



# Labor and Employment Developments in President Obama's First 100 Days

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# Labor and Employment Developments in President Obama's First 100 Days

**Trina Fairley  
Bill Flanagan  
Tom Gies  
Kris Meade**

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# Introduction

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# **The Employee Free Choice Act**

**“Card Check” -- Changing The  
Rules Of The Game**

# EFCA – Principal Provisions

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- Recognition/Certification Without An Election
- Mandatory “Interest Arbitration” of First Contracts Absent Agreement on Fast-Track Timeline
- New Draconian Penalties Against Employers

# Card Check Recognition

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- a/k/a “majority sign-up”
- 50% plus 1 of employees in an “appropriate bargaining unit”
- Automatic NLRB certification without an election
- Traditional election petitions still possible, at the union’s choice, but unlikely

# First Contract Arbitration

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- 120 days to negotiate a contract
- If bargaining unsuccessful after 90 days, mandatory mediation
- And then mandatory “interest” arbitration
- Terms imposed by arbitrators for 2 years

# New Penalties Against Employers

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- Increased monetary penalties
- Increased availability of injunctive relief against employer campaign activity
- A gag order against employers?



# EFCA - Consequences

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- Union Organizing – Much Easier
- Collective Bargaining – Less Predictable to the Employer
- Labor Costs – Much Higher

# EFCA – Unanswered Questions

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- Validity of authorization cards
- Can an employer challenge the proposed bargaining unit
- Use of economic weapons during first contract negotiations
- Mandatory arbitration standards
- Effect on other NLRB rules in organizing campaigns and first contract bargaining

# Political Considerations


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- Status of EFCA
- The Sestak bill and the “Costco third way”
- Senator Specter’s party affiliation
- Possible Compromise Terms
  - The Canadian “quickie election”
  - Equal access
  - Verification of authorization cards
  - Additional standards for mandatory arbitration
- Will it Pass?

# EFCA – What To Do Now

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- A Vulnerability Assessment
  - Type and location of facilities
  - Wages/Benefits
  - HR Practices and Procedures
  - Utilization of available HR Diagnostics
- Training
  - Managers
  - Early Warning Signs
  - Legal Constraints
- Employee Communications
  - Timing
  - Content
  - Tone
- Organizational and Operational Considerations



**Lilly Ledbetter Fair  
Pay Act: Preparing  
For Pay  
Discrimination  
Claims**

# Lilly Ledbetter Fair Pay Act

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- Amends Title VII, the ADEA, the ADA, and the Rehabilitation Act
- Charge timely if filed within 300 days after employee is “affected by” discriminatory pay decision or other practice
- Eviscerates SOL for pay claims; two year limit on back pay
- Retroactive to May 28, 2007

# Lilly Ledbetter Fair Pay Act

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- Immediate Impact – 30-plus decisions applying Ledbetter due to retroactivity provision
  - *Gentry v. Jackson State Univ. (S.D. Miss.)* – 2004 denial-of-tenure claim timely
  - *Gilmore v. Macy’s Retail Holdings (D.N.J.)* – court *sua sponte* revives dismissed claim based on prior promotion decision
  - *Bush v. Orange County Corrections Dept. (M.D. FL)*  
– wage claims based on demotion 16 years before complaint filed deemed timely

# Lilly Ledbetter Fair Pay Act

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- Longer-term Impact
  - Significant in class action context
  - Single plaintiff cases more attractive
  - More workplace discussion of pay equity issues



# Lilly Ledbetter Fair Pay Act

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- Proactive Measures
  - Holistic privileged review of compensation practices
    - Focus on all areas of managerial discretion
  - Privileged analyses of pay
    - Base pay analysis
    - “Real-time” analysis of pay change decisions
  - Expand data capture and retention – electronic



**Two Important  
Supreme Court  
Cases Decided in the  
First 100 Days**

# ***14 Penn Plaza LLC v. Pyett***

## **129 S. Ct. 1456 (2009)**

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Decided: April 1, 2009

Issue: Whether a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims under the ADEA is enforceable.

Holding: Yes  
(Decision 5:4 with Justices Souter, Stevens, Ginsburg and Breyer dissenting)

# ***14 Penn Plaza LLC v. Pyett***

## **129 S. Ct. 1456 (2009)**

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### Facts:

- CBA included an antidiscrimination provision requiring that all employees submit employment discrimination claims to binding arbitration.
- After respondents were reassigned by employer, union filed grievance including age discrimination claim.
- Union subsequently withdrew age discrimination claim.
- Respondents filed age discrimination claims in federal district court.

# ***14 Penn Plaza LLC v. Pyett***

## **129 S. Ct. 1456 (2009)**

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### Procedural History:

- Federal district court denied Petitioners' motion to compel arbitration citing 2<sup>nd</sup> Circuit precedent in *Rogers v. New York*.
- *Rogers* held that a CBA negotiated by union waiving an individual employee's right to bring a statutory claim in court is unenforceable.

# ***14 Penn Plaza LLC v. Pyett*** **129 S. Ct. 1456 (2009)**

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Supreme Court Reversed and Remanded:

- Arbitration provision enforceable under NLRA.
- Nothing under ADEA precludes arbitration of age discrimination claims.

# ***14 Penn Plaza LLC v. Pyett*** **129 S. Ct. 1456 (2009)**

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*Supreme Court addresses tension:*

*Gardner-Denver Co.* held “a collective bargaining agreement could not waive covered workers’ rights to a judicial forum for causes of action created by Congress.”

*Gilmer* held “an individual employee who had agreed individually to waive his right to a federal forum could be compelled to arbitrate a federal age discrimination claim.”

# ***14 Penn Plaza LLC v. Pyett*** **129 S. Ct. 1456 (2009)**

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- Supreme Court held *Gilmer* is applicable in context of collective bargaining agreements.
- *Gardner-Denver* should be limited to the unique facts of that case.



# ***14 Penn Plaza LLC v. Pyett***

## **129 S. Ct. 1456 (2009)**

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### Dissenting Opinions:

- (Justice Stevens)  
Argues that Court's decision driven by policy favoring arbitration.
- (Justice Souter)  
Argues that the Court violated precedent and inappropriately narrowed the Court's holding in *Gardner-Denver*.

# ***Crawford v. Metropolitan Gov't of Nashville*** **129 S. Ct. 846 (2009)**

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Decided: January 26, 2009

Issue: Whether Title VII's anti-retaliation protection extends to "an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation."

Holding: Yes

(Unanimous Decision with Justices Alito and Thomas concurring)

# ***Crawford v. Metropolitan Gov't of Nashville***

## **129 S. Ct. 846 (2009)**

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### Facts:

- Employee participated in school district's investigation of supervisor's alleged sexual misconduct.
- During investigation employee disclosed inappropriate sexual advances made toward her by supervisor.
- Employee subsequently investigated and terminated for meritless reason.

# ***Crawford v. Metropolitan Gov't of Nashville***

## **129 S. Ct. 846 (2009)**

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U.S. District Court and 6<sup>th</sup> Circuit held:

- Title VII's anti-retaliation protections did not extend to employee.
- Her cooperation in the internal investigation did not fall within the "opposition" or "participation" clauses of the statute.

# ***Crawford v. Metropolitan Gov't of Nashville*** **129 S. Ct. 846 (2009)**

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Supreme Court Reversed and Remanded:

- Term “Oppose” carries its ordinary meaning.
- Term “Oppose” does not require “active, consistent” activity or initiation of complaint.
- An employee can “oppose” discriminatory behavior by responding to someone else’s question.

## ***Crawford v. Metropolitan Gov't of Nashville*** **129 S. Ct. 846 (2009)**


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- Court rejected amici arguments that not requiring “active, consistent” activity would discourage employers from raising questions about discrimination.
- Court did not reach “participation” clause issue.

## Concurring opinion (Justice Alito)

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- Definition of “oppose” should require “active” and “purposive” conduct.
- Warns against creation of a definition that would protect “silent opposition” or opposition that was never communicated to employer.



**TWO OTHER  
IMPORTANT CASES  
PENDING BEFORE  
THE SUPREME  
COURT**



# ***Gross v. FBL Financial Services, Inc.***

## **526 F.3d 356 (8<sup>th</sup> Cir. 2008)**

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**Issue:** Whether in a “mixed motives” case an employee in an age discrimination trial must present direct evidence that discrimination occurred, in order to obtain a jury instruction that places the burden of proof on the employer.

**Case Argued:** Before Supreme Court on March 31, 2009.

# ***Gross v. FBL Financial Services, Inc.***

## **526 F.3d 356 (8<sup>th</sup> Cir. 2008)**

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### Facts:

- Employee sued employer alleging age discrimination following a series of demotions.
- Employer asserted “mixed motives” defense. Employee presented no direct evidence that age was motivating factor.

### Jury Instruction:

- Verdict must be for employer “if [*employer*] *has proved* by a preponderance of evidence that [employee] would have been demoted regardless of his age.”

# ***Gross v. FBL Financial Services, Inc.***

## **526 F.3d 356 (8<sup>th</sup> Cir. 2008)**

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Eighth Circuit holding:

- Jury instruction was improper.
- To obtain an instruction that places burden of proof on employer, employee must produce direct evidence that age was the motivating factor.
- If no direct evidence of discrimination, then burden remains, at all times, on employee.
- The 1991 Amendments to Title VII (which place burden of proof on employees in mixed motive cases) do not apply to ADEA cases.
- *Price Waterhouse v. Hopkins* applies to ADEA cases.

## ***Ricci v. John Destefano***

**554 F. Supp. 2d 142 (D.Conn. 2006),  
affirmed 264 Fed. App. 106 (2d Cir. 2008)**

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**Issue:** Whether a city may lawfully refuse to certify test results that would disproportionately make more white applicants eligible for promotions.

**Case argued:** Before Supreme Court on April 22, 2009.

## ***Ricci v. John Destefano***

**554 F. Supp. 2d 142 (D.Conn. 2006),  
affirmed 264 Fed. App. 106 (2d Cir. 2008)**

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### Facts:

- City Fire Department administered oral and written tests for promotion to Lieutenant and Captain.
- “Rule of Three” required promotions to be filled by one of the top three test scorers.
- City refused to certify test scores because test results revealed disparate impact against African-Americans and Hispanics.
- City asserted desire to comply with Title VII’s anti-disparate impact requirements as basis for refusal.

## ***Ricci v. John Destefano***

**554 F. Supp. 2d 142 (D.Conn. 2006),  
affirmed 264 Fed. App. 106 (2d Cir. 2008)**

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### Procedural History:

- Class of White (and one Hispanic) employees brought suit alleging disparate treatment under Title VII and violation of the Equal Protection Clause.
- Alleged that African-Americans and Hispanics received race-based preferential treatment.
- Parties filed cross motions for summary judgment on Title VII and Equal Protection claims.

## ***Ricci v. John Destefano***

**554 F. Supp. 2d 142 (D.Conn. 2006),  
affirmed 264 Fed. App. 106 (2d Cir. 2008)**

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### Plaintiffs' Title VII Argument:

- City's alleged desire to comply with Title VII's anti-disparate impact requirement was a pretext for intentional discrimination against white candidates.

## ***Ricci v. John Destefano***

**554 F. Supp. 2d 142 (D.Conn. 2006),  
affirmed 264 Fed. App. 106 (2d Cir. 2008)**

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### Plaintiffs' Equal Protection Argument:

- City's refusal to certify exam results amounted to a race-based classification system for promotion.
- Alternatively, the City applied facially neutrally promotion criteria in a discriminatory manner.



## ***Ricci v. John Destefano***

**554 F. Supp. 2d 142 (D.Conn. 2006),  
affirmed 264 Fed. App. 106 (2d Cir. 2008)**

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### Lower Courts Rejected Title VII Arguments:

- The failure of the test results to satisfy EEOC's "4/5 Rule" demonstrates that disparate impact was statistically significant.
- Title VII does not require the City to obtain a validation study or demonstrate that there were less discriminatory alternatives available.

## ***Ricci v. John Destefano***

**554 F. Supp. 2d 142 (D.Conn. 2006),  
affirmed 264 Fed. App. 106 (2d Cir. 2008)**

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### Lower Courts Rejected Plaintiff's Equal Protection Arguments:

- No equal protection violation because everyone was treated the same. The exam was administered and score identically, and nobody was promoted.
- Plaintiffs had no “entitlement” to promotion.
- No evidence of discriminatory purpose.



# **American Recovery and Reinvestment Act of 2009 – COBRA Premium Subsidy**

**BENEFIT FOR EMPLOYEES  
BURDEN FOR EMPLOYERS**

# COBRA SUBSIDY – THE BASICS

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- Who’s Covered – “Assistance Eligible Individual” (“AEI”)
  - Any COBRA “Qualified Beneficiary”
  - “Involuntary Termination” of Employment from 9/1/08 – 12/31/09
    - IRS Guidance regarding Reduction in Hours
  - Resulting in Loss of Group Health Coverage
    - Employer Structuring Options
  - Income Limitations
  - Open Question – Need for Pre-Qualification

# COBRA SUBSIDY – THE BASICS (cont'd)

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- What's the Benefit?
  - 35%/65% Split of COBRA Premium
  - AEI pays 35%
    - Treated as payment in full of COBRA premium
    - Payment by third party other than the Employer
  - 65% is the responsibility of “the person to whom premiums are payable under COBRA continuation coverage”
    - Reimbursement through credit against income tax withholding for that person's own employees

# COBRA SUBSIDY – ADMINISTRATIVE ISSUES

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- Who Pays the 65%?
  - Only “the person to whom premiums are payable” can pay and receive reimbursement for the 65%
  - Multi-employer plans – the plan (no IRS guidance)
  - Self-Insured Plans Subject to COBRA – Employer
  - Insured Plans Subject to COBRA – Employer
    - The “Direct Pay” Problem
  - Plans Subject to Comparable State Law – Insurer
    - The Problem of “Comparable Coverage”

# COBRA SUBSIDY – ADMINISTRATIVE ISSUES (cont'd)

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- DOL Models -- the Need for “Complete Notice”
  - Model General Notice (Full Version)
    - Complete Package of Forms
  - Model General Notice (Abbreviated Version) – All AEIs who already elected COBRA
  - Model Notice of Extended Election Periods – Potential AEIs Who Refused or Canceled COBRA
  - Model Alternative Notice – Insurers under State Programs
  - <http://www.dol.gov/ebsa/COBRAmodelnotice.html>

# COBRA SUBSIDY – TRAPS FOR THE UNWARY

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- (1) Payment by AEI guarantees coverage
  - Importance of Contractual Relationship with Insurer
  - Difficulties in the “Direct Pay” Structure
- (2) Involuntary Termination – Limitations
  - IRS Notice 2009-27, Q&A 1-9
- (3) “Complete Notice” Requirement
  - Potential for reopening previously closed COBRA election periods



# COBRA SUBSIDY – TRAPS FOR THE UNWARY (cont'd)

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- The Severance Package Problem
  - Employer Extension of Coverage
  - Employer Payment of COBRA Premiums
- Eligibility Determinations
  - IRS Notice 2007, Q&A 45 – No refusal even if employer knows the income limit is exceeded
  - Conflict with DOL eligibility form
- Applying for Reimbursement – Offset or Repayment

# COBRA SUBSIDY – TRAPS FOR THE UNWARY

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- Potential Multiple Notice Requirements
  - Special rules for involuntary terminations in January and February 2009
- The State “Comparable Coverage” Conundrum
  - HHS -the need for state insurance commissioner action

# COBRA SUBSIDY – EVOLVING STRATEGIES

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- Coordination between Employers and Insurers
  - Potential Need for Contract Restructuring
- Use of the “Cover Letter”
  - Need to avoid employee confusion
- Importance of Recordkeeping
  - An IRS/DOL audit program is inevitable
  - Avoid potential excise taxes and civil penalties



# **The Obama Administration Takes Action**

**The Power of the Executive Order**

# Executive Order #13502

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- “Use of Project Labor Agreements for Federal Construction Projects”
  - Announces a government policy of encouraging use of PLAs on large-scale construction projects for the “efficient and expeditious completion” of projects funded by the federal government
  - Broad discretion to executive agencies to require PLAs on construction projects
  - Agencies can require all contractors and subcontractors to be signatory to PLA

# Executive Order #13496

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- “Notification of Employee Rights under Federal Labor Law”
  - Revokes E.O. 13201 requiring posting of “Beck” notice at job sites covered by government contracts
  - New notice, to be promulgated by DOL to be posted at all job sites; notice must affirmatively advise employees of the right to organize
  - Contractor must comply with “all provisions of the . . . Notice, and related rules, regulations and orders”
  - Applies to almost all government contracts

# Executive Order #13495

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- “Non-displacement of Qualified Workers under Service Contracts”
  - Successful bidders on “follow-on” service contracts must offer a right of first refusal to employees of predecessor contractor “in positions for which they are qualified.”
  - Managers and supervisors excluded

# Executive Order #13495

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- Exception where new contractor has reasonable belief, based on employees' past performance, that they have "failed to perform suitably on the job."
- Applies to almost all contracts awarded under the Service Contract Act
- Effectively negates the successful bidder's ability to hire a new workforce thus guaranteeing labor law successorship
- Does not require new employer to assume predecessor's collective bargaining agreement



# Executive Order #13494

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- “Economy in Government Contracting”
  - Order changes settled “cost principles” to preclude an employer from charging the government for costs incurred as part of union organizing campaigns
  - Costs “undertaken to persuade employees . . . to exercise or not to exercise. . . the right to organize and bargain collectively” are unallowable
  - Applies to almost all government contracts

# Executive Order #13494

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- Examples of unallowable costs:
  - preparing and distributing campaign materials;
  - hiring or consulting legal counsel or consultants;
  - holding meetings (including paying the salaries of the attendees at meetings held for this purpose);
  - Planning or conducting campaign activities by managers, supervisors or union representatives during work hours

# Executive Order #13494

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- Order permits costs incurred in “maintaining satisfactory relations between the contractor and its employees, including costs of labor-management committees” to be treated as allowable costs

# Q&A

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Reminder: The slides and a link to a recording of the webinar will be distributed via e-mail.