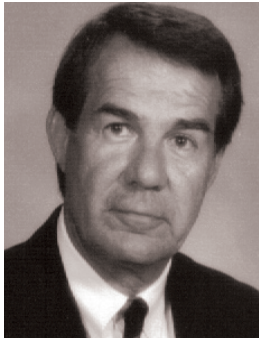


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Briefly
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ELECTION TO CHANGE LABOR AND EMPLOYMENT AGENDA



Ronald G. Daves

"...enormous power still rests with the Administration to continue to make significant change through the regulatory process, which is largely unaffected by the Republican gains in Congress."

The Republican wave that swept over the country on November 2 will not only change the balance of power in Congress, but also may cause President Obama to adjust his approach and his agenda during the final two years of his term. The GOP will end up gaining approximately 62 Democratic seats in the House, and 6 in the Senate. In comparison, in 1994 when the Republicans took control of Congress for the first time in 40 years, they won 54 seats in the House and 8 in the Senate. This was the biggest House gain for the Republicans since they added 71 seats in 1938. It appears that the House will end up with something like 241 Republican seats, and 190 Democratic seats. The Senate appears to be 47 Republican seats, and 51 Democratic seats, plus 2 Independents who caucus with the Democrats. Republicans also picked up 8 additional Governorships, and took control of 19 state legislative chambers from Democrats. There were some bright spots for the Democrats, however, retaining control over the Senate, and in Majority Leader Senator Harry Reid's defeat of Republican/Tea Party candidate Sharron Angle.

The exit polls showed some interesting voting patterns, with the Republicans making significant gains among women, middle-income and blue collar workers, seniors, and independent voters, although polls indicated that both parties were viewed unfavorably. The economy was generally listed as the most important issue, as well as skepticism of big government and opposition to Democratic party policy directives such as the President's economic-stimulus package and the health care overhaul. Exit polls also indicated that about 40% of those polled said they were supporters of the Tea-Party movement, while 31% said they were opponents of the Tea-Party. While Tea-Party candidates brought additional enthusiasm and turnout for Republican voters, some believe that Tea-Party-backed candidates cost the Republicans Senate races in Nevada, Delaware, Colorado, and possibly West Virginia and Connecticut.

Significant differences appeared in what national priorities should be going forward. Voters appear divided as to whether the country's economic problems could be addressed by cutting the budget deficit or spending more to bring additional job growth.

One wonders what direction the Administration will take in light of the Republican sweep. President Bill Clinton had significant mid-term election setbacks following his first 2 years, and responded by moving to the center, gaining enormous popularity in the process. The complication is that today political parties are more philosophically divided, with moderate Democrats suffering the greatest losses on the Democratic side, while conservative Republicans appear to be gaining. Liberal elements within the Democratic Party may be reluctant to support efforts at moderation and compromise, and instead ironically urge the following of Ronald Reagan to "steer the course" or Harry Truman to "stick to principles and if Congress doesn't go along, to blame Congress." Democrats will have to overcome internal divisions and avoid opposition building to President Obama within the Democratic Party. Republicans similarly will have to be prepared to present alternatives instead of simple opposition to the President's programs and show some bipartisan accomplishments, while adjusting to the pressure from the right from the Tea-Party candidates.

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Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.

NLRB ISSUES NEW POLICY ON REINSTATING UNION ORGANIZERS



Howard B. Jackson

"The NLRB is currently working on plans to speed up union elections..."

Although the Obama Administration has not been able to get the card-check law passed (EFCA), there are steps underway to make union organizing easier. The NLRB is currently working on plans to speed up union elections, to reduce the current median time frame of 42 days between a union's filing for a petition for an election, and the date of the election. Another priority was announced on September 30, when the NLRB stated that it would seek a speedy remedy in every meritorious unfair labor practice case that involves an unlawful discharge during a union organizing effort.

In a memorandum issued to the NLRB's regional offices (Memorandum GC 10-07), the NLRB general counsel said he intends to focus efforts on gaining immediate reinstatement of discharged union organizers if, in the general counsel's view, the termination tends to "nip in the bud" the employees' efforts to organize, and intimidates other employees from exercising their statutory rights. The procedure would be to seek a court injunction under Section 10(j) of the Act so as to obtain a swift remedy requiring employers to offer interim reinstatement to allegedly unlawfully discharged employees pending a final NLRB ruling. He outlined in the memo an "optimal time line" for case processing that will require NLRB Regional Directors to quickly consider seeking injunctive relief in "all meritorious 8(a)(3) nip-in-the-bud cases." (For

those of us who can recall Mayberry RFD, I will add that it remains to be seen whether this procedure will one day be known as the "Barney Fife injunction.")

CAN AN EMPLOYER REVOKE AN ACCEPTED JOB OFFER



Margaret Noland

"A job offer rescission in such circumstances may not only make the applicant mad, but he may sue."

Many employers have been faced with awkward situations in which they have made a job offer to a candidate, often accepted, and the employer determines that it must rescind the offer due to various circumstances, including matters going beyond the contingencies on the offer. In a worst case situation, the applicant may have resigned from his previous position, and/or moved to the employer's location, only to find he no longer has a job. A job offer rescission in such circumstances may not only make the applicant mad, but he may sue.

As a general rule, at least in most states, an employer has the right to revoke a job offer, even after it has been accepted. However, in many states there is a doctrine known as promissory estoppel or detrimental reliance, in which an applicant or the employee is allowed to sue on the promise of a job made by the employer, if he has relied to his detriment on that offer in accepting the job and giving up his prior situation.

What can the employer do to protect itself against such liability? First, it is helpful for the employer to include contingency language whenever a job offer is made. It is best if the contingency language is not limited to meeting certain specific criteria, but also includes

language on the offer letter and/or the employment application that the employer is an at-will employer and that the job offer can be revoked. Further, because the applicant is a "sympathetic" figure in the eyes of a court or jury, every effort should be made to soothe the situation through a tactful explanation to the applicant.

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WOMAN SUES EMPLOYER OVER ITS GUN POLICY



T. Joseph Lynch

“...gun-rights groups are preparing to file suits in states with restrictive laws dealing with the carrying of guns.”

During June of 2010, the U.S. Supreme Court expanded gun rights in a ruling that requires states to respect the federal right under the Second Amendment to keep and bear arms, but it did not say specifically how broadly the right extends. As a result, gun-rights groups are preparing to file suits in states with restrictive laws dealing with the carrying of guns. In addition, some states have gun laws that protect the rights of persons or employees to carry guns. Georgia, for example, has a law that no employer may condition employment upon any agreement by a respective

employee that prohibits the employee from entering the parking lot and access thereto when the employee's privately owned motor vehicle contains a firearm that is locked out of sight within the trunk, glove box, or other enclosed compartment.

In September, a former employee of Iron Mountain Information Management challenged her employer's right to terminate her employment for possessing a gun while driving her privately owned car on company business. The company issued a statement explaining its position: “Ms. Lunsford violated our company's policies for employee and customer safety when she drove herself and another employee to a customer's facility while in possession of a gun. We have zero tolerance for actions that may put our employees or customers at risk. We recognize that Ms. Lunsford is a licensed gun owner and that Georgia law allows workers to leave a firearm in their vehicle in a company parking lot. The law does not, however, permit an employee to carry a firearm while conducting company business. Given this, and for the safety of our employees and customers, we felt compelled to take the action we did.”

In light of these developments, it would be wise to monitor this situation, as they may in the future impact existing company “no weapons” policies.

KNOW YOUR ATTORNEY TERRI L. BERNAL

TERRI L. BERNAL is a Senior Associate in the Nashville, Tennessee office of the Firm, which she joined in November 2010. Her law practice includes an



emphasis on workers' compensation defense and employment law. Terri graduated *cum laude* with a B.S. in Political Science from the University of Tennessee at Chattanooga. She obtained her Doctor of Jurisprudence degree from Baylor University School of Law in Waco, Texas, graduating in 1996. Terri was admitted to practice in both Tennessee and Georgia in 1997. She is a member of the Tennessee Bar Association, the Georgia Bar Association, the Nashville Claims Association and the Mid-South Workers Compensation Association.

IRS RELEASES DRAFT W-2 FORM FOR 2011; DEFERS REQUIREMENT FOR EMPLOYERS



Catherine Shuck

“The law made the W-2 provision effective for tax years beginning on or after January 1, 2011.”

The new healthcare law requires employers to report the value of the health insurance coverage they provide employees on each employee's annual Form W-2. This reporting is for informational purposes, to show employees the value of their healthcare benefits. The amount reported does not affect income tax liability, and in the future will be used to determine certain eligibility for federal support supplements. After health insurance becomes mandatory for individuals in 2014, the W-2 information may also be used to determine whether an individual is in compliance with the mandate.

The law made the W-2 provision effective for tax years beginning on or after January 1, 2011. In October, however, the IRS announced that it would defer the reporting requirements until 2012. Thus, such reporting by employers is optional in 2011, but will become mandatory in 2012.

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“ELECTION TO CHANGE LABOR AND EMPLOYMENT AGENDA” continued from page 1

In terms of the Congressional agenda, common ground may be found between the Administration and the Republicans over limiting federal spending, extending some Bush tax cuts, promoting jobs through infrastructure investments and international trade, education, and energy as well as extending unemployment insurance benefits for a longer period of time for those who remain unemployed.

While there will likely be efforts, particularly in the House, among Republicans, to repeal the Obama healthcare law, another possibility is to amend or add to the law providing additional acceptable options or limit funding for the law. While some would argue that a divided government makes it hard to pass legislation, history suggests that the combination of one party controlling the White House, and the other the Congress, has actually led to a favorable environment for some significant legislative compromises. The pressure will be on both the President and the Congress to move forward in a bipartisan manner. Core Republican principles of cutting spending, lowering taxes, and maintaining a strong national defense, will also be the key elements of its Congressional posture along with creating additional jobs.

Outside the above areas, compromises between the Administration and Republicans appear dim. Immigration reform and climate-change legislation appear dead, at least for the present, as well as the union card-check union organizing bill and other controversial new employment laws. Nevertheless, enormous power still rests with the Administration to continue to make significant change through the regulatory process, which is largely unaffected by the Republican gains in Congress. Over the last year or so, regulatory policies towards wage-hour and safety and health have changed enormously, along with significant changes in immigration enforcement. The EEOC has gained in funding and is taking far more aggressive stances toward enforcement.

Organized labor is quite pleased with Administration changes at the National Labor Relations Board (NLRB) allowing immediate injunctive relief (without an administrative hearing) to reinstate union organizers in a union organizing drive, and changes are expected in the near future to speed up union elections, currently with a median election date of 38 days after the union's filing of an election petition. The NLRB, currently consisting of three former union lawyers and one Republican, is in the process of major revisions to NLRB policies that will assist unions in organizing and make it less likely for them to be voted out. Other NLRB rules that could change by administrative fiat include additional access for organizers to the workplace, shorter election campaigns, union representation of staffing employees, and moving voting away from the workplace through internet or mail ballots. In fact, even without new legislation many current labor and employment related policies can be significantly changed by Administration appointees, including the General Counsel of the NLRB. The Administration's appointees have stated publicly that they will use their authority to make regulatory and policy changes. About the only way the Republicans can limit the power of the administrative agencies, is through threatening to withhold funding and/or the withholding of funding. However, Republicans may remember the adverse public reaction, when federal funding was frozen during the tenure of House Speaker Newt Gingrich.

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