current Congress given the opposition of moderate Senate Democrats and is certainly a lost cause for the 112th term. In September, even President Obama acknowledged EFCA's flagging support and grim prospects. With the 2010 midterm elections sealing EFCA's fate, organized labor will no doubt seek other means to accomplish the same goals of the stalled bill. It is still possible for some of EFCA's objectives and organized labor's agenda to be implemented without Congressional action through rulemaking and NLRB decisions. In fact, this process has already started as the shift away from full Democratic control of the legislature has been anticipated for quite some time. The current Board consists of Chair Wilma Liebman (D), Members Craig Becker, Mark Pearce (D), and Brian Hayes (R). Member Becker, whose controversial nomination faltered in the Senate, received a recess appointment. The fifth Board member, Peter Schaumber (R), left the NLRB after his term expired in August. The Board can still institute a number of significant labor policy changes. For example, Member Pearce recently stated that he favors shorter election periods. The Board is also considering the use of electronic and internet voting in representation elections. In addition, the Board has recently announced changes that will bring about enhanced penalties for violations of the National Labor Relations Act (NLRA). Such changes raise the same concerns as those posed by passage of EFCA such as: (1) a lack of or limited election period would deprive employees of the chance to become familiar with the realities of unionization; (2) the loss of a secret-ballot election could result in intimidation and coercion; and (3) enhanced penalties could act to inhibit employer free speech in union organizing campaigns.

Additionally, the Department of Labor is in the process of issuing proposed "persuader" regulations further intended to hinder the free speech rights of companies. These proposed regulations, anticipated in November, are expected to greatly expand what types of employer activity and legal advice in conjunction with a union organizing campaign would trigger a requirement by the employer and the advisor to comply with expansive reporting requirements. The result would be a limiting effect on the ability of employers to obtain legal counsel during union organizing; essentially "chilling" the company's ability to communicate effectively with its employees about unionization without fear of violating the NLRA. The new rules would serve as a "gag" on employers – one of the hallmark objectives of EFCA and organized labor.

The DOL has been and is in the process of issuing regulations that will enhance organized labor's grip on companies that contract with the federal government. These include: (1) regulations encouraging Project Labor Agreements that require unionized workforces on certain construction projects; (2) the now-enacted requirement that government contractors post a notice informing employees of their right to organize; (3) proposed regulations forcing successor employers to offer employment to the predecessor employer's employees, thus potentially causing the successor to assume the predecessor union contract; (4) proposed regulations preventing contractors from using certain funds to oppose union organizing; and most importantly (5) so-called "high road" initiatives that may reward unionized contractors and punish non-union contractors when competing for government contracts.

Recent Board decisions also indicate that the agency is not opposed to expanding labor's reach and may be seeking opportunities to expand the rights of employees and labor organizations while overturning controversial decisions of the Bush-era NLRB. The Board has already announced that it will reconsider prior cases addressing voluntary union recognition agreements and successorship. Another recent decision – *New York University* – indicates the Board's willingness to overturn a prior decision holding that graduate students are not primarily employees subject to unionization. In the recent decision, the Board suggested that there might be circumstances under which such students could collectively organize. Additionally, the Board recently indicated that it would for the first time address employer limits on employees' social media activity, such as Facebook postings.

These and many other recent decisions indicate that the Board is ready and willing to, in conjunction with the Department of Labor, move labor law in a direction pro-labor members of Congress cannot.

## Employment Law

The 111th Congress began with passage of the Lilly Ledbetter Fair Pay Act. Many believed that this was the first of a number of employment-related bills that would become law during the current Congress. As the 111th Congress draws to a close, many of those bills remain stalled. However, the Senate is scheduled to consider the Paycheck Fairness Act during the "lame duck" session. Senate Majority Leader Harry Reid (D-NV), who won his closely watched reelection campaign, filed a cloture motion to proceed with consideration of the Paycheck Fairness Act. This procedural action sets up a November 17, 2010, vote on the bill that would, among other things, amend the Fair Labor Standards Act (FLSA) to provide for unlimited compensatory and punitive damages in gender-based wage discrimination cases and weaken an employer's affirmative defense against such claims. Proponents of the legislation, which would have a significant impact on employers, see the lame duck session as the last chance to pass the bill. However, the prospects of passing controversial legislation during the lame duck session diminished further after the election. The Senate Republicans will add one more member to their ranks during the lame duck session when Senator-elect Mark Kirk of Illinois is sworn in. Therefore, reaching the 60 vote threshold needed to pass the Paycheck Fairness Act or other controversial legislation before the end of the year is even more unlikely.

## Workplace Safety

In the wake of the recent mining and oil rig tragedies, Congress seemed poised to pass workplace safety and health legislation. In addition to addressing mine safety, the Robert C. Byrd Miner Safety and Health Act of 2010 (H.R. 5663) would significantly increase employer civil and criminal penalties for violations of the Occupational Safety and Health (OSH) Act, strengthen whistleblower protections and provide greater rights for victims of accidents and their family members to participate in proceedings under the OSH Act. The bill also would require employers, upon receipt of a citation, to abate the alleged violation and establish a process for a motion to stay abatement wherein the employer would have to meet the preliminary injunction standard of proving "substantial likelihood of success" in defeating the citation. Although the legislation passed the House Education and Labor Committee in July, it was not brought to a vote before the House nor has it advanced in the Senate. The opportunity to pass this sweeping OSHA reform legislation appears to have gone with the shift in power on Capitol Hill.

## Department of Labor Regulatory Agenda

The election will not likely deter agency activity. Instead, the legislative impasse will likely accelerate administrative efforts to alter

labor and employment policy. The DOL’s new regulatory and enforcement strategy of “Plan, Prevent, Protect” will require employers to implement self-monitoring plans to identify and remedy law violations. As part of this “find and fix” approach, the DOL intends to propose a rule updating the recordkeeping requirements under the Fair Labor Standards Act (FLSA). The proposal would require employers to provide notice about how pay is computed and perform a classification analysis for each worker excluded from FLSA coverage. In addition, OSHA is developing a regulation requiring employers to have an injury and illness prevention program. Although details of the proposals have not been released, the so-called I2P2 proposal reflects the expansive reach of the DOL’s “Plan, Prevent, Protect” strategy. The DOL’s aggressive regulatory agenda accompanies ramped up enforcement efforts in recent months, particularly in the areas of worker misclassification and wage and hour violations.

The midterm elections may preclude federal labor and employment legislative action. However, employers should recognize that the Administration’s labor and employment policy agenda is not likely to change course, but rather change focus from Capitol Hill to the agencies. Thus, while it is not likely that any groundbreaking legislation that negatively impacts employers will be enacted during the next session of Congress, agency rulemaking and enforcement will be in full force.

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