California LAWYER

ROUNDTABLE

Employment Law

EXECUTIVE SUMMARY

This month, with the inauguration of Barack Obama as the country's 44th president, comes the promise of closely watched changes to U.S. employment law and policy. Most notably, the Employee Free Choice Act (EFCA), which President-elect Obama has pledged to sign if given the opportunity, would dramatically modify the National Labor Relations Act in ways likely to increase union membership and impact the collective bargaining process. Additionally, pending legislation such as the Lilly Ledbetter Fair Pay Act and the Working Family's Flexibility Act will introduce new challenges and opportunities for employers and legal practitioners.

Our panel of experts from Northern California discuss the potential effects of this legislation, as well as recent, influential cases and decisions, such as *Brinker Restaurant Corp. vs. Supreme Court of San Diego, Harris vs. Superior Court,* and *Nadaf-Rahrov vs. Neiman Marcus*. They are Mike D. Moye and Diane Marie O'Malley of Hanson Bridgett LLP; JoAnna L. Brooks and Bradley Kampas of Jackson Lewis; and Tom McInerney of Ogletree, Deakins, Nash, Smoak & Stewart. The roundtable was moderated by freelance writer Bernice Yeung and reported for Barkley Court Reporters by Krishanna DeRita.

MODERATOR: Given the likely passage of some form of the Employee Free Choice Act (EFCA), what are its potential effects on your clients?

KAMPAS: Let's put EFCA in context. Unions currently win about 55 percent of secret ballot representation elections conducted by the Labor Board. Labor unionism in the U.S. is at an all-time low, at about 7.5 percent of the private sector labor force, down from a high of about 33 percent during the 1950's. So think of EFCA as an economic bail out for unions—that's why unions spent hundreds of millions of dollars in the November 2008 elections in support of pro-union candidates.

But what is EFCA? It's a dramatic modification of the National Labor Relations Act (NLRA) regarding how employees choose whether to be represented by a union and how first collective bargaining agreements are negotiated. Currently, unions typically use authorization cards signed by a majority of employees to show that there's interest in obtaining a government-conducted, secret ballot election. Prior to the election, employers and unions provide employees with information to help them make an informed choice. But EFCA does away with the elections; the Labor Board could automatically certify unions that obtain cards from a majority of employees in an appropriate unit.

EFCA would also alter the negotiation process. Currently, neither party can be legally compelled to agree to the other's demands, as long as they bargain in good faith. Under EFCA, the first contract would be negotiated for only up to 90 days. If an agreement isn't reached, the union could demand binding interest arbitration, where a third-party arbitrator determines the terms and conditions of an initial, two-year contract. EFCA would also dramatically change the law from a remedial statute to one with penalties, including treble back pay damages for discrimination claims based on union activity, among others.

Employers would ultimately lose the opportunity to communicate with employees about why a union is not in everyone's best interest. They'd also lose leverage in negotiations, and they'd be subject to arbitrator-imposed changes to wages, benefits, and the terms and conditions of employment.

McINERNEY: What may be the truly revolutionary impact of EFCA is what it does with respect to first contract-interest arbitration. Currently, it's an equal playing field. EFCA would create a shift where, because you have a union representing your employees, there will potentially be a contract imposed on you by a third party from Washington.

O'MALLEY: And what can you accomplish in those first 90 days of negotiations? Unfortunately, EFCA supporters have probably never been at the bargaining table and they don't realize that in 90 days, you probably have two meetings set up, at best. To have to go to a mediator within 30 days—that's equally premature. Then, when you get to the arbitration scenario, the panel has to act quickly but they won't have any regulations in place.

KAMPAS: Under EFCA, most contracts will likely be completed with the arbitration process. To get employees to sign cards, unions typically make promises about what they'll obtain through collective bargaining. The problem with a 90-day bargaining period is employee expectations will be high and the unions will keep even unrealistic demands on the table. So the union will want to

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let an arbitrator tell employees what is and isn't reasonable instead of doing it themselves.

MOYE: The negotiating process takes time, and it's a process that's aided by the secret ballot election. The campaign that traditionally takes place after the petition is filed is an opportunity for the employer to state its position with regard to issues that will arise in bargaining. Through the campaign, an education process occurs between employers and employees. All of that would be lost under EFCA.

KAMPAS: I think we'll see a dramatic change in industries traditionally low in unionization because employees won't get well-rounded information unless their employer is constantly campaigning, which is a strategy we recommend to our clients—develop a communication program in advance of union activity so employees can make an informed decision if card signing begins.

MOYE: That's an important point. In order to deal with EFCA, employers will need to engage in constant, ongoing communication with their employees—if they aren't already—that tells them, "I'm here to solve problems and to work with you to create the right working environment."

O'MALLEY: That's where our employment practices come in—it goes hand in hand with what employers are trying to do in order to prevent discrimination claims. Human resources (HR) should be doing the same thing with managers to make sure that employees don't have grievances, and if they do, that they don't think the only way to resolve them is by going to a union rep.

BROOKS: We recommend that clients look at how internal complaints are being handled, as well as suggesting wage-and-hour audits to address and correct any compliance issues, thereby reducing the potential grievances that might make a union attractive.

KAMPAS: We also use the acronym "EFCA" as a recommended approach for employers: evaluate, formulate, communicate, and assess. That is, employers should *evaluate* their overall preventative labor relations approach and the effectiveness of their existing positive employee relations programs. They should also *formulate* when, how, and what they are going to *communicate* to employees, and then communicate their union philosophy so employees know what the company's position is before they're asked to sign a card. Lastly, they should *assess* potential warning signs of organizing among their work force, as well as relevant wage, benefit, and work practice information so that they are aware of what they may face during collective bargaining and interest arbitration.

MOYE: I ask my non-union clients to look at a union contract so they know the types of things that ultimately end up being negotiated. This is part of the evaluation process that Brad [Kampas] mentioned—determining what the employer might do to address some of these issues before they become a problem. Most unions arise in the absence of policies such as grievance procedures or participatory decision-making; an employer can make a choice as to whether or not they want to take some preventive measures to institute such policies to keep grievances from becoming larger issues.

O'MALLEY: That's a point that can't be emphasized enough. Often, when you ask employers, "Do you know what could have fostered this?" nine times out of ten, the employer does have an idea. It might not have been pushed under the rug per se, but it might not have been dealt with completely or seriously. It sometimes stems from some little things that employers didn't pay enough attention to it, and lo and behold, the next thing you see are these union cards.

McINERNEY: Managers and HR officers can become intimidated by issues of unionization, and they often have little experience with it. It appears that unions are coming to a lot of services industries, as well as those where employees may have thought of themselves as white collar, so it's important that our clients become educated on these issues, and bring in outside counsel with expertise in this field to deal with it proactively.

MODERATOR: What else might we expect from the Obama presidency in terms of employment/labor law and policy?

McINERNEY: One piece of legislation that will undoubtedly pass is the Lilly Ledbetter Fair Pay Act, which arose out of the U.S. Supreme Court's *Ledbetter vs. Goodyear Tire & Rubber Co.* decision dealing with an equal pay claim that narrowed the filing deadline and found that you can't bring a

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claim that occurred decades back. But the Ledbetter Fair Pay Act, which was endorsed by President-elect Barack Obama, would amend the filing deadline to allow a continuing violation claim to go back potentially decades when it comes to pay violations. It presents enormous challenges for employers who may not maintain HR records going back that far.

BROOKS: There's similar legislation pending with a slightly different standard. The Fair Pay Act of 2008 would amend several federal laws to declare that an unlawful employment practice occurs when the aggrieved person knew or should have known of the discriminatory compensation decision or practice. It's a more reasonable standard than the Lilly Ledbetter Fair Pay Act.

Another piece of legislation that's likely to pass in some form is the Working Family's Flexibility Act, which creates an extraordinary new set of requirements for employers who receive requests from employees regarding part-time, flextime and telecommuting. It's similar to legislation introduced in other countries that has been quite successful. However, with the Working Family's Flexibility Act, we're looking at a long list of detailed requirements and it's unclear if employers will be able to meet these demands.

McINERNEY: It's politically popular to provide flexibility to working parents, but this legislation is going to impose, at least in its current form, rigid requirements that would present challenges for employers. Most clients want to do the right thing, but the current legislation imposes technical requirements that even well meaning employers will have difficulty complying with. I hope that the ultimate legislation provides more flexibility because it will be in everybody's interest to do so.

MOYE: The other potential concern arising from this legislation is consistency. Regulations regarding leave already exist under Family and Medical Leave Act, so would this legislation create a new standard by which you grant leaves or adjust work hours? This legislation would also provide the statutory framework for "family responsibilities" discrimination—currently a melding of sexual orientation discrimination, gender discrimination, and other types of claims regarding unfair treatment.

O'MALLEY: The problem is that, under EFCA, if there's a dispute, there's a possibility that the employer is no longer deciding those issues—it's going to go to an Administrative Law Judge who will be deciding labor contracts.

KAMPAS: On the labor front, the RESPECT Act would change the definition of a "supervisor" under the NLRA such that some frontline supervisors would now be considered "employees" who would find themselves in the same bargaining units with the people they manage, and having to take a position adverse to the employer. There's also the Patriot Act, which includes requirements that employers must be neutral during union organizing.

There are also three vacant seats on the National Labor Board, and Obama will likely fill a majority of the Labor Board with pro-union individuals. So we'll see some changes in existing case law that will not be in the favor of employers.

MODERATOR: What other decisions or cases are you following closely?

BROOKS: From the standpoint of my practice, *Brinker Restaurant Corp. vs. Supreme Court of San Diego* has been the case to watch. In that case, the Fourth Appellate District ruled that in California, the employer only needs to provide the required meal periods, not ensure that they're taken. The decision resulted in a reversal of class certification because the court determined that meal period compliance requires an individualized analysis of whether the employee voluntarily skipped or chose to take partial meal breaks. The Court of Appeal also held that the off-the-clock work claims asserted required an individualized analysis.

The California Supreme Court granted review in *Brinker*, so it's still too early to do back flips, but in the interim, the Division of Labor Standards Enforcement has adopted the *Brinker* standard. The outcome of this case has huge impact on employers in California; it creates a more flexible standard for meal break compliance. Also, in a subsequent case, *Brinkley vs. Public Storage Inc.*, the Second Appellate District adopted the same holding as *Brinker*. I think we are seeing the courts attempting to stem the tide of class action litigation.

O'MALLEY: What the *Brinker* decision tells us, even as we wait for the Supreme Court decision, is that employers need to make sure that they have meal and break policies in place, and that supervisors are monitoring these breaks to assure that employees can't argue they're unable to take

them. That's where employers should be focusing their attention now.

McINERNEY: What's also going to be important going forward is what may be required of employers in terms of making an affirmative effort to make sure that the breaks were made available. Some difficult issues will arise where an employee says they couldn't take a break because they were loaded down with too much work. Supervisors will need to be educated about making sure that employees take their breaks because employers are still probably going to be held to a standard that goes beyond simply notifying employees that they have a right to take a break.

MOYE: It will also be important for the court to articulate, with the *Brinker* and the *Brinkley* decisions, a standard that is sufficiently helpful to avoid class certification because, even under *Brinker* and *Brinkley*, sufficient room for an allegation of a practice amounts to a policy that would permit class certification. In talking to some plaintiffs' lawyers, there are a number of them who don't view *Brinker* as the end of the road as much as introducing a twist or turn.

BROOKS: Class action settlements before California trial courts are also receiving a much greater level of scrutiny, which makes it increasingly difficult to resolve these cases early. In *Kullar vs. Foot Locker,* which is a blow to employers trying to quickly resolve disputes through early mediation, the San Francisco Superior Court issued approval of a class action settlement following the parties' exchange of information and arm's length negotiations at mediation. An individual who filed a separate class action objected to the settlement because of the absence of adequate information to assess the reasonableness of the settlement. On appeal from final approval of the settlement, the Court of Appeal (First Appellate District) ultimately found in favor of the objector, holding that the trial court abused its discretion by approving the settlement because it didn't have enough information to assess whether the settlement was fair, adequate, or reasonable. The Court of Appeal also provided a laundry list of items that the trial court judge must evaluate to determine the reasonableness of a class action settlement.

McINERNEY: Another case to keep an eye on is the *Harris vs. Superior Court* case pending in the California Supreme Court. *Harris* deals with the administrative/production worker dichotomy. The Court of Appeal (Second Appellate District) basically created such a high standard in *Harris* that it would be very difficult for any employee to be deemed an administrative employee. Thankfully, the supreme court granted review of it, and the hope is that the supreme court will limit the Court of Appeal decision. As it stands, the decision is not very helpful in the context of class certification; it would make it virtually impossible, except for the most senior employees at a company, to be deemed administratively exempt from overtime.

O'MALLEY: *Nadaf-Rahrov v. Neiman Marcus* is an unfortunate case from the Court of Appeal (First Appellate District). The plaintiff, a fitter for Neiman Marcus, went on a medical leave in November 2003. At the time of her July 2004 termination, her doctor had placed her on leave through August 2004 to return to work, but not in her former position. Neiman terminated her because it believed they had no positions in which she could work. She sued the company for, among other claims, disability discrimination based on a failure to accommodate and to engage in the interactive process. What's unfortunate about that case is that it shouldn't have happened the way it did. There seemed to be a lot of miscommunication between the employer, the employee, and the doctor.

The recent Court of Appeal decision is certainly not a helpful case for the defense, but it's not surprising. What's troubling to me about this decision is that the court essentially said that when an employer is considering whether or not to terminate someone in this situation, they have to consider whether the company might have an appropriate job opening in a few months such that the employer would have to keep the employee on leave until that potential job possibly opens up.

MOYE: The other thing that's disturbing is the extent to which this opinion muddies the water over what constitutes a leave of indefinite duration—the court basically said that the fact of repeated extensions of leave doesn't in and of itself create an indefinite leave of absence. You'd think that an employer should be able to create a record that could demonstrate that the only reasonable conclusion is that this person is going to be out on leave forever, and yet the *Nadaf-Rahrov* opinion says no, you can't draw that conclusion because you might also have a job opening at some point in the future.

But all of this goes back to the point Diane [O'Malley] raised about employers having to be thoughtful about communicating with their employees. I call it the volleyball theory of management: Keep the ball in their court. If an employee gives you some information, follow up until you exhaust their requests. All too often, employers don't ask their employees what they want for fear that they'll tell us, but quite frankly, it's better to find out the laundry list of complaints at that point. ■

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