
CONGRESSIONAL STALEMATE DRIVES ACTIVISM AT THE AGENCIES

Employment regulators fill the legislative void

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Since last November's elections, it seems Congress has not done much except a lot of squabbling. Whatever your politics, this is frustrating, not least because it leaves a gap that government regulators are only too happy to fill.

On the employment front, the main government agencies are: the National Labor Relations Board (NLRB), the Department of Labor (DOL), Labor's Office of Contract Compliance Programs (OFCCP), and the Equal Employment Opportunity Commission (EEOC).

And they've all been busy.

This blog posting will outline some of the new developments. For a deeper look at what these developments mean for banks, I recommend you sign up for the Nov. 8 ABA telephone briefing "Activist Agencies: What are your new employment risks?" on Nov. 8. [Click here for a brochure.](#)

The new NLRB

Unions and banks? Unthinkable!

Maybe not.

True, the Employee Free Choice Act, introduced at the beginning of the Obama administration with the aim of aiding union organizing, is dead in the water. However, the NLRB has proposed changes to union election procedures which it claims would redress an imbalance in labor-management relations. These changes would require employers to provide unions with much more accessibility to and information about the workforce, as well as technical changes that greatly increase the burden on an employer who wants to remain union-free.

The new NLRB rule that most directly affects banks is the requirement that all employers (not just unionized workplaces) post a notice informing employees of their rights under the National Labor Relations Act.

This requirement takes effect on Jan. 31, 2012. (You can download the poster [here](#); you can read the final rule [here](#)) This is the same poster that was required to be displayed by federal contractors starting last November, so some banks subject to affirmative action plan requirements may already be in compliance.

DOL's "Hours App": Compensation arrangements under scrutiny

One of the most perplexing challenges for banks is the Fair Labor Standards Act's exempt/non-exempt classification. In earlier blogs I've tried to explain how new technology complicates non-exempt timekeeping.

Now the Labor Department is co-opting that new technology on behalf of employees who suspect they are not being appropriately paid for their time. In May, the DOL announced an app for smartphones, a timesheet to help employees independently track the hours they work and determine the wages they are owed. Users can track regular work hours, break time, and any overtime hours for one or more employers. It is available in English and Spanish.

In another blog, I warned about the perils of misclassifying employees as contractors. On Sept. 19, DOL announced a new partnership with another government agency, the Internal Revenue Service (IRS), aimed at ending the business practice of misclassifying employees as independent contractors or subcontractors in order to reduce labor costs.

Perhaps most troubling is the Labor Department's announcement that it intends to change the compensation recordkeeping rules to require employers to disclose to workers whether they are classified as an employee or an independent contractor.

If they are classified as an employee, the employer would have to also disclose how their pay is computed. The proposal likely means employers must notify employees whether they are considered exempt from the minimum wage and overtime provisions of the FLSA, and if so, the basis for their exemption.

Of course, this will significantly increase the recordkeeping burden. But this development would doubtless spur lawsuits from employees who feel they have been wrongly classified.

No more Mr. Nice Guy at the OFCCP

Banks with more than 50 employees who are subject to Executive Order 11246 are aware that maintaining an affirmative action plan is just the start of federal contractor obligations. During the Bush years, OFCCP, the agency enforcing these obligations, wasn't too hard to deal with. But times they are a-changing, as recounted in my earlier blog.

Here's where things now stand. The OFCCP will no longer employ "desk audits" (review of submitted documents). Now, contractors, including banks, can expect OFCCP investigators to pursue an onsite investigation including employee interviews, focusing intense scrutiny on all aspects of affirmative action and equal employment opportunity compliance.

In addition, the OFCCP has rescinded its guidelines for contractors to conduct voluntary self-evaluations of pay practices, including standards for determining whether systemic compensation discrimination was present. Instead, the agency is establishing new procedures for investigating compensation discrimination through "traditional means."

In other words, banks will no longer be able to self-police pay disparities between white males, and women and minorities doing the same job. The OFCCP will collect compensation data and draw its own conclusions.

What to do now

These are just some of the changes that have been proposed or are already in effect.

Others include the EEOC's final rules on the Americans with Disabilities Amendments Act and the Genetic Information Nondiscrimination Act. Agency rule changes like these are not subject to legislative approval, or Presidential veto. They go into effect after a public comments period, whether you like them or not.

The best thing is to keep yourself informed (like by participating in the ABA Briefing on November 8, and of course continuing to read this blog) and submitting comments to the agency expressing your views.

About the author

Marian Exall (marian.exall@gmail.com) is an employment lawyer and HR professional with 25 years' experience advising banks and other employers on compliance issues. She is a principal and co-founder of Employment Law Compliance, Inc. which provides HR compliance solutions to banks exclusively through the American Bankers' Association. She is a frequent speaker and writer on human resources compliance in the banking industry, including in ABA Banking Journal, on ABA Telephone Briefings and at national and state bankers' association conferences.

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