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Foreword: The Workplace Law Agenda of the Obama Administration

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FOREWORD: THE WORKPLACE LAW AGENDA OF THE
OBAMA ADMINISTRATION

BY
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I. INTRODUCTION

This issue of the *Employee Rights and Employment Policy Journal* (EREPJ) focuses on an assessment of several key aspects of the workplace law record thus far of President Barack Obama. As this issue publishes in Summer 2012 with the November 6, 2012 election a few months away, most would agree that the workplace law agenda of the Obama Administration remains a work in progress.

In all areas of law and policy, scholars debate the extent of the power that any president can have to move legislation from introduction to signature, and then withstand any constitutional challenges that might be mounted. The election of President Obama

* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. Many thanks to Marty Malin and Doug Scherer for asking me to be the guest editor on this issue of the *Employee Rights and Employment Policy Journal* (EREPJ). It is an ongoing pleasure and honor to serve on the EREPJ Editorial Board. Thanks also to Marcia McCormick for her patience and fortitude as managing editor and to the students at IIT Chicago-Kent College of Law for their work on the journal. I am further indebted to David McClure in UNLV's Wiener-Rogers Law Library for his excellent assistance. Finally, I thank the authors in this symposium for their work on these trenchant contributions to scholarship in the law of the workplace.

with nearly 53 percent of the popular vote and 365 electoral votes was seen as a decisive victory in an era when the previous two presidential elections were so close that they led to many voting disputes.¹ The many social groups and labor unions that supported the president hoped that the margin of victory and the Democratic party's control of both houses of Congress would mean expanded rights and remedies for workers, as well as sustained economic growth.

Instead, several legislative proposals have been stalled in Congress—everything from proposed new protections for gays and lesbians in the workplace to increasing the protections for women to remedy gender-based pay disparities to a much-discussed bill that would facilitate union organizing. Nevertheless, the pace of labor and employment law near the end of the first Obama Administration repeats a general historical cycle in legislative change of workplace law – a burst of optimism, stymied by legislative paralysis, which leads to attempts to make changes through actions by agencies of the Executive Branch.

The first month of the Obama Administration began on an optimistic note with the signing the Lilly Ledbetter Fair Pay Restoration Act.² The first major legislation to arrive on the President's desk was enacted to reverse the United States Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Co.*³ When signing the Ledbetter Act on January 29, 2009, President Obama repeated the familiar statistic that women across this country are still earning “just 78 cents for every dollar that a man makes – women of color even less”⁴ Title VII of the Civil Rights Act of 1964, and the Equal Pay Act (EPA) of 1963, were both intended to make pay differences because of sex irrelevant. Unfortunately, the pay gap has persisted in the nearly fifty years of litigation under the statutes. Further, other legislative efforts to improve the EPA have stalled in Congress, which I will discuss below.

Organized labor has seen its share of disappointments in the Obama Administration to date. One of the top priorities of the labor

1. Adam Nagourney, Obama: Racial Barrier Falls in Decisive Victory, N.Y. TIMES, Nov. 5, 2008, at A1.

2. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

3. *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007).

4. Remarks of President Barack Obama on the Lilly Ledbetter Fair Pay Restoration Act Bill Signing (Jan. 29, 2009), available at <http://www.whitehouse.gov/video/EVR012909#transcript>.

movement is the passage of the Employee Free Choice Act (EFCA).⁵ EFCA would require employers to bargain with unions upon the showing of majority interest without the need for a secret ballot election. Although it passed the House early in the Obama Administration, it was stalled in the Senate without the sixty votes needed to break a filibuster. With the Republican takeover of the House of Representatives in 2010, and the Republicans poised to make gains in the Senate in the 2012 elections, there is virtually no chance that the EFCA will become law even if President Obama is reelected.⁶

Given these difficulties, President Obama has attempted to utilize executive powers and appointments to further employee and union interests in the workplace. These efforts too have been beset by misfortune. Former academic and union attorney Craig Becker, for example, was forced into a recess appointment to the National Labor Relations Board (NLRB or Board) due to Republican opposition.⁷ The delays in the transition from the George W. Bush Board to the Obama Board, also left the Board with only two members when it was issuing many decisions. The Supreme Court's 2010 decision in *New Process Steel v. NLRB* held that the Board lacked a statutory quorum and thus the decisions of the two-person board had to be re-decided.⁸ At the same time, new election rules and posting requirements were challenged in the courts. At this writing, the proposals seem destined to be heard in an increasingly conservative Supreme Court.

This issue of the *Employee Rights and Employment Policy Journal* addresses the Workplace Law Agenda of the Obama Administration. The authors examined developments in a number of key areas of labor and employment law and their status from January 2009 through May 2012. In this Foreword, I first situate the Obama Administration in the context of the slow pace of legislative change in workplace law generally. History shows that legislative activity in labor and employment law generally occurs at the very beginning of a presidency, or at the very end of a president's second term, if there is

5. H.R. 1409, 111th Cong. (2009).

6. Derrick Cain, *House Republican Agenda Likely to Stymie Various Labor-Related Bills Such as EFCA*, Daily Lab. Rep. (BNA) No. 212, at AA-1 (Nov 3, 2010).

7. Susan J. McGolrick, *Becker, Pearce Sworn in as Members, Creating 3-1 Democratic Majority on NLRB*, Daily Lab. Rep. (BNA) No. 66, at AA-1 (Apr. 8, 2010).

8. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010).

one. Second, I look at three examples where the hopes for changes in workplace law after the election of President Obama have not been realized—strengthening equal pay protections; protecting lesbian, gay, bisexual and transgender (LGBT) individuals from discrimination; and facilitating union representation. Next, I outline the plan of this issue, briefly describing the five outstanding contributions from nationally recognized labor and employment law scholars in this symposium. Finally, I end this Foreword by looking toward the next four years in workplace law, regardless of which party wins control of the White House or Congress.

II. IS WORKPLACE LAW RESISTANT TO LEGISLATIVE CHANGE?

Workplace law consists of many different statutory schemes and administrative agencies, but the modern era of workplace legislation largely begins with federal statutes governing collective bargaining passed in the 1930s. The National Labor Relations Act of 1935 (NLRA) represented a change from the traditional common law view of labor management relations where the employer had almost unlimited power over the workplace. The NLRA changed the power dynamics in the workplace.

The transformative potential of the NLRA was blunted by the Taft-Hartley Amendments of 1947. The Taft-Hartley Act was a major overhaul of labor law that made it more difficult to organize by forbidding labor activity against neutral employers, or by newly defined “supervisors.”⁹ In 1959, Congress passed the Labor Management Reporting and Disclosure Act (LMRDA), protecting the rights of union members to dissent from their leadership. In 1974, the law was amended to add special rules for health care institutions.¹⁰

As several scholars have argued, labor law has become a dinosaur of the New Deal, famously resistant to change.¹¹ This might reflect the highly polarized nature of collective bargaining, or the weak political power of workers. In my 2012 book *Marginal Workers: How Legal Fault Lines Divide Workers and Leave Them Without Protection*, I argued that workers are diffuse political actors that have a hard time coalescing around demands for better legislative

9. 29 U.S.C. §§ 152(3), 158(b)(4) (2006).

10. *Id.* § 158(g).

11. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); Alan Hyde, *The Idea of the Idea of Labour Law: A Parable*, in *THE IDEA OF LABOUR LAW* 88 (Guy Davidov & Brian Langille, eds., 2011).

protections in the workplace. Workplace law is an ideologically polarized political minefield that makes compromise across the divide difficult.¹²

Indeed, as the chart below shows, the greatest possibility for workplace reform tends to be most likely at the very beginning of a President's first term or near the end of the second term, if there is one. As described earlier, the Lilly Ledbetter Act was enacted within nine days of President Obama's inauguration. The two major pieces of workplace legislation in the previous Administration – the Genetic Information Nondiscrimination Act (GINA) and the Americans with Disabilities Amendments Act (ADAA)—were not enacted until late in the second term of George W. Bush. Even in those instances, there were political stars aligned for reform. In the case of GINA, genetic technology is not yet widely available, or understood and there was a political “moment” available with the legacy of his father George H.W. Bush signing the Americans with Disabilities Act of 1990. Further, the last major overhaul of the Civil Rights Act of 1964 occurred in 1991 near the end of the first and only term of the elder President Bush. The Family Medical Leave Act, the major workplace law reform of the Clinton Administration, occurred in the first term (1994), while many other legislative possibilities crashed on the shoals of Clinton's impeachment and the Republican takeover of Congress.

While this trend is highly dependent on historical circumstances, it also makes some sense in the cycle of presidential elections. Presidents typically come into office at the height of their political possibilities. As presidents seek election to a second term, there is little incentive for Congress to hand over legislative victories, unless the legislative branch is controlled by the president's political party. Thus, the prevailing mood in Washington right now is polarized. If President Obama is reelected, there might be a chance for compromise near the end of his second term, when he is prevented by the Constitution from running again.

The following table charts these trends in the private sector, starting with the National Labor Relations Act of 1935:¹³

12. RUBEN J. GARCIA, *MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION* 18-25 (2012).

13. Presidential Information available at the Internet Public Library, <<http://www.ipl.org/div/potus/>>; Legislative Information available at the Popular Name Table for Acts of Congress (West 2011).

Table 1
Major Private Sector Workplace Legislation 1935-2011

| Major Private Sector Workplace Legislation | Enacting President Dates of Term | Date Enacted |
|--|--|---------------------|
| National Labor Relations Act (29 U.S.C. §§ 151 <i>et seq.</i>) | Roosevelt March 4, 1933-January 20, 1937 | July 5, 1935 |
| Fair Labor Standards Act (29 U.S.C. §§ 201 <i>et seq.</i>) | Roosevelt (2nd Term) January 20, 1937-January 20, 1941 | June 25, 1938 |
| Taft Hartley Act (29 U.S.C. §§ 141 <i>et seq.</i>) | Truman (1 st Term) April 12, 1945-January 20, 1949 | June 23, 1947 |
| Landrum-Griffin Act (29 U.S.C. §§ 401 <i>et seq.</i>) | Eisenhower (2 nd Term) January 20, 1957-January 20, 1961 | September 15, 1959 |
| Equal Pay Act (29 U.S.C. § 201) | Kennedy January 20, 1961-November 22, 1963 | June 10, 1963 |
| Civil Rights Act (42 U.S.C. §§ 2000e <i>et seq.</i>) | Johnson (1 st Term) November 22, 1963-January 20, 1965 | July 2, 1964 |
| Age Discrimination in Employment Act (29 U.S.C. §§ 621 <i>et seq.</i>) | Johnson (2 nd Term) January 20, 1965-January 20, 1969 | December 5, 1967 |
| Employee Retirement and Income Security Act (29 U.S.C. §§ 1001 <i>et seq.</i>) | Ford August 9, 1974-January 20, 1977 | September 2, 1974 |

Continue on next page

| | | |
|--|---|--------------------|
| Worker Adjustment Retraining and Notification Act (29 U.S.C. §§ 2101 <i>et seq.</i>) | Reagan (2 nd Term) January 20, 1985-January 20, 1989 | August 4, 1988 |
| Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 <i>et seq.</i>) | George H.W. Bush January 20, 1989-January 20, 1993 | Jul. 26, 1990 |
| Civil Rights Act of 1991 (42 U.S.C. § 1981) | George H.W. Bush January 20, 1989-January 20, 1993 | November 21, 1991 |
| Family Medical Leave Act (29 U.S.C. §§ 2601 <i>et seq.</i>) | Clinton (1 st Term) January 20, 1993-January 20, 1997 | February 5, 1993 |
| Genetic Information Nondiscrimination Act (42 U.S.C. § 2000ff) | George W. Bush (2 nd Term) January 20, 2005-January 20, 2009 | May 21, 2008 |
| Americans with Disabilities Act Amendments Act (42 U.S.C. §§ 12101 <i>et seq.</i>) | George W. Bush (2 nd Term) January 20, 2005- January 20, 2009 | September 25, 2008 |
| Lilly Ledbetter Fair Pay Restoration Act (42 U.S.C. § 2000a) | Obama January 20, 2009- | January 29, 2009 |

Besides the Taft-Hartley Act, which is generally considered as a curb to the rights of workers to organize, these legislative enactments generally expanded worker rights.¹⁴ Even the Taft-Hartley Act, however, came near the end of Truman's first term, at a time when enmity between the President and Congress was at its height.¹⁵ Clearly, the makeup of Congress is an essential variable in predicting

14. See, e.g., JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); ELLEN DANNIN, TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS (2006); Karl E. Klare: *Critical Theory and Labor Relations*, in THE POLITICS OF LAW 539 (David Kairys, ed., 3d ed. 1998).

15. DAVID MCCULLOUGH, TRUMAN 692-94 (1993).

the likelihood of new legislation. The U.S. Senate is currently controlled by 51 Democrats and two independents (well short of the 60 needed to avoid the filibuster), and the Republicans hold a 42-seat majority in the House.¹⁶ Most indications are that control of the Senate by the Democrats will be very close in the 2012 elections and might flip toward control by the Republicans.¹⁷ The foregoing table suggests that even if President Obama is elected to a second term, he will continue to have difficulty pushing workplace law initiatives through Congress. As the chart above shows, President Obama is on par with the average number of workplace law reforms per term – one or two.

III. LOST POSSIBILITIES: PAYCHECK FAIRNESS, LGBT PROTECTION AND EMPLOYEE FREE CHOICE

Since his inauguration in January 2009 until the summer of 2012, President Obama had some significant and hard fought legislative achievements. The Patient Protection and Affordable Care Act, signed into law on March 23, 2010, aimed to fundamentally reshape healthcare in America. Indeed, the law led to a counter movement to attempt to repeal it, including an unsuccessful constitutional challenge.¹⁸ The health care law was one of several legislative achievements that utilized the capital that President Obama had after his historic election. Although, the 2008 election produced a Senate and House of Representatives controlled by The President's party, the Republican takeover of the House in the 2010 election stopped many Obama Administration initiatives cold.

During the 2008 campaign, President Obama made several appearances with Ms. Lilly Ledbetter, the plaintiff in the 2007 United States Supreme Court decision in *Ledbetter v. Goodyear Tire*. There, the Court held that Ledbetter's claim was time-barred because she did not file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of the start of the alleged pay discrimination, even though she only found about the discrimination

16. For party affiliation of House and Senate Members, see *Guide to House and Senate Members*, <<http://memberguide.gpo.gov/?AspxAutoDetectCookieSupport=1>> (last visited June 28, 2012).

17. Nate Silver, *Democrats Chances of Retaining Senate Improve*, FIVETHIRTYEIGHT (May 16, 2012, 4:36 PM), <<http://fivethirtyeight.blogs.nytimes.com/2012/05/16/democrats-odds-of-retaining-senate-improve>>.

18. Nat'l Fed'n of Independent Businesses v. Sebelius, Nos. 11-393, 11-398, 11-400, 2012 WL 2427810 (U.S. June 28, 2012).

when a list of salaries was placed anonymously in her mailbox. Ledbetter became a featured presence on the 2008 campaign trail for then-Senator Obama. She was also by his side as he signed the Lilly Ledbetter Fair Pay Restoration Act.¹⁹ Although the Act dealt only with pay discrimination under Title VII, there is some chance that it might have implications for other claims.²⁰

After the passage of the Ledbetter Act, advocates hoped that passage of the Paycheck Fairness Act (PFA) might further address gender based wage disparities.²¹ The PFA would ban employer retaliation against employees who share salary information and require employers to prove that pay disparities are job-related and consistent with business necessity.²² Proponents in the Senate were unable to muster the sixty votes needed to break a filibuster and move the legislation forward.²³ In a statement, the President expressed disappointment and promised, “My Administration will continue to fight for a woman’s right to equal pay for equal work.”²⁴

At the same time that there has been much activity around the issue of gay marriage and recognition of gay marriages in various courts and state legislatures, a federal prohibition against employment discrimination on the basis of sexual orientation has languished in Congress.²⁵ Besides the expected pushback that comes from an expansion of employment protection and the perceived new burden on employers, the Employment Non-Discrimination Act (ENDA) has also been hamstrung by the question of whether the law will cover transgender workers, among other issues. While the Senate has held hearings on ENDA, it is unlikely to proceed in the House.²⁶

With the large amount of financial and voter mobilization provided by organized labor to the President’s election campaign, there were great hopes that the unions’ top legislative priority – the Employee Free Choice Act (EFCA) – would be passed soon after

19. See Remarks of President Barack Obama, *supra* note 4.

20. See Charles A. Sullivan, *Raising the Dead? The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499 (2010).

21. Derrick Cain, *Many Pro-Employee Bills Expected to Stall in the Face of Republican Opposition*, Daily Lab. Rep. (BNA) No. 85, at CC-1 (May 3, 2011).

22. HR 1519, 112th Cong. (2011).

23. Derrick Cain, *Many Pro-Employee Bills Expected to Stall in the Face of Republican Opposition*, Daily Lab. Rep. (BNA) No. 85, at CC-1 (May 3, 2011).

24. Statement of the President on the Paycheck Fairness Act (June 5, 2012), <<http://www.whitehouse.gov/the-press-office/2012/06/05/statement-president-paycheck-fairness-act>>.

25. *Senate HELP Committee to Hold Hearing on ENDA, Sexual Orientation Discrimination*, Daily Lab. Rep. (BNA) No. 92, at A-2 (May 11, 2012).

26. *Id.*

Inauguration Day.²⁷ EFCA would require an employer to bargain with a union upon a showing of majority interest without the need for a secret ballot election, which the employer currently has a right to demand. EFCA would also mandate arbitration for a first contract and stronger penalties for unfair labor practices. Although it was hard to get some Senate Democrats on board for EFCA in the first two years of the Obama Administration, the legislation had no chance of passage after the 2010 Republican takeover of the Congress.²⁸

IV. THIS SYMPOSIUM: GUIDEPOSTS FOR MOVING FORWARD IN THE WORKPLACE

The three initiatives discussed above (the PFA, ENDA and EFCA) are just a sample of possible legislation in the workplace law area. This issue examines several more areas of workplace law, how the Obama Administration handled its workplace law agenda, and what the Administration's future actions might look like. In this special issue of the EREPJ, noted scholars of workplace law assess what has occurred in the last four years and what is possible in the next four years in different areas of workplace law, regardless of the outcome of the election.

In the first article, Professor Michael Harper looks at the state of age discrimination protections.²⁹ Although the statute has not been significantly amended since its original enactment in 1967, the courts have been active in restricting the scope of protection for older workers. As Harper points out, these issues will continue to be important in the future workforce. Harper also examines the role of the EEOC in the absence of statutory change.

Professor Richard Moberly examines the protection given to whistleblowers in the Obama administration, which many hoped would be a change from the George W. Bush administration.³⁰ Institutional pressures, however, often take priority over full protection of whistleblowers. Congress as well, has failed to enact comprehensive whistleblower protection, which is what one might expect when whistleblowing might implicate members of Congress.

27. See Michelle Amber, *Harkin to Introduce Bill to Help Middle Class Including One Provision from Failed EFCA Bill*, Daily Lab. Rep. (BNA) No. 21, at A-14 (Feb. 1, 2012).

28. *Id.*

29. Michael C. Harper, *A Gap in the Agenda: Enhancing the Regulation of Age Discrimination in Employment*, 16 EMP. RTS. & EMP. POL'Y J. 13 (2012).

30. Richard Moberly, *Whistleblowers and the Obama Presidency*, 16 EMP. RTS. & EMP. POL'Y J. 51 (2012).

Professor Moberly's call for improved protection of whistleblowers is needed for a fully open and transparent government.

In the absence of labor law reform in Congress, the role of the National Labor Relations Board becomes all the more important. In the last four years with the *Boeing* case and the inability to get Board members confirmed, the Board has been a political football whose vitality has sometimes been questioned. Professor Michael Duff analyzes a new twist on an old statute – the doctrine of preemptive retaliation for concerted activity.³¹ The Board's recent decision in the *Parexel* case³² represents a possibility for greater protection of the nonunion private sector, which is all the more important as union membership continues to stagnate. The continued vitality of the preemptive retaliation doctrine under the National Labor Relations Act depends on future appointments to the Board, but the theory should be utilized by worker advocates in future cases.

Professor E. Gary Spitko reminds us of the harms caused by the "Don't Ask Don't Tell" policy in the military and the ongoing harms that are unaddressed by the lack of comprehensive protection for gays and lesbians.³³ Professor Spitko's insights on LGBT issues can be related to a number of important areas in workplace law, such as the ENDA, that will be confronted in the next four years. Indeed, President Obama's signing of the repeal of the "Don't Ask, Don't Tell" policy in the military is one of the most significant actions in the public sector in his first term as Commander-in-Chief of the armed forces.

Finally, Professor Rona Kitchen takes a look at the family responsibilities agenda of the Obama Administration.³⁴ Professor Kitchen questions whether the hoped-for progress has been achieved, but recognizes that, at least, the intention of the President is to provide working parents greater flexibility in their meeting their family responsibilities. After all, the President and the First Lady are balancing their very demanding jobs with raising two young daughters.

31. Michael C. Duff, *New Nip in the Bud: Does the Obama Board's Preemptive Strike Doctrine Enhance Tactical Employment Strategies*, 16 EMP. RTS. & EMP. POL'Y J. 143 (2012).

32. *Parexel Int'l LLC*, 356 NLRB No. 82 (2011).

33. E. Gary Spitko, "*Don't Ask, Don't Tell*": *Employment Discrimination as a Means for Social Cleansing*, 16 EMP. RTS. & EMP. POL'Y J. 179 (2012).

34. Rona K. Kitchen, *Off-Balance: Obama and the Work-Family Agenda*, 16 EMP. RTS. & EMP. POL'Y J. 211 (2012).

V. CONCLUSION

The Articles in this Symposium cover several important aspects of workplace law and regulation in the Obama era. There are a number of other developments that have been covered elsewhere.³⁵ Further, there have been dramatic changes in the public sector labor law in Wisconsin, Ohio, and various other states since 2010, which the President has very little control over, except to critique them from his bully pulpit. In workplace law generally, there are certainly possibilities for change at the state and local level. Further, the President can exert moral leadership on multiple issues. If he is reelected, President Obama will again have the opportunity to continue to push for better worker protections, even though history suggests he is unlikely to significantly remake the law of the workplace in that time. The Articles in this Symposium provide a way forward in the next four years for all those who care about improved legal protection of workers.

35. Symposium, *Labor and Employment Under the Obama Administration: A Time for Hope and Change?* 87 *IND. L.J.* 1 (2012).