Capitol Hills' Updates

What's Pending on the Employment Law Front in D.C. and Lansing?

By Robert A. Boonin
Butzel Long
(734) 213-3601
boonin@butzel.com

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This outline highlights some of the key proposed changes pending before Congress and various regulatory agencies, as well as the Michigan Legislature, on issues relevant to human resources professionals and employment law counsel. Some of these initiatives may become law, but many will not. Nonetheless, it is instructive, if not informative, to keep track of the types of issues the government and its policymakers are considering on the employment law front.[1]

I. *From Washington, D.C. . . .*

The 112th Congress did not focus much of its attention on labor and employment law matters, though many bills were introduced. The 113th Congress has only recently convened, and as of the date of this outline, only a few employment-related bills have been introduced. Those bills are summarized below, but if historical patterns continue, many bills from the prior session will be re-introduced. In anticipation of this occurring, some of the major or otherwise perennially introduced bills from the past are also discussed. Perhaps more significantly, there are some proposed changes in regulations and even new administrative law doctrines on the forefront of which employers should be aware.

Proposed EEO-Related Regulations and Legislation

ADEA Disparate Impact Regulations

Following the Supreme Court's decisions in *Smith v. City of Jackson*, 544 U.S. 228 (2005), and *Meacham v. Knolls Atomic Laboratory*, 128 S. Ct. 2395 (2008), which recognized a disparate impact claim under ADEA and that the employer bore the burden of proving the "reasonable factor other than age" (RFOA) defense (and that that the defense was not "business necessity"), the EEOC is about to publish more regulations to elaborate upon the RFOA defense. It is expected that under the regulation, employers will have to take age into account while relying on the defense by conducting disparate impact review and assessing age impact of alternative employment practices. The proposed regulation also requires that employers prove that their entire course of conduct was reasonable, not just their use of the questionable factor. On January 4, 2011, the final regulations were sent to the OMB for interagency review, but got delayed. Final action, according to the EEOC, was anticipated for March 2013, but that goal was not achieved. The regulations are still considered to be imminent.

OFCCP Affirmative Action in Construction

The OFCCP plans to publish a proposed rule in 2013 to change the way affirmative action plans of federal construction contractors are to be designed.

[1] OSHA, OFCCP, benefits, immigration, workers' compensation, unemployment and tenure related developments are beyond the scope of this outline. This outline is current through April 17, 2013.

OFCCP Sex Discrimination Guidelines

The OFCCP expects to be publishing a Notice of Proposed Rulemaking to update the guidelines on sex discrimination, which have not been updated for thirty years. The general goal is to update the guidelines to better reflect the applicable statutes, as amended, as well as judicial developments.

OFCCP Vietnam-Era Veterans' Readjustment Act Rules

The OFCCP is expected to announce final rules revising existing regulations under VEVRAA enhancing federal contractors' affirmative action requirements regarding veterans. Under the new rules, contractors will have to conduct more substantive analyses of their recruitment and placement efforts and establish benchmarks to measure the effectiveness of their efforts (as opposed to just showing "good faith"). The target date for releasing the new rule is April 2013.

OFCCP Rules Under Section 503

Also in April 2013, the OFCCP is planning to roll-out new rules revising contractors' obligations under Section 503 of the Rehabilitation Act. The new rule is expected to increase contractors' data collection obligations, revise recordkeeping requirements, and for the first time, establish utilization goals for contractors employing disabled workers.

Equal Pay/Comparable Worth Bills

The "**Fair Pay Act of 2013**" (S 168; HR 438) would amend the Equal Pay Act to require equal pay for equivalent jobs without regard to sex, race or national origin, but allows payment of different wages under seniority systems, merit systems, systems that measure earnings by quantity or quality of production, or differentials based on bona fide factors that the employer demonstrates are job-related or further legitimate business interests. If so, though, the employer would have to prove that the factor is job-related with respect to the position in question, or furthers a legitimate business purpose, except that this defense will not apply if the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing the pay differential and that the employer has refused to adopt such alternative practice, and the employer actually applied and used the factor reasonably in light of the asserted justification.

The "**Paycheck Fairness Act**" (HR 377 with 199 cosponsors, S 84 with 46 cosponsors) would: significantly limit defenses to Equal Pay Act claims; permit unlimited punitive for intentional violations of the law; and would make it easier to bring class action suits by using an opt-out method. The bill provides that employers asserting that a pay differential between male and female employees is "based on bona fide factors other than sex" must prove are not based upon or derived from a sex-based differential in compensation, are job-related with respect to the position in question, and are consistent with business necessity. These defenses would be inapplicable where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential, and that the employer has refused to adopt such alternative practice. A motion to discharge from the House

committee is failed, and so this bill is considered stalled, if not dead, for the balance of the legislative session.

Credit History Protection Bills

The "**Equal Employment for All Act**" (HR 645) would prohibit a current or prospective employer from using a consumer report or an investigative consumer report, or from causing one to be procured, for either employment purposes or for making an adverse action, if the report contains information that bears upon the consumer's creditworthiness, credit standing, or credit capacity. Exception applies with respect to positions requiring a national security or Federal Deposit Insurance Corporation clearance, with a state or local government agency which otherwise requires use of a consumer report, or for supervisory, managerial, professional or executive positions at financial institutions.

EEO Related Bills from the 112th Congress Which May Resurface

- The "**Fair Employment Act of 2011**" (HR 1113) would amend Title VII of the Civil Rights Act of 1964 to add **unemployment status** to the categories of prohibited discrimination. The bill defines "unemployment status" as being unemployed, having actively looked for employment during the then most recent four-week period, and currently being available for employment.

- The "**Fair Employment Opportunity Act of 2011**" (HR 2501, S 1471) would make it an unlawful practice for certain employers with at least 15 employees to refuse to consider or offer employment to an individual based on present or past **unemployment**, regardless of the length of time the person was unemployed. The FLSA's limitation periods would apply to claims brought under the act.

- The "**Employment Non-Discrimination Act**" ("ENDA" – HR 1397 and S 811) would prohibit employment discrimination on the basis of actual or perceived **sexual orientation** or gender identity by employers, employment agencies, labor organizations, or joint labor-management committees, other than with respect to religious organizations or the military. The bill would also prohibit preferential treatment or quotas and would only permit disparate treatment claims.

- The "**Breastfeeding Promotion Act**" (S 1463, HR 2758) would amend Title VII of the Civil Rights Act of 1964 to include **"lactation"** as a condition protected from discrimination in employment.

- The "**Civil Rights Tax Relief Act of 2011**" (HR 3195, S 1782) would eliminate the **taxation of noneconomic damages** and permit income averaging for lump sum back pay awards for violations of non-discrimination or other employment rights.

- The "**Protecting Older Workers Against Discrimination Act**" (S 2189) would amend the ADEA to lower the burden of proof needed to support an age discrimination claim to that associated with other claims of discrimination, i.e., eliminate the "but for" standard

under the *Gross v. FBL Financial Services, Inc.* decision of the Supreme Court. All that would need to be proven is that age was a motivating factor in the employment action.

- The **"Give Workplace Gender Violence Victims Their Day in Court Act**" (HR 6198) would make employers liable for compensatory and punitive damages and other relief if their "negligent conduct results in a person's (including a person who acts under color of [state law]) committing a crime of violence motivated by gender against another person on premises under the control of the employer."

Proposed FMLA-Related Changes

Military Leaves

New regulations were published in January 2009 implementing amendments making certain leaves available to military personnel and their families. The DOL has indicated that it is reviewing these new military family leave amendments and other revisions made by the prior administration. It was anticipated that the proposed revisions will be announced in 2011, but to date, they've not been published.

The "**Military Family Leave Act of 2013**" (HR 1333 with 27 cosponsors) would allow an employed family member of a member of the Armed Forces who receives notification of a call or order to active duty in support of a contingency operation, or who is deployed in connection with a contingency operation, to two workweeks of leave per year for each family member who is so called or deployed. Such leaves could: (1) be taken intermittently or on a reduced leave schedule; and (2) consist of paid or unpaid leave, as the employer considers appropriate. The bill would allow an employer to require certification of entitlement to such leave within a leave request. Employees would also be entitled to employment and benefits protection upon their return from leave. Employers would also be prohibited from interfering with or otherwise denying the exercise of such leave rights

Paid Sick Leave Bill

The "**Healthy Families Act"** (HR 1286 with 101 cosponsors, and S 631 with 18 cosponsors) would require employers of 15 or more employees would have to allow employees to earn one hour of paid sick leave for every 30 hours of work, up to 56 hours. This leave time could be used for (1) the employees own medical needs of to care for the medical needs of certain family members, or (2) to seek medical attention, assist a related person, take legal action, or engage in other activities related to domestic violence, sexual assault or stalking.

Bereavement Leave Bill

The "**Parental Bereavement Act of 2013**" (S 226) would allow 12 weeks of FMLA leave to parents grieving the death of their child.

Leave Related Bills from the 112th Congress Which May Resurface

- The "**David Ray Ritcheson Hate Crime Prevention Act (David's Law)**" (HR 224) would provide various protections to **victims of hate crimes** including the right to take FMLA leave "because an employee is addressing a hate crime and its consequences... [and] is unable to perform the functions of the position of such employee." A hate crime is defined as "a criminal offense in which the prosecutor has determined that the defendant intentionally selected a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."

- The "**Family and Medical Leave Enhancement Act of 2011**" (HR 1440) would amend the FMLA to allow employees to take FMLA leave **to attend programs or activities in which their children are involved** at a school or community organization, and to also allow them to use FMLA leave for dealing with routine medical care and physician visits, as well as nursing home visits. No more than 4 hours of leave for these reasons could be used within a 30 day period, and no more than 24 hours of such leave could be used during a 12 month period. Also under the bill, paid leave may be substituted for such uses, at the employee's option.

- The "**Family and Medical Leave Inclusion Act**" (S 1283, HR 2364) would expand the FLMA's coverage to cover leaves for the **care of domestic partners**, children of domestic partners, grandparents, grandchildren, parents-in-law, and siblings.

- The "**Domestic Violence Leave Act**" (HR 3151) would allow FMLA leave for medical assistance, psychological counseling, attending court proceedings or safety planning exercises. Certifications for using this leave would be provided by courts, policy, clergy, or medical or counseling professional. The "**Security and Financial Empowerment Act**" would also allow the use of FMLA leave to allow domestic violence victims time to seek legal assistance and attend court with respect domestic violence matters. In addition, victims who lose their jobs due domestic violence would be entitled to receive unemployment compensation, and it would also prohibit employers and insurance providers from basing decisions on one's history of domestic violence.

Proposed FLSA-Related Rulemaking and Bills

The DOL's Plan /Prevent/Protect Initiative

In the Spring of 2010, the DOL announced a plan to establish a comprehensive set of regulations requiring employers to establish formal compliance plans with respect to the various laws administered by the Department, to document training with respect to those plans, and to document how they are complying with their legal obligations. Failure to have such a plan and properly administering it will be deemed to be a penalty. The DOL indicated that it intends to require employers to be more proactive in their compliance, in lieu of what it perceives to be a

"catch me if you can" mind-set. This initiative still underlies most of the DOL's rulemaking proposals.

Recordkeeping Regulations

The DOL has reiterated its intent to greatly alter the recordkeeping required under the FLSA. This initiative was initially announced as an "FLSA Recordkeeping" proposal, but it has since been relabeled "Right to Know Under the Fair Labor Standards Act." According the Department's December 2010 Regulatory Agenda, this proposal was to be published in April 2011, but now it is not anticipated until sometime in 2013. Under the proposal, employers are expected to be required to provide greater disclosure for each pay on how each employee's pay is computed (including deductions), and also to require that employers create, maintain and make available to the DOL a "classification analysis" for each person classified as an exempt employee under the FLSA or an independent contractor.

- With respect to misclassifying employees as contractors, the DOL's Office of the Assistant Secretary for Policy has commissioned a study to "assess the prevalence of employee misclassification through a nationally representative survey of workers. Misclassification gives employers a "profound advantage." Based on one estimate, the Secretary notes, which may be an "underestimate," "if only 1 percent of all employees were misclassified, the loss in … overall unemployment insurance revenue … would be nearly $200 million annually…. The GAO estimates that unpaid taxes total more $2.7 billion…. In FY 2009, WHD investigators found about $2.6 million dollars owed to about 2,000 employees resulting from their misclassification as independent contractors." The two year study is expected to be concluded in September 2013.

Break Time for Nursing Mothers Regulations

On December 21, 2010, the Wage and Hour Division of the U.S. Department of Labor published a request for information ("RFI") from the public regarding the recent amendment to the Fair Labor Standards Act which requires employers to "provide reasonable break time and a place for nursing mothers to express breast milk for one year after their child's birth." The new amendment and break time requirement for nursing mothers is set forth in Section 4207 of the Patient Protection and Affordable Care Act, P.L. 111-148, and became effective on March 23, 2010. The RFI is the first step in rulemaking, and employers can expect DOL to issue new regulations perhaps as early as later this year. The key issues to be addressed by regulation include: should nursing mothers receive compensation for break time of 20 minutes or less; what is considered a "reasonable break time"; what "space provided to the nursing mother for expressing breast milk" is adequate and meets the requirements of the statute; and what would be considered "reasonable notice" to the employer of an employee's intent to take breaks to express milk? Further action is anticipated, but when is uncertain.

Regulations on the Domestic Service Exemption

The DOL anticipates that it will be publishing a final rule in April 2013 regarding the domestic service (companionship) exemption under the FLSA. The new rule is intended to undo the

holding of the Supreme Court in *Long Island Health Care v. Coke* and apply the companionship and domestic caregiver exemptions to only those employed by the patient or the patient's family, and not to caregivers from third party agencies and thereby significantly narrow the types of services covered by the exemption. The rules will dramatically narrow the scope of this overtime pay exemption.

Special Exemption for Natural Disasters

HR 1001 would amend the FLSA to exempt from the FLSA's overtime/maximum hours requirement any employee who: (1) works as an insurance claims adjuster for at least $591 per week during the 24-month period after a major disaster; and (2) is employed as an adjuster by an employer not itself engaged, directly or through an affiliate, in underwriting, selling, or marketing property, casualty, or liability insurance policies or contracts resulting from or relating to such major disaster This provision would also preempt state laws to the contrary.

Compensatory Time

The **"Working Families Flexibility Act of 2013'** (HR 1406 with 150 cosponsors) would amend the Fair Labor Standards Act to authorize private employers to provide compensatory time off to private employees at a rate of 1.5 hours per hour of employment for which overtime compensation is required in accordance with an applicable collective bargaining agreement or, in the absence of such an agreement, an agreement between the employer and employee. Employees could accrue up to 160 hours of compensatory time and employers would have to provide monetary compensation, after the end of a calendar year, for any unused compensatory time off accrued during the preceding year. Employers may not intimidate, threaten or coerce employees in order to: (1) interfere with an employee's right to request or not to request compensatory time off in lieu of payment of monetary overtime compensation, or (2) require an employee to use such compensatory time. The bill was introduced on April 9, 2013, hearings were held on April 11, 2013, and reported out of Committee on April 17 by a 23-14 vote.

Minimum Wage Bills

The "**Original Living American Wage (LAW) Act**" (HR 229) would adjust the federal minimum wage every four years to be equal to "the minimum hourly wage sufficient for a person working for . . . 40 hours per week, 52 weeks per year, to earn an annual income in an amount that is 15 percent higher than the Federal poverty threshold for a family of 2, with one child under the age of 18, and living in the 48 contiguous States, as published for each such year by the Census Bureau."

The "**Working for Adequate Gains for Employment in Services Act**," or "WAGES Act" (HR 650), would amend the Fair Labor Standards Act to establish a base minimum wage for tipped employees of at least: (1) $3.75 an hour beginning 90 days after the Act's enactment; (2) $5.00 an hour one year thereafter; and (3) for every year thereafter, to be the greater of 70% of the minimum wage and $5.50 an hour.

The **"Fair Wages for Workers with Disabilities Act of 2013"** (HR 831) would direct the Secretary of Labor to discontinue issuing to any new profit or non-profit or governmental entity special wage certificates, which permit individuals with disabilities to be paid at lower than minimum wages, and requires that all existing certificates be phased out over three years.

The **"Fair Minimum Wage Act"** (S 460 and HR 1010) would amend the FLSA to increase the federal minimum wage to $8.20 in three months, to $9.15 one year later, to $10.10 two years later, and based on increases to the CPI each year thereafter. Also, the minimum wage for tipped employees would increase to $3.00 per hour, and thereafter 70% of the federal minimum wage.

The **"Catching-Up to 1968 Act of 2013"** (HR 1346) would increase the federal minimum wage to $10.50 per hour, and thereafter be indexed to the CPI. The minimum wage for tipped employees would also be pegged to be 70% of the federal minimum wage. The bill would also repeal the domestic service employment/companionship employee exemptions for overtime under the FLSA.

Prevailing Wages

The **"Responsibility in Federal Contracting Act"** would require prevailing wage determinations for federally funded construction projects to be determined by the Secretary of Labor (as under current law), but acting through the Bureau of Labor Statistics (BLS), using surveys carried out by BLS that use proper random statistical sampling techniques.

FLSA Related Bills from the 112th Congress Which May Resurface

- The "**Veterans Day Off Act**" (HR 319) would require employers of veterans who worked for the employer at least one year to take off Veterans Day. The veteran may take the day without pay, or use accrued paid time off for the absence. The employer may only deny the leave in the interest of public safety or if the leave would cause the employer significant or operational disruption.

- The "**Payroll Fraud Prevention Act**" (S 770) would expand current FLSA **recordkeeping requirements** to all workers, including non-employees. Also, employers that **misclassify employees** would be subject to a civil penalty, not to exceed $1,100 per employee who was the subject of such a violation, with higher penalties for repeat violators. The bill would also require employers to give the following notice to employees and nonemployees: "Your rights to wage, hour, and other labor protections depend upon your proper classification as an employee or non-employee. If you have any questions or concerns about how you have been classified or suspect that you may have been misclassified, contact the U.S. Department of Labor." In addition, the bill would require the Secretary of Labor to establish a single webpage on the Labor Department's website that "summarizes in plain language the rights of employees and non-employees under the Fair Labor Standards Act." The bill would also require states to investigate and audit employers who may be misclassifying employees, in order for those states to continue to receive federal unemployment insurance grants.

- The "**Employee Misclassification Prevention Act**" (HR 3178) would extend the recordkeeping requirements applicable to employees to all workers, including non-employees. Employers would have to record the status of each worker, and notify each employee of his or her status. Failure to comply with these requirements would result in increased penalties. Further, the bill would create a presumption of employee status, and that employers could only rebut that presumption by "clear and convincing evidence." In addition, states will be required to investigate and audit employee/contractor classification issues as a condition for federal money, and the DOL and the IRS will have to coordinate their efforts to make sure that employees are properly classified.

- The "**Electronic Paycard Protection Act**" (HR 2125) would amend the Fair Labor Standards Act to require an employer who pays or wishes to pay an employee by means of an electronic payroll card to provide certain disclosures to the employee at the time the employee is provided the option to enroll in the electronic payroll card program.

- The "**Companionship Exemption Protection Act**" (S 3280 and HR 3066) would amend the FLSA to include "companionship services" as being exempt from the Act's overtime pay requirements. Such services would include third party non-medical in-home care services such as: companionship; light housekeeping; meal preparation; errands; assistance to appointments; laundry; medication reminders; bathing and assistance with incontinence and grooming. *See also* the **"Ensuring Access to Affordable and Quality Companion Care Act"** (HR 5969).

- The "**Computer Professional Update Act**" (S 1747) would update the duties of an exempt computer employee to include a much broader group of employees whose work relates to computers.

Proposed NLRA Related Regulations and Bills

Regulations on Notice of Employee Rights under Labor Laws

On December 22, 2010, the NLRB published proposed regulations to require all covered employers to post a notice of employee rights under the NLRA. The regulations became final on August 30, 2011, and were to become effective on early 2012. Due to various pending legal challenges, the rule has been put on hold.

LMRDA's Persuader Reporting Regulations

The Department of Labor is primed to finalize rules changing to employer reporting obligations under the LMRDA which would narrow the "advice exception" and the exception for the conduct of the employer's employees, which would result in increasing the regulation of communications employers have with their attorneys and trade associations regarding union issues. The general rule, which would be expanded by narrowing these exceptions, requires employers and consultants to report any agreement or arrangement with a third party consultant to persuade employees as to their collective bargaining rights or to obtain certain information

concerning the activities of employees or a labor organization in connection with a labor dispute involving the employer. A proposed regulation was distributed for interagency review in 2011, and it is anticipated the DOL will be pursuing making them final in the foreseeable future.

Election Procedures Regulations

In 2012, the NLRB was finalizing rules to change the pre-election and election procedures for union representation matters. Under the new rules: (1) petitions could be filed electronically; (2) pre-election hearings would be held within 7 days of the hearing notice; (3) positions would have to be stated prior to the hearing commencing; (4) Regional Director rulings would be reviewed post-election; (5) phone numbers and addresses would be included on eligible voter lists. The implementation of this rule is on hold due to legal challenges.

Union Dues

On January 4, 2013, the **"Employee Paycheck Protection Act"** (HR 175) was introduced. Under the bill, prior to imposing, collecting or increasing union dues or fees, the union will have to provide notice to all employees in the union an explanation of how the union calculates the share which is for non-political collective bargaining purposes. Further, dues and fees cannot be collected from any employee without the employee's affirmative consent.

NLRB Authority

The "**Protecting American Jobs Act**" (HR 795) would eliminate the NLRB's ability to adjudicate unfair labor practices, but instead permit such claims be brought to court by the "aggrieved party." Also prohibits the NLRB from promulgating rules that affect the substantive rights of a person, employer, employee, or labor organization. Also prohibits the NLRB from hearing or preventing ULPs, but still allows it to investigate them.

The "**Preventing Greater Uncertainty in Labor-Management Relations Act"** (HR 1120) would require the National Labor Relations Board to cease all activity that requires a quorum of Board members when a quorum does not exist, including prohibiting it from appointing any personnel nor implementing, administering, or enforcing any decision, rule, vote, or other action decided, undertaken, adopted, issued, or finalized on or after January 4, 2012, that requires a quorum of the Board members. The Act would become null upon the confirmation of all Board members constituting a quorum with the advice and consent of the Senate, a decision by the Supreme Court on the constitutionality of Board appointments made in January 2012, or the adjournment sine die of the first session of the 113th Congress. However, it will still prohibit the appointment, or implementation, administration, or enforcement of any Board action occurring on or after January 4, 2012, that requires authorization by not less than a quorum of the Board members, unless and until the action is considered and acted upon by a Board constituting a quorum, or the Supreme Court issues a decision on the constitutionality of the Board appointments made in January 2012. Bill was passed by the House on April 12, 2013 by a 219-209 vote. See also S 180 ("**NLRB Freeze Act of 2013**"), S 188 ("**Advice and Consent Restoration Act**"**)** and S 190 ("**Restoring the Constitutional Balance of Power Act of 2013**").

Union Organizing and EFCA-Related Bills

The "**National Right to Work Act**" (HR 946, with 69 cosponsors; S 204 with 12 cosponsors) would amend both the National Labor Relations Act and the Railway Labor Act to repeal the employers' ability to agree to union security agreements requiring employees to join a union as a condition of employment, and requiring union dues or fees to be subject to payroll deduction as a condition of employment.

The **"Labor Relations First Contract Negotiations Act of 2013"** (HR 169) would amend the NLRA to require the arbitration of initial collective bargaining agreements if an agreement, is not reached after 60 days of bargaining and 30 days of mediation

Government Contractors

The **"Government Neutrality in Contracting Act"** (S 109, HR 436) would prohibit the federal government, with respect to the award of construction contracts or grants, require or forbid a bidder, offeror, contractor, or subcontractor to enter into or adhere to agreements with a union with respect to that construction project or another related construction project,; otherwise discriminate against such a party because it did or did not become a signatory or otherwise adhere to such an agreement.

EFCA Related Bills from the 112th Congress Which May Resurface

The President of the AFL-CIO has indicated that efforts will be undertaken to re-introduce a card-check/Employee Free Choice Act bill during the new congressional term. EFCA triggered a number of other bills, and those bills may be introduced again as alternatives or shields to such and effort. During the last congressional term, such bills included:

- The "**Secret Ballot Protection Act**" (S 217) would make it an unfair labor practice for: (1) an employer to recognize or bargain collectively with a labor organization that has not been selected by a majority of the employees in a unit appropriate for such purposes in a secret ballot election conducted by the NLRB; and (2) a union to cause or attempt to cause an employer to recognize or bargain collectively with a representative that has not been selected in such manner.

- The "**State Right to Vote Act**" (HR 1047) would amend the National Labor Relations Act to protect state requirements for a secret ballot election of labor organizations.

    - Conversely, HR 2775 was introduced which would amend the LMRA to repeal the provision allowing states to have right to work laws.

- The "**Truth in Employment Act**" (HR 2153) would amend the NLRA to provide that nothing in the provisions establishing what constitutes an unfair labor practice by employers shall be construed as requiring an employer to employ someone who seeks or has sought employment with the employer in furtherance of other employment or agency.

- The "**Fair Representations in Elections Act**" (S 1425) would require that representational elections not be held within 40 days from the filing of the election petition, and that employers provide a list of employee names and address within seven days of the NLRB's determination of the appropriate unit or the reaching of an agreement between the employer and the union regarding eligible voters. Elections also could not be held if a hearing is held, until the issues are resolved by the Regional Director. A related bill, the "**Employee Rights Act"** (S 1507, HR 2810) would require secret ballot elections and that re-elections be held every 36 months.

- The "**Keep Employees' Emails and Phones Secure Act**" (KEEP) (HR 3991) would amend the NLRA to prohibit the NLRB from requiring employers to provide the NLRB or unions with employee phone numbers and email addresses.

- The "**National Labor Relations Reorganization Act**" (HR 2926) would abolish the NLRB and its responsibilities would be transferred to the Department of Labor and the Department of Justice. The DOL's Office of Management-Labor Standards would be responsible for the many of the NLRB's current responsibilities, but the DOJ's Bureau of Labor Relations Enforcement, a bureau that the measure would create, would handle the Board's current enforcement functions. All rules and regulations issued under the NLRA would continue in full effect and would become rules and regulations issued by the Secretary of Labor.

- Senator Rubio sponsored the "**Rewarding Achievement and Incentivizing Successful Employees Act**" (the "RAISE Act") (S 2371 and HR 4385) to amend the NLRA to allow employers to pay an employee more than the amount set in a collective bargaining agreement due to the employee's services.

Other Pending Legislation

The **"Social Networking Online Protection Act"** (HR 537) would prohibit employers from (1) requiring or requesting that an employee or applicant provide a user name, password or any other means of accessing a private email account or social networking website; or (2) discharging, disciplining, discriminating against, denying employment or promotion to, or threatening to take such action against any employee or applicant who refuses to provide such information, files a complaint or testifies under the Act.

II. *From Lansing . . .*

The 2011-2012 two year session of the Michigan Legislature was anything but boring. Many bills and reforms were passed, and many of those were controversial. Since the 2013-2014 session has only recently begun, only a few bills have been proposed having anything to do with employment law. Those bills are discussed below. Significantly, though, as the last legislative

session was expiring, the Legislature passed what was perhaps its most controversial bill – the right-to-work act. Given its significance and likely "after-shocks", a review of what may lie ahead with respect to that law is also provided.

Right to Work

On December 12, 2012, Governor Snyder signed two right-to-work bills: PA 348 (SB 116) with respect to private sector employees; and PA 349 (HB 4003) with respect to public sector employees. Key provisions include:

- No person shall by force, intimidation, or unlawful threats compel or attempt to compel any employee to:
    - Become or remain a member or otherwise affiliate with a union, or financially support a union;
    - Refrain from engaging in employment or refrain from joining a union; or
    - Pay to a charity or other organization any amount that is in lieu of, equivalent to, or any portion of union dues, fees or assessments required of employees represented by unions.
- Except as to police and fire employees subject to PA 312, and state police troopers and sergeants, an individual shall not be required as a condition of obtaining or continuing employment to:
    - Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a union;
    - Become or remain a member of a union; or
    - Pay any dues, fees, assessments, or other charges or expenses, to a union.
- A person who violates the above will be subject to a $500 fine.
- A person who suffers an injury by having union support being a condition or obtaining or continuing employment may bring a civil action for damages, injunctive relief, or both, and if the person prevails in that action, may also be awarded costs and reasonable attorneys fees.
    - The person may also pursue other legal remedies available under law.
- A total of $2,000,000 is appropriated to LARA for: responding to inquiries regarding the right-to-work law; providing MERC with sufficient staff and other resources to

implement the law; and inform employers, employees and unions concerning their rights and responsibilities under the law.

- Applies to any agreement, contract, understanding, or practice that takes effect or is extended or renewed after March 27, 2013.

What remains on the horizon?

- Legal challenges –
    - The MEA has pending a lawsuit claiming that the laws were passed in violation of the Open Meetings Act.
    - The law allegedly was passed without proper deliberations by the Legislature.
    - The law applicable to public employees allegedly violates the Equal Protection Clause due to the carve-out for public safety employees.
    - The laws allegedly violate the Contract Clause of the Constitution ("No State shall . . . pass any . . . Law impairing the Obligations of Contracts").
    - The laws allegedly violate the *ex post facto* prohibition in the Constitution (i.e., no state may enact any law which "imposes a punishment of an act which was not punishable at the time it was committed").
- NLRA preemption arguments may be raised.
- Disputes over check-off administration may occur.
- An attempt to amend the state constitution may be pursued.
- Attempts to pass new legislation to repeal the right-to-work law may be pursued.

Lessons from Indiana?

Litigation arose in Indiana regarding its right-to-work law which was enacted on February 1, 2012. On January 17, 2013, the local federal court dismissed the case in its entirety. *Sweeney v. Daniels*, 2:12CV81 (N.D. Ind. Jan. 17, 2013). The unions' lawsuit attempted to invalidate the Indiana law on: contract and *ex post facto* grounds; equal protection grounds, claiming that the law denies equal protection to unions and union members, and to non-construction workers); NLRA preemption grounds; and state constitutional grounds. While dismissing the case, the court concluded:

> For better or worse, the political branch of government make policy judgments. The electorate can ultimately decide whether those judgments are sound, wise and constitute good governance,

> and then can express their opinions at the polls or by other means. But those are beyond the reach of the federal court . . . .

Id. at p. 23. In the same vein, the while dealing the constitutional claims, the court noted: "Whether I think this law constitutes wise governance simply doesn't matter. If a mistake has been made in passing the law, it is for the citizens to fix through the democratic process " *Id.* at p. 14.

Pending Right-to-Work Related Bills

SB 95 was introduced to amend the Labor Mediation Act to repeal its right-to-work provisions as to private sector employees, but allow unions charge fees to unit members without regard to their membership status.

SB 96 was introduced to repeal the public sector right-to-work law, much in the same way as provided in SB 95.

Misclassifications

On January 16, 2013, Senate Majority Leader Richardville introduced **"The Employee Misclassification Act"** (SB 1) to establish a uniform test for determining the existence of an employer/employee relationship and to prohibit employers from misclassifying employees as contractors. Under the bill, for the purpose of all state laws, the employment relationship would be determined by applying the IRS's 20-factor test. If a misclassification takes place, the employer would be subject to whatever sanctions exist under the statute under which the misclassification occurred. Further, individuals who suffer damages may also bring an action against the employer or agent who made the misclassification.

Pay Protection Bills

Minimum Wage

SB 203 an HB 4554 would increase the state minimum wage from $7.40 to $7.90 per hour on January 1, 2014, to $8.40 on July 1, 2014, to $9.00 on January 1, 2015, and to $10.00 on January 1, 2016. Thereafter, the minimum wage is to be adjusted annually based on increases to the CPI. The minimum wage for tipped employees would be pegged to 50% of the state minimum wage. (See also HB 4386)

Comparable Worth

SB 298 and HB 4518 have been introduced to amend the Elliott-Larsen Civil Rights Act by adding amongst its proscriptions discrimination on the basis of comparable worth.

Disclosure of Pay Information

SB 296 and HB 4516 have been introduced to amend the Payment of Wages and Fringe Benefits Act to require employers to provide within 30 days of an employee's request "wage information on similarly situated employees covering a period of up to 3 years prior to the date of the request." Names may be redacted, but the sex and seniority of the similarly situated employees must be disclosed. "Similarly situated" means "employees who are within the same job classification as the employee requesting the information or whose duties are comparable in skill, effort, responsibility, working conditions, and training to those of the requesting employee." "Wage information" includes "salary and hourly wage information as well as information about bonus pay, overtime pay, and other forms of compensation provided by the employer."

Background Check Bills

Credit Histories

HB 4331 was introduced to prohibit employers from utilizing credit histories with respect to the making of most job-related decisions other than with respect to banks, casino employees, certain employees of insurers, and certified public accountants.

Criminal Histories

The **Employment Application Fairness Act** (HB 4366) was introduced to prohibit an employer from making or using an initial employment application (paper or electronic) that seeks information concerning felony convictions unless: a) it is made pursuant to a post-application background check; or b) needed to comply with a state or federal law.

Fringe Benefits Related Bills

Leaves of Absence

The **Employment Leave Uniformity Act** (SB 173 and HB 4249) would prohibit a local governmental employer from adopting or administering an ordinance or policy requiring an employer (public or private) to provide paid or unpaid leave not otherwise required by state or federal law. On April 8, 2013, this bill was referred by the Senate Committee to "Committee of the Whole."

Severance Pay

The "**Public Employee Severance Pay Regulation Act**" (HB 4141) would have prohibited public bodies from providing employees or contractors with severance pay upon their voluntary terminations or terminations instigated by them.

Public Employee Health Insurance

SB 323 would amend the "Hard Caps" law for public employers providing health insurance coverage to their employees by increasing the hard cap for "employee and spouse" coverage to the base rate of $13,455.

PERA-Related Bills

Union Use of Employer Property

HB 4201 was introduced to amend PERA to provide that a "public employee or collective bargaining organization shall not use publicly owned property, facilities, or services, including an electronic mail system, for political activities, political fund-raising, campaigning for office of a collective bargaining organization, collective bargaining organizing activities, or solicitation of employees for membership in a collective bargaining organization."

Scope of Local Laws on Labor Relations

The "**Labor and Management Rights Protection Act**" (HB 4509) would prohibit local units of government from adopting ordinances or regulations that infringe on federal labor laws, and prohibit employers and unions from waiving certain rights. This would eliminate conditioning contracts, zoning, permits, licenses on the waiver or limitation of any right under federal labor laws, including the right to insist on secret ballot elections, express views about unions, to withhold information not subject to release under federal labor laws, to keep information confidential to the extent allowed under federal labor laws, to restrict access to property as allowed under federal labor laws.

State Employment-Related Bills Which Died in 2012

Labor Relations Related Bills

- HB 4059 - Amend PERA to add a provision providing that a public employer would be prohibited from entering into or renewing a collective bargaining agreement that "requires or allows [employer] paid release time for union officers or bargaining representatives to conduct union business." The bill passed the House by a vote of 59 to 47. The Senate did not take any action.

- HB 4300 - Amend the Revised School Code to require school districts to post the total dues union withheld, per employee and per bargaining unit.

- HB 5025 – Amend PERA to require union dues authorizations to be renewed annually.

- HB 5023 – Amend PERA to mandate fines and penalties for those engaged in public sector strikes or lockouts, require MERC to promptly hold a hearing on determining if a

strike or lockout has occurred, forbid any effort to compensate employees for striking, and to require courts to enjoin illegal strikes without regard to the normal standards for injunctions.

- HB 4205 - Repeal Act 312 and the right of public safety employees to have an arbitrator set their contract terms if a collective bargaining agreement cannot be mutually reached between their unions and their employers.

- HB 4777 - Amend PERA to make the decision of public employer to renegotiate a collective bargaining agreement upon a merger or consolidation of employers or services a permissive act subject to the employer's discretion.

Civil Rights/Discrimination Related Bills

- ***Discrimination of the Basis of Health of Family Members*:** SB 73 - The "**Employee Family Health Privacy Act**" would have prohibited employers from basing an employment decision on "a known or believed illness or health condition of a member of an employee's family," and inquiring "as to the physical condition or health status of a member of an employee's family."

- ***Smoking:*** SB 352 - To amend the Public Health Code to allow smoking in certain ventilated enclosed "legal smoking rooms."

- ***Unemployment Status*:** HB 4675; SB 606 - The "**Fair Consideration of the Unemployed Act**" would have prohibited employers from stating, suggesting or requiring that current employment is a job qualification.

- ***Political Meetings*:** HB 5038 – The "**Employee Political and Religious Freedom Act**" would have prohibited employers from being able to require employees to attend "an employer-sponsored meeting or participate in any communication with the employer or its agent or representative if the primary purpose is to communicate the employer's opinion about religious or political matters."

- ***Gender Identity*:** SB 1063 - To amend the Elliott-Larsen Civil Rights Act to include as protected statuses sexual orientation, gender identity or expression.

Leave Rights Bills

- SB 590 and HB 4898 - The "**Family Education Leave Act**" would have required employers to provide up to 8 hours of unpaid leave per minor child for employees to attend academic activities of their children.

- HB 5410 - The "**Voting Leave Act**" would have required employers of 50 or more employees to provide employees paid leave of up to three hours to vote and to prohibit employers from discriminating against employees who request such time off.

- HB 5625 - The "**Paid Sick Leave Act**" would have required all employers to allow employees to accrue, in one hour increments, paid leave. Small employers (fewer than 10 employees) would have to allow up to 40 hours of paid leave, and all other employers would have had to allow up to 72 hours of paid leave.