

## Change Coming in Key Areas of Law

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Call it a dream list or a nightmare list, depending upon your client's interests. But with a new Democratic White House and a strengthened, emboldened Democratic Congress, those making either list agree that change is coming in key areas of the law.

Trial lawyers, consumer advocates, civil rights groups, environmentalists and others have had some success moving their agenda items through the Democratic-controlled House in the past two years, only to see many of the more ambitious ones stopped in a Democratic-controlled Senate unable to reach the "magic" 60 votes needed to block a Republican filibuster, or unable to overcome the threat of a presidential veto.

But in the new congressional session, it will be all about the math, particularly in the Senate. In the next few weeks, the outcome of three closely contested Senate races will be known, as will the answer to the largest lingering election question: Will Senate Democrats, whose numbers grew to 55 in the election, pick up those three seats, and then, with the fairly reliable assistance of two independent senators, reach the magic 60?

Although economic stimulus and financial industry proposals are likely to dominate Congress' agenda, many who work the halls of Congress predict that a number of other proposals -- some supported by President-elect Barack Obama when he was a senator -- will serve as early bellwethers of where the new administration and Congress are headed in particular areas of the law.

The listmakers point to common items likely now to ride the post-election wave to a presidential signature: workplace legislation -- from union elections to equal pay to safety regulation to protection on the basis of sexual orientation; prohibition on mandatory arbitration; retrenchment on federal pre-emption of state tort suits; and elimination of the crack/powder cocaine disparity in sentencing.

### HEAVY WORKPLACE AGENDA

"It's not too often you see an election with such major implications for employment issues," said management attorney Michael S. Kalt, a partner at San Diego's [Wilson Petty Kosmo & Turner](#). "Obama campaigned he would work on a bipartisan basis.

What we don't know is whether we will see compromise or Democrats will move with the majority they now have."

But what Kalt and Washington employment lawyers who work on Capitol Hill do predict is a rash of Obama-supported employment legislation, with the Employee Free Choice Act likely to head the list.

Highly controversial and fervently supported by unions, the act would change the rules in labor-management relations in two critical ways: It would eliminate the traditional secret-ballot process for union elections and instead require the National Labor Relations Board to certify a union if a majority of employees sign authorization cards, and it would impose binding arbitration if a first collective bargaining agreement cannot be reached within 120 days.

"Obama was a co-sponsor of a Senate version and signaled on the campaign trail that it was a priority for him," said Kalt. "The business community is opposed, and it will be an early bellwether."

A second early test will be the Lilly Ledbetter Fair Pay Act (or the Fair Pay Restoration Act), named for the 2007 U.S. Supreme Court decision, *Ledbetter v. Goodyear Tire*, 127 S. Ct. 2162. The bill would amend Title VII of the Civil Rights Act of 1964 to allow pay discrimination claims to be brought within 180 days of receiving any paycheck affected by a discriminatory pay decision. Last April, the Senate fell three votes short of the 60 needed for cloture, but management and employee experts predict the measure now will pass.

Other Obama-supported workplace measures to be pushed include:

- Amending federal employment statutes to make it illegal for an employer to discriminate with respect to an individual's actual or perceived sexual orientation.
- Requiring public and private employers with more than 15 employees to provide paid sick leave to their full- and part-time employees.
- Removing the current \$300,000 cap on compensatory damages and punitive damages for violations of Title VII and the Americans With Disabilities Act.
- Narrowing the definition of "supervisor" under the National Labor Relations Act.

Business and trial lawyers are expected to go head-to-head again over tort-related issues, but congressional experts now give the trial lawyers significantly more heft in the new Congress.

Bills to eliminate predispute binding arbitration have been gaining momentum, said David Arkush, director of [Public Citizen's Congress Watch](#), adding, "Binding arbitration in consumer contracts affects such a broad swath of people. Those bills were doing quite

well, but we'll see better prospects in an administration that isn't going to veto them, and one of the bills was introduced by Senator Obama."

His opponent in that battle agrees that eliminating mandatory arbitration will be a Democratic priority.

"The trial lawyers can't really pass anything unless they get consumer groups to help," said Victor Schwartz, a partner at [Shook, Hardy & Bacon](#). "Consumer groups don't like arbitration. Putting their muscle behind that, they get more muscle from consumer groups."

And, another big agenda item: reversals of the Bush administration's expansion of federal pre-emption of state tort lawsuits in a number of regulated areas.

"With passage of time it only becomes clearer and clearer the extent to which the Bush administration overstepped its bounds in trying to pre-empt state law and common law," said Arkush. "It has implications for public health and safety but also as a matter of separation of powers. It's a real encroachment on Congress' turf, and there is recognition this is a serious problem."

The criminal justice agenda is less clear. The Obama campaign supported elimination of the crack/powder cocaine sentencing disparity, which has growing congressional support. Congressional Democrats also may move on proposals involving mandatory minimum sentences; hate-crime protection; prisoner re-entry support; drug rehabilitation programs for first-time, nonviolent offenders; and death penalty reforms.