Ogletree Deakins

A Review of Labor and Employment Policy in 2013: What's Next in 2014?

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2013: ANOTHER BAD YEAR FOR CONGRESS

Although the first session of the 113th Congress in 2013 produced the lowest output of legislation in history and Congress received the lowest public approval rating on record, the first session of the two-year congressional cycle ended on a positive note. Congress passed a two-year budget deal that will keep the government running through 2015. As with most legislative compromises, the new budget deal does not please everyone. It maintains a large portion of the indiscriminate, across-the-board sequester cuts in government spending and does not create new government programs. But it also does not raise taxes to restore funding for the programs previously cut by sequester. Depending on one's point of view, that is either good news or bad news.

Some had suggested in lieu of a budget deal that Congress pass a continuing resolution maintaining the status quo including the full sequester budget cuts to domestic spending and the defense budget. They will be disappointed. As will those who demanded a complete roll-back of the sequester.

Instead, passage of the two-year budget compromise eases the pressure created by the threat of another government shutdown, but sets up two key votes by Congress early in 2014: (1) a vote on a comprehensive omnibus appropriations bill on how to allocate the budget throughout the government; and (2) a vote on whether to extend the debt ceiling.

The result of the 2013 budget compromise is a budget of $1.012 trillion in 2014 and $1.014 trillion in 2015, which is a compromise half-way between the president's requested budget and that proposed by the Republican-led House of Representatives. Of course it does not reduce the deficit, which stands at $17.2 trillion. The budget deficit must be extended by next February or March to raise the debt ceiling.

The 2013 budget deal also does not establish how the money is to be divided among the 12 appropriations bills that fund federal government agencies. The congressional appropriations committees are hard at work to fashion new spending limits for each of the 12 bills. The outcome should be determined before the January 15 deadline and perhaps passed by an Omnibus Spending Bill approved by House and Senate Appropriations Committees.

Also, Congress adjourned for 2013 without extending long-term unemployment benefits, which means that unemployment benefits for the long-term unemployed will expire on December 31. That sets up another critical fiscal vote early in 2014 soon after Congress returns to start its second session.

IS PASSAGE OF THE 2013 BUDGET COMPROMISE A TURNING POINT FOR CONGRESS?

Does passage of the budget deal by bipartisan, bicameral compromise signed by the president portend passage of other legislation by compromise in 2014 during the next session of Congress? Probably not—at least not on the labor and employment law battlefields. One possible exception remains some form of immigration legislation, most likely to be piecemeal reforms rather than a grand comprehensive bill, including a path to legal status (or "amnesty"), which passed the Senate in 2013. Perhaps Congress also will vote on a much-needed reform of the endangered and badly-underfunded multi-employer pension system with its legacy withdrawal liability, which exceeds many companies' entire net worth and threatens their very survival. Something should also be done to replace and improve the current Pension Protection Act of 2006, which sunsets at the end of 2014.

There may be a few other election-year votes in 2014 as well, such as one on a minimum wage increase but without indexation of automatic future increases and another on the Employment Non-Discrimination Act (ENDA) to address employment discrimination on the basis of sexual orientation, sexual preference, or gender identity, which passed the Senate in 2013.

But, in general, employers should not expect that passage of the budget deal will bring about a new era of comity between the two political parties or the two legislative bodies in 2014. Until the results of the 2014

elections are in, and possibly even thereafter, employers should not expect bipartisanship in Congress, especially not on the labor and employment agenda.

THE ABYSMAL RECORD OF THE FIRST SESSION OF THE 113TH CONGRESS

Congress passed only 59 bills in 2013, which is a very small fraction of the 6,366 bills introduced during the first session of the 113th Congress. That figure represents the lowest one-year output in congressional history, lower even that what President Truman described as the "do-nothing Congress" of 1947-48, which passed only 395 bills during the first session of the 80th Congress and 511 during the second session. The 2013 record low is a sharp decline even from 2011 and 2012 when Congress passed 90 and 148 bills respectively, and it's a big drop from the 258 bills passed in 2010.

Again, depending on one's point of view, the sluggish rate of passage of new legislation is either good news or bad news. It's good news, of course, if bills you oppose such as the Employee Free Choice Act (EFCA or "card check" bill) are not passed, but it's bad news if bills you may support, such as modification of the Affordable Care Act (ACA or Obamacare) are not passed either. The House passed 40 bills attempting to repeal or modify Obamacare, but the Senate passed none.

In assessing the record of Congress in 2013, as the old saying goes, "where you sit depends upon where you stand." According to Gallup polls, however, the public's job approval rating for Congress in 2013 averaged only 14 percent—the lowest in Gallup's history. Certainly not a poll any incumbent from any party would welcome going into an election year.

2013: A BAD YEAR FOR GOVERNMENT AGENCIES

In 2013 there was a prolonged government shutdown during which many government workers were humbled to find out that they were "nonessential" and furloughed. Yet the record of accomplishment in 2013 was not that impressive in any event, despite a flood of proposed but not finally implemented new regulations with administrative policies and decisions still pending review in the federal courts.

After the ACA's high water mark in June of 2012 when the Supreme Court of the United States declared that it was constitutional, it was all downhill. In July of 2013, the U.S. Treasury Department delayed implementation of the law's employer "play or pay" mandate until 2015 because the law was not ready for implementation. In October, that lack of preparation was demonstrated when hundreds of people were unable to enroll due to glitches with the federal health insurance website. Next, the biggest blow came in December when it was confirmed that millions of policy holders were informed by their insurance companies that their existing health plans were being cancelled because the plans did not conform to the ACA—belying the president's unequivocal assurance throughout passage of the act that no one would lose coverage of their health plans. A November 17 *The Wall Street Journal* editorial projected the bad news: "Millions of Americans

are losing their plans and paying more for health care, and doctors are being forced out of insurance networks."

Obamacare is still the law with an effective date of January 1, 2014, for provisions not delayed or deferred, but implementation will move forward in 2014 under continuing attack. Even organized labor, originally a strong proponent of the ACA, threatened to support repeal unless labor's demands were met. The Obama administration issued a proposed rule to exempt, starting in 2015, union-controlled health-insurance plans (commonly referred to as Taft-Hartley plans) from the ACA's reinsurance tax on self-insured health-care plans. If union plans were carved out, the result would advantage union organizing in companies that must pay the reinsurance tax on self-insured plans. Watch for this to be a major labor-management issue in 2014.

WHAT'S AHEAD FOR LABOR AND EMPLOYMENT LAW ISSUES IN 2014?

One result of congressional inaction is that it shifts focus to the federal regulators and regulatory agencies such as the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA), Wage and Hour Division (WHD), and Office of Federal Contract Compliance Programs (OFCCP), the National Labor Relations Board (NLRB), and the U.S. Equal Employment Opportunity Commission (EEOC). The government's record of new and proposed regulations, expanded enforcement through regulatory and sub-regulatory policies, and overturning of long-established legal precedent through administrative case law decisions over the past several years stands in dramatic contrast to Congress's inaction. Expect that trend to continue in 2014.

For example, among the regulatory actions in 2013 by federal executive branch agencies, the OFCCP issued proposed regulations requiring federal contractors to advance hiring and employment "goals" for veterans and the disabled. The WHD continued work on its "right to know" regulation, which will require employers to justify overtime exempt classifications, including independent contractor status, through notification to employees of the basis for their classifications. In sub-regulatory action, OSHA issued an interpretive letter approving walk around rights of outside union organizers to accompany OSHA inspectors during workplace safety and health investigations. Among independent federal agencies, the EEOC issued rules limiting the use of criminal background checks and credit references in hiring.

Also, near the end of the year there even was renewed discussion in Washington of stricter rules governing federal contracting by companies with wage and hour and safety and health violations as a result of a new report released by Senate Health, Education, Labor and Pensions (HELP) Committee Chairman Tom Harkin. That discussion is reminiscent of the "high road" proposal led by Vice President Biden early in the administration and the ill-fated "government contractor blacklisting" regulation proposed by the Clinton administration. The latter, which would have revised the Federal Acquisition Regulation (FAR) to deny federal contractors the eligibility to bid on federal contracts based on their compliance with labor and employment laws, went through the full rulemaking process and was issued as a "midnight regulation" in the closing days of the administration. The rule was rescinded at the start of the Bush administration.

Ironically, one of the biggest developments in the 2013 Congress was the Senate's procedural rule change based on a simple majority vote (the "nuclear option"), which strengthens the regulatory hammerlock by eliminating the 60-vote filibuster on executive branch appointments and judicial nominations. Trying to avoid the nuclear option, the Senate agreed to confirm all five candidates to the NLRB and its General Counsel, resulting in a pro-union majority for the foreseeable future. The Senate also confirmed Secretary of Labor Thomas Perez and is in the process of confirming three new judicial appointments to the D.C. Circuit Court of Appeals, which will result in tilting the balance on what many consider to be the second most important federal court after the Supreme Court of the United States. These newly-confirmed appointments assure a liberal, pro-union agenda in federal agencies such as the NLRB and greater difficulty in successfully challenging agency regulations and administrative case decisions in the D.C. Circuit for years to come.

ADMINISTRATION REGULATORY PRIORITIES

Defense and implementation of the beleaguered ACA will be the administration's top priority in 2014. So it's unlikely that the White House will welcome other major new regulatory fights to distract attention from the ACA, especially in an election year. Nevertheless, regulatory battles begun in 2013 and before may not simply be abandoned in 2014. Certainly, organized labor will pressure for their advance. Here are only a few of the potential regulatory issues to watch for next year.

1. Revisions to the LMRDA "Persuader Activity" Regulations

The administration's most far-reaching sop to organized labor is its proposed revisions to the "persuader activity" reporting requirements. The Department of Labor intends to publish a final rule in March 2014 revising its interpretation of the "advice exemption" under section 203(c) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) that currently exempts legal advice from public disclosure and reporting requirements that apply to employers and other persons in connection with efforts to persuade employees concerning union organizing, collective bargaining, strikes, and other forms of concerted activity. Reporting by employers and outside consultants and law firms is required when a "persuader" is hired to communicate directly with employees regarding unionization. But for over 50 years the law has exempted "advice"—especially legal advice—from the reporting requirement.

The revised interpretation under the proposed persuader rule would narrow dramatically, if not entirely eviscerate, the scope of the advice exemption by requiring consultants, management-side labor law firms, public relations firms, and trade associations to report activities broadly defined in the proposed regulation as "persuader" services. That would include common labor relations services designed to prevent unfair labor practices, such as review, preparation, and provision of speeches, written and electronic materials, and supervisory training, including seminars and workshops.

In particular, lawyers and law firms, and their corporate clients, will be pressured to disclose attorney-client confidences. In dealing with that pressure, they will have to decide whether to disclose this confidential

information (thus potentially violating Rule 1.6 of the American Bar Association (ABA) Model Rules of Professional Conduct, which was made binding under state bar association rules, and thereby potentially subjecting themselves to discipline, including disbarment) or protecting the confidences by not reporting, which would arguably subject them to civil and criminal penalties, including imprisonment, under the LMRDA.

The DOL is also likely to argue that under the proposed regulation, lawyers and law firms must report all "labor relations advice and services" for all clients, even those for whom the lawyer provides no persuader work, whenever the lawyer reports such services for a single client.

According to ABA comments filed during the rulemaking that demanded withdrawal of the proposed rule, the reporting requirement would unjustifiably interfere with employer access to counsel by making it difficult for businesses that do not have in-house legal and labor relations expertise—especially small businesses—from retaining outside legal counsel during union organizing and collective bargaining. That, in turn, would conflict with the National Labor Relations Act's employer "free speech" rights in union representation elections and could lead to "back door" EFCA-like forced card check recognition and bargaining where uncounseled employers commit serious unfair labor practices. The intended result is to reverse the steady decline in private sector union density by making it more difficult for employers to communicate lawfully with their employees during a union organizing campaign and collective bargaining. A more in depth discussion of the persuader regulation proposal is available in our article, "Labor Agencies Double-Team Business Community with Onerous Rules."

2. NLRB "Ambush Election" Rules for Union Representation Elections

2013 was a bad year for the NLRB. The Supreme Court is reviewing the decision of the D.C. Circuit Court of Appeals in *Noel Canning v. NLRB* holding that the recess appointments to the agency on January 4, 2012, were unconstitutional and that thereafter the agency's decisions and other actions were invalid for lack of a quorum. The case will be argued to the Supreme Court in January and a decision thereafter may necessitate the NLRB to reconsider hundreds of previously-issued decisions.

As a result of the uncertainty, the pace of reversals of long-established precedent by the recess-appointed Board slowed noticeably in 2013. However, now with a new, fully-confirmed five-member Board and General Counsel expect the pace of decisions and regulations to pick up in 2014 with a pro-union majority. One pending issue of overriding importance is union organizing on a company's email system at work and other forms of electronic equipment. Watch for the long-awaited Board decision in *Roundy's Inc.* to serve as the vehicle for an exception to a company's "no solicitation" policy.

One of the casualties of the D.C. Circuit decision was the NLRB's dramatic overhaul of its union representation election rules (the so-called "ambush election" or "quickie election" rules), which would dramatically shorten the time between when a union files an election petition—presumably at its peak of support among the proposed unit of employees—and the actual date of the election. The rule would have

resulted in most union representation elections occurring within two weeks of the union's petition by eliminating pre-election litigation to determine such critical issues as voter eligibility and the composition of the bargaining unit.

The rule was challenged in the D.C. Circuit and thereafter held in abeyance pending the Supreme Court's review of the *Noel Canning* case as to whether the NLRB had the authority to act. Finally, in December the NLRB threw in the towel on its appeal in support of the representation election rules and withdrew the appeal but is expected to reissue an even stronger version of the rules in 2014.

In 2013, the NLRB also lost several high-profile appeals court decisions; in at least two of these cases, Ogletree Deakins represented the prevailing employers. The first was a successful challenge by the Chamber of Commerce of the United States and the South Carolina Chamber of Commerce to the NLRB's "notice posting" rule. In *Chamber of Commerce of the United States v. NLRB*, the Fourth Circuit Court of Appeals struck down the rule, which mandated that all private sector employers post a workplace notice informing employees of their right to join or form a union. Both the Fourth Circuit and the D.C. Circuit in a separate case held that the rule exceeded the agency's authority under the National Labor Relations Act and violated employers' free speech rights to remain silent.

In the second case, *D.R. Horton, Inc. v. NLRB*, which was also argued by Ogletree Deakins, the Fifth Circuit Court of Appeals upheld the employer's argument in favor of class action waivers in mandatory employment law arbitration agreements. The NLRB had ruled that such waivers violated employees' rights to engage in protected concerted activity. In denying enforcement of the Board's order, the Fifth Circuit held that under the authority of the Federal Arbitration Act and several Supreme Court decisions employers could insist on class action waivers in arbitration agreements.

However, the NLRB did prevail before the Sixth Circuit Court of Appeals in *Specialty Healthcare*, which upheld the Board's decision approving micro-sized, fragmented, single job description bargaining units over an employer's objection for a broader, more inclusive unit—unless the employer could prove the difficult standard that the excluded employees shared an "overwhelming" community of interests with employees in the union's petitioned-for unit. That standard will continue to be problematic for employers.

3. OSHA "Injury and Illness Prevention Program" (I2P2)

OSHA is developing a rule requiring employers to identify hazards in the workplace and then implement an Injury and Illness Prevention Program to address them. It involves planning, implementing, evaluating, and improving processes and activities designed to protect employee safety and health that would be monitored by employees and enforceable by OSHA even without an established standard. The proposed rule would require employers to develop safety and health plans with their employees that would become enforceable even in lieu of a specific OSHA safety and health standard. For that reason, the proposal is considered a "back

door ergonomics standard," which was rejected by Congress pursuant to the Congressional Review Act nearly a decade ago. The target date for promulgation of the I2P2 rule is September 2014.

4. Occupational Exposure to Crystalline Silica

OSHA issued a Notice of Proposed Rulemaking (NPRM) on September 12, 2013, with written comments due, as extended, on January 27, 2014. The proposed rule would dramatically reduce the permissible exposure level to crystalline silica, which is common in many industries and industrial application.

CONCLUSION

2014 may be slightly more productive in Congress (it could hardly be less productive than 2013), but most of the attention will be directed toward congressional oversight on the implementation of Obamacare and on the 2014 midterm congressional elections where all 435 House seats and 35 Senate seats (21 held by Democrats and 14 held by Republicans) are up for election, as well as states in which incumbent senators have announced retirement. Expect most of the labor and employment agenda in Washington again to be driven by federal agencies and by the reviewing federal courts.

TOPICS

Governmental Affairs, Traditional Labor Relations