

**Greater Winston-Salem Chamber of Commerce
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Labor, Employment and Voting – Oh, My!!!

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With the 2010 election less than three weeks away, it's time to remember that our votes really do matter. And for anyone concerned with human resources and the landscape of American business and industry, what especially matters are those candidates who stand for the type of labor and employment laws that help rather than hurt the appropriate conduct of both in today's modern economy.

It's not the place of the Greater Winston-Salem Chamber of Commerce, its Healthcare, Immigration and Labor Law ("HILL") Committee or this article to recommend any specific party or candidate, or to take any specific voting position. But it is part of our purpose to educate ourselves and others in various labor and employment issues that can affect how business is conducted, and to provide information for comparing candidates – all with a stated goal of helping voters reach informed political decisions on November 2.

But those votes aren't just important for who they put into or remove from office. Rather, the same political interest that leads to choosing one candidate over another in early November needs to stay kindled until those politicians leave or take office in January. That's especially true since an unintended consequence of any election is that it can sometimes lead to various unexpected legislative passages in November through January from a "lame duck" Congress and state legislature whose accountability is diluted until its new members take office. In other words, we need to maintain a close watch on our national and state elected officials during those interim months as well, and hopefully this article will help encourage that effort.

The following discussion briefly reviews some of the key labor and employment concerns that have recently taken a back seat to healthcare reform in Washington. But make no mistake – they're alive and well in certain political circles, and can rear their proverbial head at any time and often associated with some other legislative initiative that garners a larger news headline. (Did someone say, "back door passage"?) So before you punch the voting card or fill in the blank circles next to a candidate's name on November 2, you might want to first check on that federal or state candidate's position on the following. All of these are just the leading examples of a myriad of *pending* or *proposed* legislative initiatives that would build on the new and expansive labor and employment laws, Executive Orders and regulations already recently imposed on business, including the Americans with Disabilities Act Amendments Act, the Lilly Ledbetter Fair Pay Act and various orders and regulatory initiatives from the executive branch that have opened the door even wider to union involvement and unfunded mandates on American business and industry:

- **Employee Free Choice Act (“EFCA”)** (S. 560/H.R. 149) – What hasn’t been written over the past two years about this headliner of proposed labor laws? Card check, mandatory arbitration with an imposed two-year bargaining agreement if contract negotiations fail – the list goes on with how EFCA could rewrite our labor and employment landscape.
- **Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act (“RESPECT”)** (S. 969/H.R. 1644) – Simply stated, this proposed bill would amend the National Labor Relations Act to redefine “supervisors” as *excluding* lead persons and thereby making them subject to bargaining as well. The practical effect if passed? It would eliminate many employers’ best and most direct line of communication with employees during union organizing attempts.
- **Arbitration Fairness Act** (S. 931/H.R. 1020) – This bill would make unenforceable any “pre-dispute” arbitration agreement in employment, consumer, franchise or civil rights matters.
- **Paycheck Fairness Act** (S. 182/H.R. 12) – Already passed by the House, this law would significantly amend the Equal Pay Act by limiting defenses that justify legitimate, nondiscriminatory pay differentials, greatly expanding potential damage recoveries and enlarging the litigation pie to virtually invite class actions.
- **Family and Medical Leave Enhancement Act** (H.R. 824) – One of numerous recent attempts to expand the FMLA to reduce the required number of employees for an employer to be covered from 50 to 25, and would expand certain leave entitlements for parents and grandparents to attend parent-teacher conferences or to take family members to routine medical and dental appointments.
- **Family Leave Insurance Act** (H.R. 1723) – Would create a federal insurance fund to provide up to eight weeks of paid FMLA leave, expand the entitlement to domestic partners, and apply to *any employer that employs two or more persons for more than 20 workweeks in a year*. Employees would be eligible after just six months of employment.
- **Family and Medical Leave Restoration Act** (H.R. 2161) – This Act would repeal a number of FMLA regulatory changes that actually “helped” employers, including the right to require employees on intermittent leave to use at least one hour of FMLA leave, to deny attendance bonuses for employees on FMLA, to have consequences for employees who refuse to comply with company leave request policies, to allow employers direct contact with an employee’s medical provider – the list goes on.
- **Family and Medical Leave Inclusion Act** (S. 3680/H.R. 2132) – Would expand FMLA coverage to include same-sex spouses or domestic partners and their children, parents-in-laws, adult children, siblings or grandparents with serious health conditions.
- **Healthy Families Act** (S. 1152/H.R. 246) – A bill that mandates employers with 15 employees or more to provide one hour of paid sick leave for every 30 hours worked, up to 56 hours (seven days) per year. Employees could take the leave to care for themselves or family members with health care problems, and would further impose various sick leave eligibility and accrual rules on employers.

- **Working Families Flexibility Act** (S. 3840 / H.R. 1274) – Allows employees to request flexible working hours and other changes in the terms and conditions of their workplace. If the request is denied, the door is then opened to meetings, federal investigators, administrative law hearings and even federal court actions – with legal or union representation possible at each stage in the process. Employers with at least 15 employees would be affected.
- **Alert Laid Off Employees in Reasonable Time Act** (H.R. 2077) – Forget the definition of “mass layoff” under the current WARN Act. This bill would expand that definition to include actions taken by employers at multiple locations, not simply at a single employment site, and would double the potential damages an affected employee could receive.
- **Forewarn Act** (S. 1374/H.R. 3042) – Would amend the WARN Act in a number of important ways that would expand this plant-closing and mass layoff law to cover a much greater number of small business, include a number of currently excluded personnel actions from its definitions of “mass layoff” and “plant closing”, increase the notice period from 60 to 90 days, double the amount of current potential damages, and allow even more government enforcement.
- **Employee Misclassification Prevention Act** (S. 3254/H.R. 5107) – This proposed law would expand the Fair Labor Standards Act in a number of significant ways, from mandating certain additional employment recordkeeping requirements to increasing employer penalties for noncompliance. But perhaps most significantly it includes a “presumption” that individuals are employees rather than independent contractors if the recordkeeping mandates are not properly followed, rebutted only by the relatively high legal standard of “clear and convincing” evidence.

And that’s just a sampling of the many federal efforts to affect labor and employment issues. Add to this a veritable host of other movements on the federal and state level that this limited article simply cannot address – such as a strong push (emanating again from Washington) to eliminate “right to work” laws in certain states (like North Carolina) and to make all states allow public employees to unionize and, of course, strike if their demands aren’t met in certain circumstances (currently prohibited in North Carolina under N.C. Gen. Stat. § 95-98).

To help focus at least some national awareness to the potential impact of these many proposed or pending labor and employment initiatives, the United States Chamber of Commerce last summer issued an “open letter” to the president, the Congress and the American people. This letter says it as well as it can be said – and there’s no better way to end this article than with its call to arms:

Uncertainty is the enemy of growth, investment, and job creation. Through their legislative and regulatory proposals – some passed, some pending, and others simply talked about – the congressional majority and the administration have injected tremendous uncertainty into economic decision making and business planning. This is why banks are reluctant to lend and why American

corporations are sitting on well over a trillion dollars. It is why America's small businesses and entrepreneurs, the engines of innovation and job creation, are starving for capital and are either struggling to survive or unable to expand.

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There must be a recognition by the administration and Congress that the regulatory burden they have imposed on the U.S. economy has reached a tipping point. Unless the cumulative impact of existing regulations, newly mandated regulations, and proposed regulations is seriously addressed, the economy will not create the jobs Americans need. We will lose even more jobs. They will simply disappear or be sent offshore.

Please vote on November 2 – and let's all make sure that we, and to the extent possible those we know, recognize the tremendous and lasting power that elected officials have over our labor and employment landscape.

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