

# Obama's First Year

## The Evolving Legal Landscape of the Workplace

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**Fox Rothschild LLP**

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# About the Speakers

## **Catherine T. Barbieri, Partner**

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Catherine is a management-side employment litigator who represents clients in the full range of employment matters, including:

- Discrimination suits (ADAAA, ADEA, FMLA, Title VII, Section 1981)
- Wrongful termination suits
- Restrictive covenant litigation
- Sarbanes-Oxley Act discrimination complaints
- Counseling and litigation avoidance
- Regulatory compliance (ADAAA, ADEA, COBRA, FLSA, FMLA, HIPAA, OSHA)
- Reductions-in-force

In addition, Catherine counsels colleges and universities regarding student disability and harassment issues and represents institutions of higher learning in discrimination litigation.

Catherine's leadership roles within the firm include:

- Hiring Partner
- Chair, Recruitment Committee
- Member, Diversity Committee



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# About the Speakers

## James A. Matthews III, Partner

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Jim is co-chair of the firm's Labor & Employment Department and an elected member of the firm's Executive Committee. Jim has more than 25 years experience representing management in all aspects of the employment relationship. He has extensive trial and appellate litigation experience in the arbitral, administrative and judicial systems. Jim's practice includes:

- Union organizing campaigns
- Collective bargaining, strikes and labor arbitration
- Employment discrimination and wrongful discharge issues
- The employment implications of mergers, acquisitions, relocations and other major transactions
- Employment, non-disclosure and non-competition agreements
- Multi-employer benefit plan issues, including serving as management plan counsel and representing participating employers in withdrawal liability avoidance planning and withdrawal liability and contribution disputes
- Labor-related antitrust issues

Jim has particular experience in the transportation and logistics industry, including air, rail, trucking and shipping (both ocean and inland); public transit; stevedoring and marine terminal operations; and warehousing and distribution.



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# Obama's First Year

- Unquestionable pro-employee, pro union agenda.
- Much talk but much less actual change than expected.
  - It was all about health care.
- Several key issues of continuing concern to business.



# Obama's First Year

## The Key Issues

- Equal Pay
- Disabilities
- Family Leave
- FLSA Exempt Employees and Independent Contractors
- EFCA & the NLRB



# Key Issue: Equal Pay

## What happened?

- Leadbetter v. Goodyear (2007): Statute of limitations on an Equal Pay Act claim begins to run at the time the initial discriminatory decision is made.
- “Lilly Leadbetter Fair Pay Act” (enacted Jan. 2009): Statute of limitations begins to run anew with each allegedly discriminatory paycheck.



# Key Issue: Equal Pay

## What happened?

- Every compensation decision remains subject to challenge until at least two years after the employee's final paycheck.
- How can the employer defend a decision potentially made decades earlier by managers long since gone?
- Only practical solution is detailed documentation of the basis for decisions and extended records retention.



# Key Issue: Equal Pay

## What could still happen?

- **Current Law:**
  - Unless the jobs are substantially identical or if pay disparity is based upon “any factor other than gender,” there is no Equal Pay Act violation.
  - Unless there is proof of pretext for intentional discrimination or of an adverse impact on one gender as a class not justified by business necessity, there is no Title VII violation.





# Key Issue: Equal Pay

## What could still happen?

- “Paycheck Fairness Act”
  - Passed House 256-163 in 2008.
  - Would require the employer to prove that any pay disparity between a male and a female employee is based on a job-related factor justified by “business necessity.”



# Key Issue: Equal Pay

## What could still happen?

- “Paycheck Fairness Act”
  - Would prohibit restrictions on employees discussing their pay with each other.
  - Would provide grant money to train women and girls how to negotiate.
  - Would add punitive damages to the EPA/PPA.



# Key Issue: Equal Pay

## What could still happen?

- “Fair Pay Act of 2009”
  - “Comparable Worth” redux
  - Would prohibit employers from paying less for jobs “dominated” by women or minorities than for jobs “dominated” by men or non-minorities where the jobs are “equivalent in value” to the employer.



# Key Issue: Disabilities

## What happened?

- In September, 2009 EEOC issued Notice of Proposed Rulemaking with respect to Americans with Disabilities Act Amendments Act of 2009 (ADAAA)



# Key Issue: Disabilities

## What happened?

- Scope of who is considered disabled has expanded
  - No longer consider mitigating measures except normal eyeglasses or contact lenses
  - Disability analysis should not require extensive analysis



# Key Issue: Disabilities

- An impairment need not prevent or significantly or severely restrict performance of MLA to be substantially limiting



# Key Issue: Disabilities

- Individual's ability to perform MLA is compared to most people in the general population
- Common sense analysis, often without medical or scientific evidence



# Key Issue: Disabilities

- Episodic or in remission impairment = disability if substantially limits MLA when active





# Key Issue: Disabilities

- Impairment may still be substantially limiting even if it lasts or is expected to last fewer than 6 mos.
  - e.g. 20 lb. lifting restriction lasting several months



# Key Issue: Disabilities

- “Regarded As”: Take prohibited action based on an actual or perceived impairment that is not transitory (lasting or expected to last 6 mos. or less) and minor
  - No: if take action based on sprained wrist or broken leg expected to heal fully
  - Yes: if take action based on carpal tunnel syndrome, Hep C, 2-day virus perceived to be heart disease



# Key Issue: Disabilities

## What might still happen?

- Comments to be taken into consideration by EEOC and proposed regulations expected to be finalized by July, 2010



# Key Issue: Family Leave

## What happened?

- The Fiscal Year 2010 National Defense Authorization Act (10/28/09)
  - Made 12-week exigency leave benefit available to family members of active duty service members in Armed Forces who are deployed to a foreign country (formerly only available to family of National Guard members and reservists)



# Key Issue: Family Leave

## What happened?

- The Fiscal Year 2010 National Defense Authorization Act
  - Caregiver leave benefit of up to 26 weeks to care for child, spouse, parent or next of kin who is (1) veteran; (2) undergoing medical treatment, recuperation or therapy for serious illness or injury; and (3) was member of Armed Forces in 5 years preceding treatment



# Key Issue: Family Leave

## What happened?

- Airline Flight Crew Family and Medical Leave Act (12/21/09)
  - Amended FMLA to permit airline pilots and flight attendants to qualify for leave



# Key Issue: Family Leave

## What might still happen?

- “Healthy Families Act” (H.R. 2460/S. 1152)
- Would require employees of employers with >15 employees to accrue one hour of paid leave for each 30 hours worked.



# Key Issue: Family Leave

## What might still happen?

- “Healthy Families Act”
- Leave could be used for the employee’s own illness or to care for a child, parent, spouse or “other individual related by blood or affinity whose close association with the employee is equivalent to that of a family relationship.”





# Key Issue: Family Leave

## What might still happen?

- “Family & Medical Leave Enhancement Act” (H.R. 824)
- Would amend the FMLA to permit employees to take “parental involvement leave” to participate in their children’s or grandchildren’s educational or extracurricular activities.



# Key Issue: Family Leave

## What might still happen?

- “Family Fairness Act” (H.R. 389)
- Would amend the FMLA to remove the eligibility requirement that employees have completed 1250 hours of service in the preceding 12 months.



# Key Issue: Family Leave

## What might still happen?

- “Family and Medical Leave Inclusion Act” (H.R. 2132).
- Would amend the FMLA to permit leave to care for a same-sex spouse, domestic partner, parent-in-law, adult child, sibling or grandparent with a serious health condition



# Key Issue: Family Leave

## What might still happen?

- “Domestic Violence Leave Act” (H.R. 2515).
- Would amend the FMLA to permit victims of domestic violence, sexual assault, and stalking and their family members to take leave as a result of the violence.



# Key Issue: Family Leave

## What might still happen?

- “Domestic Violence Leave Act” (H.R. 2515).
- Leave could be taken for medical attention, legal assistance, counseling, or to attend support groups.



# Key Issue: Family Leave

## What might still happen?

- “Working Families Flexibility Act” (H.R. 1274).
- Would require employers to negotiate in good faith over an individual employee’s request to modify work hours, schedule or work location subject to review by DOL.



# Key Issue: Family Leave

## What might still happen?

- “Family-Friendly Workplace Act” (H.R. 933)
- Would amend the FLSA to permit private sector employers to offer compensatory time off at time and one-half in lieu of overtime pay.
- Unused time required to be paid out at end of year.



# Key Issue: Exempt Employees & Independent Contractors

## What happened?

- IRS National Research Project
  - Most comprehensive study of worker classification since 1984.
  - Concerned principally with payroll tax non-compliance issues.
  - Focus on misclassification of employees as independent contractors, fringe benefit & executive compensation issues.





# Key Issue: Exempt Employees & Independent Contractors

## What happened?

- New DOL Emphasis
  - DOL Solicitor Patricia Smith has announced a “Misclassification Initiative” to identify employees wrongly classified as FLSA exempt or independent contractors.
  - FY2011 DOL Budget contains a special, \$25MM appropriation to fund the initiative.



# Key Issue: Exempt Employees & Independent Contractors

## What happened?

- Extraordinary volume of class action litigation
  - Well-funded plaintiffs' firms with nationwide focus on specific industries.
  - Health Care, Hospitality, Retail & Financial Services



# Key Issue: Exempt Employees & Independent Contractors

## What might still happen

- Fundamental problem for employers: A statute designed for the industrial workplace of the 1930s often makes little sense in the flexible/virtual/global workplace of the new millennium.
  - As a result, employers tend to do what makes business sense and end up violating the FLSA.



# Key Issue: Exempt Employees & Independent Contractors

## What might still happen

- Invites more of the same
  - Government audits.
  - Private litigation.
- Often much easier (and cheaper) to self-audit and settle up with the DOL than to wait and settle a private class action.



# Key Issue: EFCA & the NLRB

## What happened?

- Absolutely nothing.
- NLRB appointees can't get confirmed.
- Much noise but no real progress on EFCA.
- Clearly not a priority for Administration or Congress.



# Key Issue: EFCA & the NLRB

## What might still happen?

- Employee Free Choice Act (H.R. 1409) (passed the House 241-185 in 2007).
  - Mandatory card check recognition
  - Mandatory first contract interest arbitration
  - Enhanced penalties for employer ULPs in the context of organizing campaigns and first contract negotiations.



# Key Issue: EFCA & the NLRB

## What might still happen?

- Employee Free Choice Act
  - Enhanced penalties for employer ULPs in the context of organizing campaigns and first contract negotiations
    - Least controversial provision
    - Aimed primarily at the urban myth of widespread firings of union supporters during campaigns.



# Key Issue: EFCA & the NLRB

## What might still happen?

- Employee Free Choice Act
  - Mandatory “card check” recognition based upon a 50%+1 majority
  - Would overturn the 70 year-old principle that NLRB-supervised, secret ballot elections are the preferred method for resolving questions concerning representation.





# Key Issue: EFCA & the NLRB

## What might still happen?

- Employee Free Choice Act
  - Mandatory “card check” recognition based upon a 50%+1 majority
  - Based upon the dubious proposition that, since so many employees end up voting against the union after signing a card, the Company must have some unfair advantage under the current system.



# Key Issue: EFCA & the NLRB

## What might still happen?

- Employee Free Choice Act
  - Mandatory “card check” recognition based upon a 50%+1 majority
  - Some supporters have already indicated a willingness to give up “card check” to save the rest of the bill.
  - But why?



# Key Issue: EFCA & the NLRB

## What might still happen?

- Employee Free Choice Act
  - Mandatory first contract interest arbitration.
  - Based on the premise that winning an election (or obtaining card-check certification) is meaningless unless there is a contract and unions often lack the bargaining power to obtain a contract satisfactory to them and ultimately, the employees give up and decertify them.
  - The single most drastic change in national labor policy since the Wagner Act of 1935.



# Key Issue: EFCA & the NLRB

## What might still happen?

- NLRB Decisional Law
  - Virtually no such thing as stare decisis.
  - Important legal principles change back-and-forth depending on the Board majority (traditionally 3-2 favoring the President's party).



# Key Issue: EFCA & the NLRB

## What might still happen?

- NLRB Decisional Law
  - Currently two members
    - Chair Wilma Liebman (D)
    - Member Peter Schaumber (R)
  - The “Liebman Principle”: The Act is intended to encourage collective bargaining so any result which favors the employer over the union is inconsistent with the purpose of the Act.
    - “We’re poised for changes.”



# Key Issue: EFCA & the NLRB

## What might still happen?

- NLRB Decisional Law
  - Three nominations stalled
    - Craig Becker (D)
      - Former SEIU General Counsel
      - Has written that employers should have no standing at all in representation cases.
      - Makes Liebman look conservative.
      - Unions demanding a recess appointment.
    - Mark Pearce (D)
      - Also a Union General Counsel
    - Brian Hayes (R)
      - Senate staffer



# Key Issue: EFCA & the NLRB

## What might still happen?

- NLRB Decisional Law
  - Several Important Issues
  - Who is an employee?
    - v. an independent contractor
  - Who is a supervisor?
    - Kentucky River
    - Also the subject of the Re-Empowerment of Skilled & Professional Employees & Construction Traders (“RESPECT”) Act.



# Key Issue: EFCA & the NLRB

## What might still happen?

- NLRB Decisional Law
  - Several Important Issues
  - What are the limits of “employer free speech” under Section 8(c)?
  - What are the rights of non-employee to access to private property?
    - Particularly shopping centers.
    - Lechmere





# Key Issue: EFCA & the NLRB

## What might still happen?

- NLRB Decisional Law
  - Several Important Issues
  - What are the rights of employees to act “collectively” even in the absence of a union?
    - Excellent example of constant changes in Board law



# Key Issue: EFCA & the NLRB

## What might still happen?

- NLRB Decisional Law
  - NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975)(union employee has the right to a fellow employee witness at an interview with management which could reasonably result in discipline).
  - Materials Research Corp., 262 NLRB 1010 (1982)(Weingarten applies in the non-union workplace).



# Key Issue: EFCA & the NLRB

## What might still happen?

- NLRB Decisional Law
  - Sears, Roebuck & Co., 274 NLRB 230 (1985)(no it doesn't).
  - Epilepsy Foundation, 331 NLRB 676 (2000)(yes it does).
  - IBM Corp., 341 NLRB 1288 (2004)(no it doesn't).
  - XYZ, Inc., \_\_\_ NLRB \_\_\_ (2011)(yes it does).



# Obama's First Year

## The Bottom Line

- Much still remains in play and requires careful attention from business.
- Uncertainties include:
  - The continuing health care debate.
  - The economy and jobs.
  - The mid-term elections.



# Obama's First Year

## The Bottom Line

- The trillion dollar question:
- Do you add additional benefits and protections to those who are (and can remain) employed if the resulting cost means that fewer people will be (or remain) employed to enjoy them?



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