



Published on *Texas Magazine* (<http://mytexasmag.com>)

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## Windswept Halls

The Changing Employment Climate in the Obama Administration

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President Barack Obama ran on the platform of bringing change to America and change has come. Though media coverage has focused almost exclusively on the nation's economic woes, the winds of change have already affected how business will be done in Texas and more change is coming. With majorities in both the House and Senate, Mr. Obama will likely be able to continue to enact additional significant employment legislation, making it easier for unions to form and increasing the number of lawsuits businesses may face.

On January 29, 2009, President Obama signed his first bill into law, the Lilly Ledbetter Fair Pay Act of 2009. The purpose of the Lilly Ledbetter Fair Pay Act is to overturn the U.S. Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire and Rubber Co.* An employee in Texas has 300 days to file a claim of unlawful employment discrimination and any claims beyond that statute of limitations are barred. In *Ledbetter*, the Supreme Court said that a decision to pay a female employee less money because of her gender constitutes gender discrimination, but that subsequent paychecks are considered non-discriminatory acts. Under the Lilly Ledbetter Fair Pay Act, every paycheck is considered a separate discriminatory act for which a claim could be made by the employee or other person affected by the wage discrimination. Individuals asserting claims under the new law can seek back pay for up to two years, in addition to other available damages. The effect would be that the 300 day statute of limitations for wage-based discrimination claims would become virtually non-existent because a new discriminatory act occurs every time a paycheck is tendered and because an employer's salary decision made years in the past regarding an employee can be brought into question if the employee claims that she is being underpaid today as a result of gender discrimination.

In addition to the Lilly Ledbetter Fair Pay Act, there are four other pieces of legislation in Congress favored by President Obama and the Democrats: the Employee Free Choice Act, the Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act, the Paycheck Fairness Act, and the Employment Non-Discrimination Act. While he was in the Senate, President Obama co-sponsored all but the Employment

Non-Discrimination Act, though he has consistently expressed support for that Act.

Of all the pending legislation that may affect how Texans do business, the Employee Free Choice Act (EFCA) will sweep in the most significant change in federal labor law in more than 50 years. The Act will change the way unions form by moving from a system employing secret employee ballots to the "card check" system, which requires individual employees to sign their name to a card. Unions argue that employers currently pressure employees by conducting formal campaigns against union formation. Under EFCA, the pendulum will swing the opposite direction, allowing labor organizers to pressure employees to sign the card in support of union formation. When more than fifty percent of the employees sign the card, a union is formed. If this union and an employer cannot agree on the union-employer relationship, a binding arbitration board will decide on an agreement that will dictate the union-employer relationship for the following two years.

Currently, fewer than five percent of employees in Texas are unionized, but EFCA could radically raise that number. EFCA's critics charge that increased unionization will raise the cost of doing business, hurt the economy, lower job growth, reduce the GDP, and reduce individual income. Unions argue that EFCA will balance the playing field and reduce income inequality between employees and management.

The Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (RESPECT) Act would redefine who qualifies as a supervisor and, therefore, who can and who cannot be a member of a union. Unions argue that the National Labor Relations Board has interpreted the law to read that any employee with even minor supervisory responsibilities qualifies as a "supervisor", and thus cannot join a union. The RESPECT Act would make explicit that only supervisors with significant supervisory duties are considered to be "supervisors", thus increasing the number of employees eligible to be unionized. With union membership down below ten percent nationally in the private sector, this Act and EFCA could give big labor a shot in the arm.

The Paycheck Fairness Act (PFA) would make it harder for employers to win gender-based wage claims brought by employees. Under the PFA, employers will have a much more difficult time in successfully asserting that any disparity in wages was the result of factors other than sex. If an employer loses the lawsuit, they could be exposed to high compensatory and punitive damage awards. The PFA specifically allows for class action lawsuits to be brought by employees, prohibits employers from punishing employees for discussing their compensation information, and allows for expanded government information gathering about employee wages.

Dr. Will Bralick, President and CEO of Irving-based Paladin Logic, Limited, is concerned about the effect the PFA will have. "In a professional environment, individual salaries are negotiated. Employees comparing salaries can create dissatisfaction, loss of team unity, and decreased effectiveness. The result will be the tendency to pay every job classification category exactly the same wages and bonuses (irrespective of individual productivity) and the increase in the use of individual, independent contractors. In technology sectors it will result in increased offshoring of projects."

The Employment Non-Discrimination Act (ENDA) is perhaps the least likely of the four

Acts to have a material impact on a business' bottom-line in the near future. Federal law currently prohibits employers from discriminating on the basis of such factors as race, sex, religion, national origin, disability and age, and it prohibits retaliation against an employee who complains about unlawful discrimination. ENDA will make it illegal for any employer (except religious institutions) to discriminate against an employee based on that employee's actual or perceived sexual orientation or to retaliate against an individual for complaining about such discrimination. An employer found to have discriminated or retaliated against an employee will be exposed to compensatory and punitive damages and may also have to pay the employee's attorney's fees.

In these economically precarious times, not only is the federal government spending money in hopes of shoring up the economy, but it is also changing the way employers do business. Only time will tell whether these pieces of legislation will be enacted into law with the weakening economy, but employers should be vigilant because President Obama did not hesitate to sign the Lilly Ledbetter Fair Pay Act while he was fighting for passage of his stimulus package. The winds of change are blowing and employers should take heed.

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