MICHIGAN HR DAY

Capitol Hills' Updates:

What's Pending in DC and Lansing on the Employment Front?

By Robert A. Boonin
Butzel Long
(734) 213-3601
boonin@butzel.com

LANSING, MICHIGAN
JUNE 13, 2012

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This outline highlights some of the key proposed changes pending before Congress and various regulatory agencies, as well as the Michigan Legislature, on issues relevant to human resources professionals and employment law counsel. Some of these initiatives may become law, but many will not. Nonetheless, it is instructive, if not informative, to keep track of the types of issues the government and its policymakers are considering on the employment law front.[1]

I. *From Washington, D.C. . . .*

Though it may have gotten off on a slow start, the 112th Congress currently has before it a plethora of bills on employment law. To be sure, some bills – such as the Employee Free Choice Act (EFCA) (certifying unions on the basis of card-check) or the Employee Non-Discrimination Act (ENDA) (prohibiting discrimination on the basis of sexual preference) will not make it to the "front burner" during this congressional term. That is not to say that changes in employment law matters are not anticipated, at least from Washington. Other legislative initiatives are beginning to percolate, though their prospects of passage in the near future also may be faint. Perhaps more significantly, there are some proposed changes in regulations and even administrative law doctrine on the forefront of which employers should be aware.

Proposed EEO-Related Regulations and Legislation

GINA Recordkeeping Regulations

While the final rules implementing GINA were finalized on November 9, 2010, the EEOC is now considering updating its regulations under both Title VII and the ADA with respect to an employer's recordkeeping requirements under GINA.

ADEA Disparate Impact

Following the Supreme Court's decisions in *Smith v. City of Jackson*, 544 U.S. 228 (2005), and *Meacham v. Knolls Atomic Laboratory*, 128 S. Ct. 2395 (2008), which recognized a disparate impact claim under ADEA and that the employer bore the burden of proving the "reasonable factor other than age" (RFOA) defense (and that that the defense was not "business necessity"), the EEOC is about to publish more regulations to elaborate upon the RFOA defense. It is expected that under the regulation, employers will have to take age into account while relying on the defense by conducting disparate impact review and assessing age impact of alternative employment practices. The proposed regulation also requires that employers prove that their entire course of conduct was reasonable, not just their use of the questionable factor. On January 4, 2011, the final regulations were sent to the OMB for interagency review. Final action is anticipated this summer.

OSHA, OFCCP, benefits, immigration, workers' compensation, unemployment and tenure related developments are beyond the scope of this outline. This outline is current through May 15, 2012.

Affirmative Action

In July 2010, the Labor Department published an advanced notice of proposed rulemaking to strengthen the affirmative action requirements of federal contractors and subcontractors under Section 503 of the Rehabilitation Act. The Department's goal is to require these employers to increase linkages and conduct more substantive analyses of recruitment and placement actions taken under the act, and to also revise the recordkeeping requirements. In December 2010, the Department announced similar intentions regarding the recruitment and placement of veterans under the VEVRAA.

Pay Discrimination

On January 3, 2011, the OFCCP published a notice of proposed rulemaking to rescind guidance issued under the Bush administration relating to systemic compensation discrimination. The current guidance rejects the use of pay-banding (the "DuBray method) in determining whether discrimination occurred, and favored other approaches such as multivariable regression. It is unclear whether this means that the DuBray method will be redeployed, though it was harshly criticized by the OFCCP when it was abandoned.

Equal Pay/Comparable Worth

On April 12, 2011, the "**Fair Pay Act of 2011**" (S 788; HR 1493) was re-introduced by Senator Harkin to amend the Equal Pay Act to require equal pay for equivalent jobs without regard to sex, race or national origin, but allows payment of different wages under seniority systems, merit systems, systems that measure earnings by quantity or quality of production, or differentials based on bona fide factors that the employer demonstrates are job-related or further legitimate business interests. If so, though, the employer would have to prove that the factor is job-related with respect to the position in question, or furthers a legitimate business purpose, except that this defense will not apply if the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing the pay differential and that the employer has refused to adopt such alternative practice, and the employer actually applied and used the factor reasonably in light of the asserted justification. If the employer meets these standards, the employer may still be held liable if the employee proves that the differential produced by the reliance of the employer on the factor is itself the result of discrimination on the basis of sex, race, or national origin by the employer. The bill also sought to allow the awarding of expert fees and the use of class actions. This bill has been introduced in both the last two congressional sessions, but never left committee.

Fair Pay

The "**Paycheck Fairness Act**" (HR 1519, with 167 co-sponsors; S 797, with 28 co-sponsors) was re-introduced in on April 12, 2011. Last congressional term, a similar bill passed the House just three days after being introduced (along with the Ledbetter Act). The bill was un-linked to the Ledbetter Act in the Senate, however, and did not leave committee. Therefore, it has been reintroduced. The revised bill, if enacted, would significantly limit defenses to Equal Pay Act claims; permit unlimited punitive for intentional violations of the law; and would make it easier

to bring class action suits by using an opt-out method. The bill provides that employers asserting that a pay differential between male and female employees is "based on factors other than sex" must prove those factors are "job-related" and "consistent with business necessity."

Unemployment Discrimination

On March 16, 2011, the "**Fair Employment Act of 2011**" (HR 1113) was introduced to amend Title VII of the Civil Rights Act of 1964 to add unemployment status to the categories of prohibited discrimination. The bill defines "unemployment status" as being unemployed, having actively looked for employment during the then most recent four-week period, and currently being available for employment.

On July 12, 2011, the "**Fair Employment Opportunity Act of 2011**" (HR 2501, S 1471) was introduced. Under the bill, it would be an unlawful practice for certain employers with at least 15 employees to refuse to consider or offer employment to an individual based on present or past unemployment, regardless of the length of time the person was unemployed. The FLSA's limitation periods would apply to claims brought under the act.

Sexual Preference Discrimination

On April 15, 2011, Representative Frank re-introduced the "**Employment Non-Discrimination Act**" ("ENDA" – HR 1397, with 133 cosponsors; S 811, with 39 cosponsors) to prohibit employment discrimination on the basis of actual or perceived sexual orientation or gender identity by employers, employment agencies, labor organizations, or joint labor-management committees, other than with respect to religious organizations or the military. The bill would also prohibit preferential treatment or quotas and would only permit disparate treatment claims. Hearings on this bill were recently held.

Credit Histories

On January 19, 2011, the "**Equal Employment for All Act**" (HR 321) was introduced to amend the Fair Credit Reporting Act to prohibit a current or prospective employer from using a consumer report or an investigative consumer report, or from causing one to be procured, for either employment purposes or for making an adverse action, if the report contains information that bears upon the consumer's creditworthiness, credit standing, or credit capacity. The bill would except the use of this information in the employment context when it is required for the purpose of national security or for Federal Deposit Insurance Corporation (FDIC) clearance, or by a state or local government agency, or with respect to a supervisory, managerial, professional, or executive position at a financial institution.

Breastfeeding

On August 1, 2011, the "**Breastfeeding Promotion Act of 2011**" (S 1463, HR 2758) was introduced. The act seeks to amend Title VII of the Civil Rights Act of 1964 to include "lactation" as a condition protected from discrimination in employment.

Tax Treatment of Damages

On October 13, 2011, the "**Civil Rights Tax Relief Act of 2011**" (HR 3195, S 1782) was introduced. The would eliminate the taxation of noneconomic damages and permit income averaging for lump sum back pay awards for violations of non-discrimination or other employment rights.

Age Discrimination

On March 13, 2012, Senator Harkin introduced the "**Protecting Older Workers Against Discrimination Act**" (S 2189). This act would amend the ADEA to lower the burden of proof needed to support an age discrimination claim to that associated with other claims of discrimination, i.e., eliminate the "but for" standard under the *Gross v. FBL Financial Services, Inc.* decision of the Supreme Court. All that would need to be proven is that age was a motivating factor in the employment action.

Proposed FMLA-Related Changes

Military Leaves

New regulations were published in January 2009 implementing amendments making certain leaves available to military personnel and their families. The DOL has indicated that it is reviewing these new military family leave amendments and other revisions made by the prior administration. It was anticipated that the proposed revisions will be announced in 2011, but to date, they've not been published.

The "**Military Family Leave Act of 2011**" (S 1112) was introduced on May 26, 2011. Under the bill, an employed family member of a member of the Armed Forces who receives notification of a call or order to active duty in support of a contingency operation, or who is deployed in connection with a contingency operation, to two workweeks of leave per year for each family member who is so called or deployed. Such leaves could: (1) be taken intermittently or on a reduced leave schedule; and (2) consist of paid or unpaid leave, as the employer considers appropriate. The bill would allow an employer to require certification of entitlement to such leave within a leave request. Employees would also be entitled to employment and benefits protection upon their return from leave. Employers would also be prohibited from interfering with or otherwise denying the exercise of such leave rights.

Leaves Relating to Hate Crimes

The "**David Ray Ritcheson Hate Crime Prevention Act (David's Law)**" (HR 224, with one co-sponsor) would provide various protections to victims of hate crimes including the right to take FMLA leave "because an employee is addressing a hate crime and its consequences... [and] is unable to perform the functions of the position of such employee." A hate crime is defined as "a criminal offense in which the prosecutor has determined that the defendant intentionally selected a victim, or in the case of a property crime, the property that is the object of the crime, because of

the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." The phrase "addressing a hate crime and its consequences" means "(A) seeking medical attention for or recovering from injuries caused by being a victim of a hate crime; (B) seeking legal assistance or remedies, including communicating with the police or an attorney, or participating in any legal proceeding related to being a victim of a hate crime; (C) attending support groups for victims of hate crimes; and (D) obtaining psychological counseling related to the experience of being a victim of a hate crime." Benefits include various uses of FMLA leave and unemployment compensation. Versions of this bill were also introduced in 2007 and 2009.

School Activities and Routine Medical Care

The "**Family and Medical Leave Enhancement Act of 2011**" (HR 1440) was introduced on April 8, 2011. Under the bill, the FMLA would be amended to allow employees to take FMLA leave to attend programs or activities in which their children are involved at a school or community organization, and to also allow them to use FMLA leave for dealing with routine medical care and physician visits, as well as nursing home visits. No more than 4 hours of leave for these reasons could be used within a 30 day period, and no more than 24 hours of such leave could be used during a 12 month period. Also under the bill, paid leave may be substituted for such uses, at the employee's option.

Paid Sick Leave

On May 12, 2011, the "**Healthy Families Act"** (S 984, HR 1876, HR 1876) was introduced. Under this Act, employers of 15 or more employees would have to allow employees to earn one hour of paid sick leave for every 30 hours of work. This leave time could be used for (1) the employees own medical needs of to care for the medical needs of certain family members, or (2) to seek medical attention, assist a related person, take legal action, or engage in other activities related to domestic violence, sexual assault or stalking.

Extension of FMLA Coverage to Other Family Members

On June 24, 2011, the "**Family and Medical Leave Inclusion Act**" (S 1283, HR 2364) was introduced. This bill seeks to expand the FLMA's coverage to cover leaves for the care of domestic partners, children of domestic partners, grandparents, grandchildren, parents-in-law, and siblings.

Leave for Bereavement

On July 13, 2011, the "**Parental Bereavement Act of 2011**" (S 1358) was introduced to allow 12 weeks of FMLA leave to parents grieving the death of their child.

Domestic Violence

On October 11, 2011, the "**Domestic Violence Leave Act**" (HR 3151) was introduced. The bill seeks to allow FMLA leave for medical assistance, psychological counseling, attending court

proceedings or safety planning exercises. Certifications for using this leave would be provided by courts, policy, clergy, or medical or counseling professional. The "**Security and Financial Empowerment Act**", introduced on October 27, 2011, would also allow the use of FMLA leave to allow domestic violence victims time to seek legal assistance and attend court with respect domestic violence matters. In addition, victims who lose their jobs due domestic violence would be entitled to receive unemployment compensation, and it would also prohibit employers and insurance providers from basing decisions on one's history of domestic violence.

Flexible Schedules

On February 29, 2102, the "**Working Families Flexibility Act**" (S 2142; HR 4106) was introduced to allow employees to request temporary or permanent changes in their terms or conditions of employment relating to 1) the number of hours the employee is required to work, 2) the times when the employee is required to work or be on call, 3) where the employee is to work, or 4) the amount of notification to be given for work assignments. Employers will be required to meet with employees regarding these requests, and soon thereafter provide a written decision. If the request is denied, the employer will have to specify the grounds for the denial, offer an option for the employee to consider, and seek reconsideration of the request by another manager. Employees will be protected in this process, and if their rights are violated, file a complaint with the Department of Labor or sue.

Proposed FLSA-Related Rulemaking and Bills

Plan /Prevent/Protect Initiative

In the Spring of 2010, the DOL announced a plan to establish a comprehensive set of regulations requiring employers to establish formal compliance plans with respect to the various laws administered by the Department, to document training with respect to those plans, and to document how they are complying with their legal obligations. Failure to have such a plan and properly administering it will be deemed to be a penalty. The DOL indicated that it intends to require employers to be more proactive in their compliance, in lieu of what it perceives to be a "catch me if you can" mind-set.

Recordkeeping

The DOL has announced its intent to greatly alter the recordkeeping required under the FLSA. This initiative was initially announced as an "FLSA Recordkeeping" proposal, but it has since been relabeled "Right to Know Under the Fair Labor Standards Act." According the Department's December 2010 Regulatory Agenda, this proposal was to be published in April 2011, but now it is not anticipated until sometime in June. Under the proposal, employers are expected to be required to provide greater disclosure for each pay on how each employee's pay is computed (including deductions), and also to require that employers create, maintain and make available to the DOL a "classification analysis" for each person classified as an exempt employee under the FLSA or an independent contractor.

Break Time for Nursing Mothers

On December 21, 2010, the Wage and Hour Division of the U.S. Department of Labor published a request for information ("RFI") from the public regarding the recent amendment to the Fair Labor Standards Act which requires employers to "provide reasonable break time and a place for nursing mothers to express breast milk for one year after their child's birth." The new amendment and break time requirement for nursing mothers is set forth in Section 4207 of the Patient Protection and Affordable Care Act, P.L. 111-148, and became effective on March 23, 2010. The RFI is the first step in rulemaking, and employers can expect DOL to issue new regulations perhaps as early as later this year. The key issues to be addressed by regulation include: should nursing mothers receive compensation for break time of 20 minutes or less; what is considered a "reasonable break time"; what "space provided to the nursing mother for expressing breast milk" is adequate and meets the requirements of the statute; and what would be considered "reasonable notice" to the employer of an employee's intent to take breaks to express milk?

Veterans Day Off Act

On January 19, 2011, the "**Veterans Day Off Act**" (HR 319) was introduced to require employers of veterans who worked for the employer at least one year to take off Veterans Day. The veteran may take the day without pay, or use accrued paid time off for the absence. The employer may only deny the leave in the interest of public safety or if the leave would cause the employer significant or operational disruption.

Independent Contractors

On April 8, 2011, the "**Payroll Fraud Prevention Act**" (S 770) was introduced. The Act would expand current FLSA recordkeeping requirements to all workers, including non-employees. Also, employers that misclassify employees would be subject to a civil penalty, not to exceed $1,100 per employee who was the subject of such a violation, with higher penalties for repeat violators. The bill would also require employers to give the following notice to employees and nonemployees: "Your rights to wage, hour, and other labor protections depend upon your proper classification as an employee or non-employee. If you have any questions or concerns about how you have been classified or suspect that you may have been misclassified, contact the U.S. Department of Labor." In addition, the bill would require the Secretary of Labor to establish a single webpage on the Labor Department's website that "summarizes in plain language the rights of employees and non-employees under the Fair Labor Standards Act." The bill would also require states to investigate and audit employers who may be misclassifying employees, in order for those states to continue to receive federal unemployment insurance grants.

On October 13, 2011, the "**Employee Misclassification Prevention Act**" (HR 3178) was introduced to extend the recordkeeping requirements applicable to employees to all workers, including non-employees. Employers would have to record the status of each worker, and notify each employee of his or her status. Failure to comply with these requirements would result in increased penalties. Further, the bill would create a presumption of employee status, and that employers could only rebut that presumption by "clear and convincing evidence." In addition,

states will be required to investigate and audit employee/contractor classification issues as a condition for federal money, and the DOL and the IRS will have to coordinate their efforts to make sure that employees are properly classified.

Minimum Wage

On January 12, 2011, the "**Living American Wage (LAW) Act of 2011**" was re-introduced. Under this bill, the federal minimum wage would be adjusted every four years to be equal to "the minimum hourly wage sufficient for a person working for . . . 40 hours per week, 52 weeks per year, to earn an annual income in an amount that is 15 percent higher than the Federal poverty threshold for a family of 2, with one child under the age of 18, and living in the 48 contiguous States, as published for each such year by the Census Bureau." Similar bills have been introduced since 2006.

On February 10, 2011, the "**Working for Adequate Gains for Employment in Services Act**," or "WAGES Act" (HR 631), was introduced to amend the Fair Labor Standards Act to establish a base minimum wage for tipped employees of at least: (1) $3.75 an hour beginning 90 days after the Act's enactment; (2) $5.00 an hour one year thereafter; and (3) for every year thereafter, to be the greater of 70% of the minimum wage and $5.50 an hour.

On January 5, 2011, the "**Health Care Incentive Act**" (HR 42) was introduced H.R. 42. The bill would require that the Secretary of Labor promulgate a rule that for any employer engaged in interstate commerce that is required by Federal of State law to pay a minimum wage at a rate set higher than the minimum ceiling as in effect on September 1, 1997, to receive a credit towards the wage for "any creditable health care benefits."

Paychecks

On June 3, 2011, the "**Electronic Paycard Protection Act**" (HR 2125) was introduced. The act would amend the Fair Labor Standards Act to require an employer who pays or wishes to pay an employee by means of an electronic payroll card to provide certain disclosures to the employee at the time the employee is provided the option to enroll in the electronic payroll card program. Included among such disclosures, in addition to all terms and conditions governing the card's use, are that: (1) the employee has the ability to access his or her wages as well as electronically check the available balance through use of the card; (2) no fees are assessed to the employee for ordinary card use; (3) the employer maintain payroll funds accessible by means of the card only in an insured depository institution; (4) the employer offers the employee the option of wage payment through direct deposit to the employee's checking or savings account; and (6) the employee not be terminated for opting not to participate in the program.

Direct Care/Companionship Workers

On June 23, 2011, the "**Direct Care Job Quality Improvement Act of 2011**" (HR 2341) was introduced to overcome the outcome the Supreme Court's decision in the *Long Island Care at Home v. Coke* case and make most domestic caregiver employees subject to the FLSA and no longer exempt. This would be accomplished by the bill's new definition of "casual basis" in

domestic service employment to provide companionship services to mean: "employment which is irregular or intermittent, and which is not performed by an individual (1) whose vocation is the provision of companionship services; or (2) who is employed by an employer or agency other than the family or household using the services of such employer or agency." The bill further states that "[e]mployment is not on a casual basis if any family or household employer employs an individual performing companionship services for more than five (5) hours per week or has employed the individual for a time period that has extended beyond twelve (12) weeks in a calendar year." In other words, if the bill passes, any direct care worker such as nursing aide, home health aide, or personal and home care aide who works more than 5 hours per week or is employed by the individual needing care for longer than 12 weeks per year would be entitled to minimum wage and overtime pay. The bill also provides for data collection and analyses to evaluate the needs for and uses of domestic caregivers. The Department of Labor has indicated that it may propose regulations to redefine the meaning of "casual", as well.

On September 23, 2011, the "**Companionship Exemption Protection Act**" (HR 3066) was introduced to amend the FLSA to include "companionship services" as being exempt from the Act's overtime pay requirements. Such services would include third party non-medical in-home care services such as: companionship; light housekeeping; meal preparation; errands; assistance to appointments; laundry; medication reminders; bathing and assistance with incontinence and grooming.

On December 27, 2011, the Wage and Hour Division published a Notice of Proposed Rulemaking to undo the holding of the *Long Island Health Care v. Coke* decision and apply the companionship and domestic caregiver exemptions to only those employed by the patient or the patient's family, and not to caregivers from third party agencies. The proposed rule will also significantly narrow the types of services covered.

Elimination of Subminimum Wage for Disabled Employees

On October 4, 2011, the "**Fair Wages for Workers with Disabilities Act of 2011**" (HR 3086) was introduced to phase-out over three years Section 4(c) of the FLSA which allows for subminimum wages to be paid to disabled workers with special work certificates, and to prohibit the DOL from issuing more of those certificates.

Computer Professional Exemption

On October 20, 2011, the "**Computer Professional Update Act**" (S 1747) was introduced to update the duties of an exempt computer employee to include a much broader group of employees whose work relates to computers.

Government Contractor Related Bills

Successor Service Contractors

The DOL announced in the Spring of 2010 that it was proposing regulations requiring successor contractors to federal service contracts to offer the displaced employees of the predecessor contractor a first right of refusal to employment per one of President Obama's first Executive Orders, No. 13,495. On December 13, 2010, these regulations were submitted to OMB for final approval, which was to occur by March 2011, but to date, it has not been finalized.

Non-Reimbursement of Labor Relations Costs

On January 30, 2009, President Obama signed Executive Order 13,497 that prohibits federal contractors from seeking reimbursement for certain labor relations costs, for example, communicating with employees during a union organizing campaign. The FAR Councils proposed regulations on April 14, 2010 to implement the Executive Order. The rules have yet to be finalized.

Davis-Bacon Repeal

On February 16, 2011, the "**Davis-Bacon Repeal Act**" was introduced (HR 745 - with 60 co-sponsors, and HR 746 – with 17 cosponsors), which would eliminate the minimum "prevailing wage" requirements under the Davis-Bacon Act. A number of other bills to repeal or have a limited repeal of the Davis Bacon Act and its prevailing wage requirements have been introduced, as well. See HR 735, S 119 ("**Government Neutrality in Contracting** Act"), as well as HR 408/S 178, S 223, HR 658 and HR 746.

Davis-Bacon Expansion

A number of bills were introduced in 2011, mostly in the later part of the year on mostly in the Senate, which would require Davis-Bacon prevailing wages to be paid for most stimulus-type and other infrastructure projects funded in part by the federal government. So far, these bills have not survived Senate cloture votes. See HR 402 (January 24), S 936 (May 10), S 942 (May 10), S 1549 (September 13), S 1769 (October 31), and S 1813 (November 7).

On October 6, 2011, the "**Adjusting Davis-Bacon for Inflation Act**" (HR 3135) was introduced, and if passed, would increase the minimum threshold for statutory coverage from $2,000 to $50,000.

Proposed NLRA Related Regulations and Bills

Notice of Employee Rights under Labor Laws

On December 22, 2010, the NLRB published proposed regulations to require all covered employers to post a notice of employee rights under the NLRA. The regulations became final on

August 30, 2011, and were to become effective on early 2012. The posting requirement is similar to that promulgated on May 20, 2010 by the Department of Labor pursuant to Executive Order 13,496, which applies to federal contractors. Under the regulation, the posting will state:

> Under the NLRA, you have the right to:
>
> - Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
> - Form, join or assist a union.
> - Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
> - Discuss your terms and conditions of employment or union organizing with your co-workers or a union.
> - Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
> - Strike and picket, depending on the purpose or means of the strike or the picketing.
> - Choose not to do any of these activities, including joining or remaining a member of a union.
>
> Under the NLRA, it is illegal for your employer to:
>
> - Prohibit you from soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
> - Question you about your union support or activities in a manner that discourages you from engaging in that activity.
> - Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.

- Threaten to close your workplace if workers choose a union to represent them.

- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.

- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.

- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten you that you will lose your job unless you support the union.

- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.

- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.

- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.

- Take other adverse action against you based on whether you have joined or support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's website: www.nlrb.gov.

You can also contact the NLRB by calling toll-free:

1-866-667-NLRB (6572) or

(TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

Failure to post the notice as required will be considered an unfair labor practice. Due to various pending legal challenges, the NLRB announced that the effective date would be postponed, initially until January 31, 2012, and in late December, extended the effective date until April 30, 2012.

On September 2, 2011, the "**Employee Workplace Freedom Act**" (HR 2833) was introduced to void the NLRB's new rule, and to prohibit the NLRB from promulgating rules to require employers to post notices relating to the NLRA. On October 6, 2011, a similar bill was introduced in the Senate, the "**Employer Free Speech Act**" (S 1666). On September 7, 2011, a similar bill, the "***Employer Free Choice Act***" (HR 2854) was introduced. This bill would repeal the NLRB's poster rule, prohibit any NLRB rule requiring such posters, but allow employers to voluntarily post such notices.

Non-Reimbursement of Labor Relations Costs to Federal Contractors

To implement Executive Order 13,497, on April 14, 2010 the FAR councils published proposed regulations prohibiting federal contractors from seeking reimbursement for certain labor relations costs, such as communicating with employees during a union organizing campaign.

LMRDA's Persuader Reporting Regulations

The Department of Labor is considering changes to employer reporting obligations under the LMRDA which would narrow the "advice exception" and the exception for the conduct of the employer's employees, which would result in increasing the regulation of communications employers have with their attorneys and trade associations regarding union issues. The general rule, which would be expanded by narrowing these exceptions, requires employers and consultants to report any agreement or arrangement with a third party consultant to persuade employees as to their collective bargaining rights or to obtain certain information concerning the activities of employees or a labor organization in connection with a labor dispute involving the employer. A proposed regulation was distributed for interagency review on November 2, 2010 and is anticipated to be published for comment this summer. The proposal is similar to that which was considered for promulgation near the end of President Clinton's administration.

Election Procedures

On June 21, 2011, the NLRB proposed rules to change the pre-election and election procedures for union representation matters. Under the new rules: (1) petitions could be filed electronically; (2) pre-election hearings would be held within 7 days of the hearing notice; (3) positions would have to be stated prior to the hearing commencing; (4) Regional Director rulings would be

reviewed post-election; (5) phone numbers and addresses would be included on eligible voter lists;

EFCA-Related Legislation

On January 5, 2011, the "**Labor Relations First Contract Negotiations Act of 2011**" (HR 129) was re-introduced. This bill was offered in the prior Congress, but did not leave committee. Under the bill, the NLRA would be amended to require the arbitration of initial collective bargaining agreements if an agreement, is not reached after 60 days of bargaining and 30 days of mediation. Versions of this bill date back to 1993 (S 1568).

On January 27, 2011, the "**Secret Ballot Protection Act**" (S 217) was introduced (and its companion bill was introduced on March 9, 2011 as HR 972). Under the bill, it would be an unfair labor practice for: (1) an employer to recognize or bargain collectively with a labor organization that has not been selected by a majority of the employees in a unit appropriate for such purposes in a secret ballot election conducted by the NLRB; and (2) a union to cause or attempt to cause an employer to recognize or bargain collectively with a representative that has not been selected in such manner. *See also* the "State Right to Vote Act" (HR 1047) which would amend the NLRA to declare that nothing in the Act shall be construed to authorize or recognize a union as the representative of employees in a state where recognition of the union is prohibited, unless the union has been selected by a majority of such employees in a secret ballot election conducted by the NLRB. The bill would also prohibit the government from bringing a challenge against a state statute or constitutional provision which protects the right of employees to choose labor organization representatives through secret ballot elections.

On March 8, 2011, the "**National Right to Work Act**" (S 504, HR 2040) was introduced. Under the bill, both the National Labor Relations Act and the Railway Labor Act would be amended to repeal the employers' ability to agree to union security agreements requiring employees to join a union as a condition of employment, and requiring union dues or fees to be subject to payroll deduction as a condition of employment. Conversely, on August 1, 2011, HR 2775 was introduced which would amend the LMRA to repeal the provision allowing states to have right to work laws.

On March 11, 2011, the "**State Right to Vote Act**" (HR 1047) was introduced. Under the bill, the National Labor Relations Act would be amended to protect state requirements for a secret ballot election of labor organizations. The legislation would codify the amendments to state Constitutions in Arizona, South Carolina, South Dakota and Utah that only permit the use of secret ballot elections in union organizing campaigns. The bill would also forbid the federal government from bringing any challenges against a state statute or constitutional provision which would require the use of a secret-ballot election.

On June 13, 2011, the "**Truth in Employment Act of 2011**" (HR 2153) was introduced to amend the NLRA to provide that nothing in the provisions establishing what constitutes an unfair labor practice by employers shall be construed as requiring an employer to employ someone who seeks or has sought employment with the employer in furtherance of other employment or agency.

On July 27, 2011, the "**Fair Representations in Elections Act of 2011**" (S 1425) was introduced. This bill would require that representational elections not be held within 40 days from the filing of the election petition, and that employers provide a list of employee names and address within seven days of the NLRB's determination of the appropriate unit or the reaching of an agreement between the employer and the union regarding eligible voters. Elections also could not be held if a hearing is held, until the issues are resolved by the Regional Director. A related bill, the "**Employee Rights Act"** (S 1507, HR 2810) would require secret ballot elections and that re-elections be held every 36 months.

On February 9, 2012, the "**Keep Employees' Emails and Phones Secure Act**" (KEEP) (HR 3991) was introduced to amend the NLRA to prohibit the NLRB from requiring employers to provide the NLRB or unions with employee phone numbers and email addresses.

Boeing Reaction

On May 12, 2011, the "**Job Protection Act**" (S 964, HR 1976) was introduced. The bill seeks to amend the NLRA to provide that an employer's expression or written dissemination of views, argument, or opinion regarding the costs associated with collective bargaining, work stoppages, or strikes shall not constitute antiunion animus or unlawful motive (an unfair labor practice), if such expression contains no threat of reprisal or force or promise of benefit. The would also prohibit the NLRB, unless an employer has been adjudicated to have unlawfully undertaken certain actions, any power to: (1) order the employer to relocate, shut down, or transfer any existing or planned facility or work or employment opportunity; (2) prevent the employer from making such relocations, transfers, or expansions to new or existing facilities in the future; or (3) prevent the employer from closing or not developing a facility, or from eliminating an employment opportunity. In addition, under the bill, the NLRB or a court may not, in the absence of such an adjudication: (1) prevent the employer from choosing where to locate, develop, or expand its business or facilities; (2) require the employer to move, transfer, or relocate any facility, production line, or employment opportunity, or require the employer to cease or refrain from doing so; or (3) prevent the employer from closing a facility or eliminating any employment opportunity.

On September 8, 2011, the "**Protecting Jobs from Government Interference Act**" (HR 2587, S 1523) was introduced to prohibit the NLRB from ordering employers to close, relocate or transfer employment under any circumstance. On September 15, 2011, the bill passed the House by a vote of 238-136. On October 6, 2011, Sen. McCain introduced S 1720, the "**Jobs Through Growth Act**," which compiles a number of bills into one bill, including the "Protecting Jobs from Government Interference Act" and the "Government Neutrality in Contracting Act."

NLRB's Abolishment

On September 14, 2011, the "**National Labor Relations Reorganization Act of 2011**" (HR 2926) was introduced. Under the bill, the NLRB would be abolished and its responsibilities would be transferred to the Department of Labor and the Department of Justice). The DOL's Office of Management-Labor Standards would be responsible for the many of the NLRB's

current responsibilities, but the DOJ's . Bureau of Labor Relations Enforcement, a bureau that the measure would create, would handle the Board's current enforcement functions. All rules and regulations issued under the NLRA would continue in full effect and would become rules and regulations issued by the Secretary of Labor.

On September 20, 2011, the "**Protecting American Jobs Act**" (HR 2978) was introduced which would eliminate the NLRB's ability to adjudicate unfair labor practices, but instead permit such claims be brought to court by the "aggrieved party."

Preemption Repeal

On June 3, 2011, HR 2118 was introduced to remove any ability of the NLRB to enjoin state laws on the grounds of NLRA preemption.

Bargaining Units

On October 15, 2011, the "**Workplace Democracy and Fairness Act**" (HR 3094) was introduced to amend the NLRA by revising the requirements for determining an appropriate bargaining unit before a representation election, and in effect reversing the NLRB's August 26, 2011, decision in *Specialty Healthcare and Rehabilitation of Mobile* and its June 22, 2011, rulemaking regarding proposed changes to procedures involving the election of collective bargaining representation. The bill would replace the current restriction in the meaning of collective bargaining unit to employer unit, craft unit, plant unit, or subdivision, to instead require the NLRB to determine a unit as appropriate for collective bargaining if it consists of employees that share a sufficient community of interest, as follows: "the unit appropriate for purposes of collective bargaining shall consist of employees that share a sufficient community of interest. In determining whether employees share a sufficient community of interest, the Board shall consider (1) similarity of wages, benefits, and working conditions; (2) similarity of skills and training; (3) centrality of management and common supervision; (4) extent of interchange and frequency of contact between employees; (5) integration of the work flow and interrelationship of the production process; (6) the consistency of the unit with the employer's organizational structure; (7) similarity of job functions and work; and (8) the bargaining history in the particular unit and the industry. To avoid the proliferation or fragmentation of bargaining units, employees shall not be excluded from the unit unless the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit. Whether additional employees should be included in a proposed unit shall be based on whether such additional employees and proposed unit members share a sufficient community of interest, with the sole exception of proposed accretions to an existing unit, in which the inclusion of additional employees shall be based on whether such additional employees and existing unit members share an overwhelming community of interest and the additional employees have little or no separate identity." The bill would also require the NLRB to provide a non-adversarial hearing at least 14 days after the filing of an election and to: (1) direct an election by secret ballot as soon as practicable, but in any event not before 35 calendar days following the filing of an election petition, in cases where a question of representation exists; and (2) acquire, at least 7 days after its final determination of the appropriate bargaining unit, a list of all eligible voters

(including certain informational data) from the employer and make it available to all parties. The bill passed the House on November 30, 2011 by a vote of 235-188.

On November 10, 2011, the "**Representation Fairness Restoration** Act" (S 1843) was introduced. This bill requires the same factors to be considered as in the above House bill when determining the appropriate bargaining unit, but does not include the provisions regarding the election process.

Flexibility in Granting Raises

On April 26, 2012, Senator Rubio introduced the "**Rewarding Achievement and Incentivizing Successful Employees Act**" (the "RAISE Act") (S 2371) would amend the NLRA to allow employers to pay an employee more than the amount set in a collective bargaining agreement due to the employee's services.

Pre-Dispute Arbitration Related Bills

On January 31, 2011, the "**Non-Federal Employee Whistleblower Protection Act of 2011**" (S 241) was introduced. The legislation would make any pre-dispute arbitration involving whistleblower protections between federal contractors or those organizations that receive funds from the federal government and their employees' invalid, except those agreed to in the course of collective bargaining.

On May 12, 2011, the "**Arbitration Fairness Act of 2011**" (S 987, HR 1873) was re-introduced by Senator Franken. Under the Act, all pre-dispute arbitration agreements of employment, civil rights and consumer disputes would be declared invalid, and the issue of arbitrability and the enforceability of any arbitration agreement would be reserved to the courts (and not arbitrators) to decide. A hearing was held on October 13, 2011.

Job Protection Related Bills

On April 4, 2011, the "**American Jobs Matter Act of 2011**" (HR 1354) was introduced. The legislation would amend the Federal Property and Administrative Services Act of 1949 and title 10, United States Code to provide that in issuing a solicitation for competitive proposal, an executive agency shall state in the solicitation that the offeror may submit information known as a "job impact statement" with the application, describing the effects on employment within the United States of the contract, if it is awarded to the offeror.

On April 5, 2011, H.R. 1378, the "**Fighting for American Jobs Act of 2011**" (HR 1378, S 1363) was introduced. The legislation would impose a new recordkeeping requirement that would require employers receiving "contracts, grants, loans or loan guarantees" by a federal agency to report on the "number of individuals employed by the business enterprise in the United States; the number of individuals employed by the business enterprise outside the United States; and a description of the wages and benefits being provided to the employees of the business

enterprise in the United States." Beginning one year after the date of enactment, the employer would also have to provide a written certification that includes "the percentage of the workforce of the business enterprise employed in the United States that has been laid off or induced to resign, and the percentage of the total workforce of the business enterprise that has been laid off or induced to resign." If the percentage of the total workforce in the United States that has been laid off or induced to resign is greater than the rest of the workforce, the employer would be blacklisted from receiving "any further assistance from the department or agency" and from "any other federal department or agency.

II. *From Lansing . . .*

Labor Relations Related Bills

Right to Work

On January 13, 2011, Reps. Knollenberg, Jacobsen, MacMaster, McMillin, Lund, Genetski and LaFountaine introduced HB 4054 which would disallow any "all-union shop" agreements covering employees of a city, county, township, village, public school district or intermediate school district, if the applicable employer, by vote of its governing body or the adoption of a measure "initiated by the people," have made the area a "right to work zone." The proscription would apply to agreements made or renewed after the adoption of the measure. The bill is pending before the House Commerce Committee. *See also* SB 116 and SB 120.

Union Use of Public Employer Facilities

On January 13, 2011, HB 4052 was introduced, which would amend PERA to provide that a "public employee or collective bargaining organization shall not use publicly owned property, facilities, or services, including an electronic mail system, for political activities, political fund-Raising, campaigning for office of a collective bargaining organization, collective bargaining organizing activities, or solicitation of employees for membership in a collective bargaining organization." The bill further provides that the "prohibition does not limit the right of a public employee or collective bargaining organization to use, on the same terms as members of the general public, public property that is made available as a public forum." The bill is pending before the House Committee on Oversight, Reform and Ethics.

Union Official Paid Release Time

On January 13, 2011, Reps. Knollenberg, Jacobsen, MacMaster, McMillin and Genetski introduced HB 4059 which would amend PERA to add a provision providing that, a public employer would be prohibited from entering into or renewing a collective bargaining agreement that "requires or allows [employer] paid release time for union officers or bargaining representatives to conduct union business." The bill passed the House by a vote of 59 to 47. The Senate has not taken any action.

Union Dues

On February 17, 2011, HB 4300 was introduced, to amend the Revised School Code so that districts will be required to post the total dues union withheld, per employee and per bargaining unit.

On September 28, 2011, HB 5025 was introduced to require union dues authorizations to be renewed annually.

Strike Penalties

On September 28, 2011, HB 5023 was introduced to mandate fines and penalties for those engaged in public sector strikes or lockouts, require MERC to promptly hold a hearing on determining if a strike or lockout has occurred, forbid any effort to compensate employees for striking, and to require courts to enjoin illegal strikes without regard to the normal standards for injunctions.

On the same day, HB 5026 was introduced to repeal the provision of the LMA which requires employers advertising for strike replacements to include a notice that the vacancy is due to a strike.

Act 312 Repeal

On February 8, 2011, HB 4205 was introduced. The bill would repeal Act 312 and the right of public safety employees to have an arbitrator set their contract terms if a collective bargaining agreement cannot be mutually reached between their unions and their employers.

Employees of Contractors

On January 13, 2011, HB 4003 was introduced, which would amend the LMA by expanding the exclusion to the definition of a public employee, so that in addition to employees of a private entity providing services to a public body, it would also include those who receive a direct or indirect government subsidy in their private employment. It would further prohibit this exclusion from being superseded by any type of interlocal agreement. The bill would also prohibit MERC from recognizing a unit which includes individuals who are not "public employees" as redefined, and that any such bargaining unit shall be deemed void. The bill passed the House on June 8, 2011 and is pending in the Senate.

Consolidation of Public Services

HB 4777, introduced on June 16, 2011, would amend PERA to make the decision of public employer to renegotiate a collective bargaining agreement upon a merger or consolidation of employers or services a permissive act subject to the employer's discretion.

Civil Rights/Discrimination Related Bills

Credit Histories

On March 2, 2011, HB 4363 was introduced to prohibit employers from utilizing credit histories with respect to the making of most job-related decisions.

Comparable Worth

On April 26, 2011, SB 340 was introduced to amend the Elliott-Larsen Civil Rights Act to add amongst its proscriptions discrimination on the basis of comparable worth. Under the bill, claims could be maintained on the basis of an employer failing or refusing to "provide compensation equally for work of comparable value in terms of the composite skill, responsibility, effort, education or training, and working conditions because of religion, race, color, national origin, age, sex, height, weight or marital status." *See also* HB 4611 (May 4, 2011).

Disclosure of Pay Information

On April 26, 2011, SB 342 was introduced to amend the Payment of Wages and Fringe Benefits Act to require employers to provide within 30 days of an employee's request "wage information of similarly situated employees covering a period of up to 3 years prior to the date of the request." The employer may redact the names of the employees listed, but must include their sex and seniority. "Similarly situated" is defined as "employees who are within the same job classification as the employee requesting the information or whose duties are comparable in skill, effort, responsibility, working conditions, and training to those of the requesting employee. *See also* HB 4614 (May 4, 2011).

Discrimination of the Basis of Health of Family Members

On January 26, 2011, the "**Employee Family Health Privacy Act**" (SB 73) was introduced. Under the bill, employers would be prohibited from basing an employment decision on "a known or believed illness or health condition of a member of an employee's family," and inquiring "as to the physical condition or health status of a member of an employee's family." The employer would still be able to inquire as to information to obtain information necessary to verify the employee's eligibility for use of sick leave, to verify the employee's eligibility for family and medical leave, and to process an employee's health coverage claim.

Smoking

On May 3, 2011, SB 352 was introduced to amend the Public Health Code to allow smoking in certain ventilated enclosed "legal smoking rooms."

Unemployment Status

On May 24, 2011, the "**Fair Consideration of the Unemployed Act**" (HB 4675; SB 606) was introduced. Under the bill, employers cannot state, suggest or require that current employment is a job qualification. Violators would be fined $5,000.00 for the first offense, and $10,000 for each subsequent violation. The Senate version of the bill (SB 606) was introduced on September 7, 2011.

Political Meetings

On October 5, 2011, the "**Employee Political and Religious Freedom Act**" (HB 5038) was introduced. Under the bill, employers will be prohibited from being able require employees to attend "an employer-sponsored meeting or participate in any communication with the employer or its agent or representative if the primary purpose is to communicate the employer's opinion about religious or political matters." Employees will also be protected from being retaliated against for complaining about the employer's compliance with act. Claims will have to be brought to court within one year of the last violation. Damages include treble damages as exemplary damages. The term employees includes all forms of teaching assistants, and exempted from prohibited speech are meetings of political, religious or labor organizations directed to their employees. The term "political matters" includes "political party affiliation or the decision to join or not join any lawful political, social, or community group or activity or any labor organization."

Gender Identity

On April 17, 2012, SB 1063 was introduced to amend the Elliott-Larsen Civil Rights Act to include as protected statuses sexual orientation, gender identity or expression.

Leave Rights Bills

On September 7, 2011, the "**Family Education Leave Act**" (SB 590, HB 4898) was introduced. Under the Act, employers would have to provide up to 8 hours of unpaid leave per minor child for employees to attend academic activities of their children. The employer could limit the leave to be in 3 hour increments, and it may require the employee to provide verification of attendance. In most instances, the employee must make the request 7 days in advance of the intended leave. If available, the employee may use paid leave. Employees also may not be discriminated against for using or requesting such leaves.

On February 21, 2012, the "**Voting Leave Act**" (HB 5419) was introduced to provide the right to paid leave of up to three hours for employees of employers with 50 or more employees to vote and to prohibit employers from discriminating against employees who request such time off.

On May 15, 2012, the "**Paid Sick Leave Act**" (HB 5625) was introduced. Under the bill, all employers would have to allow employees to accrue, in one hour increments, paid leave. Small employers (fewer than 10 employees) would have to allow up to 40 hours of paid leave, and all other employers would have to allow up to 72 hours of paid leave. Leave may be used for the employee's heath condition (including preventative care) or the care of a family member due to a health condition (including time for domestic violence victims to relocate). Seven days notice is required if the need for the leave is foreseeable, and if more than 3 consecutive days are used, documentation may be required.

Bills Relating to Pay and Benefits for Public Employees

Public Employee Health Plans

On January 26, 2011, HB 4140 was introduced to: "to provide for consolidation of health benefits for public employees . . .; to create a board to administer a uniform public employee health benefits program; to create the MI prescription drug plan committee; . . . to require public employers and retirement boards that provide health benefits to public employees and retirees to participate in the MI health benefits program; to provide for exceptions from the requirement to participate in the program; [and] to provide for optional participation in the program by private employers . . . ."

Public Employee Pay Reductions

On January 19, 2011, SJR B was introduced to amend the state constitution to require a 5% cut in pay for public employees for the years 2012, 2013 and 2014.

Severance Pay

On December 15, 2011, HB 5238 was introduced as the "**Public Employee Severance Pay Regulation Act**." Under the bill, public bodies may not provide employees or contractors with severance pay for upon their voluntary terminations or terminations instigated by them. Officials allowing such pay will be subject to a $25,000 fine. Specifically exempted from the bill are payments under a reduction-in-force or early retirement play, a civil service or merit pay plan, or if the termination is by the employer for reasons other than cause.