

Political Priorities

What the 2008 election means to the in-house bar.

By Mary Swanton and Melissa Maleske

The economy. Taxes. Energy prices.
Health care. National security.

The candidates' views on these topics dominate the airwaves and headlines as America prepares to elect its 44th president next month.

But other issues at stake in the election get pushed aside—including several that directly impact in-house counsel. Should Congress make it easier for unions to organize workers? How should the country address the threat of climate change? Should undocumented workers get a chance to become U.S. citizens? How can lawmakers stop frivolous lawsuits? Who will be the new judges who will hear business cases in the federal and Supreme Courts?

To shed some light on these topics, *InsideCounsel* interviewed several Washington veterans, including former White House advisers in both Democratic and Republican administrations. On some issues—including climate change and immigration—many see the two presidential candidates as holding similar views. On others—especially labor and employment issues—they are miles apart.

Washington observers on both sides of the political fence emphasize that the expected Democratic control of Congress will determine what either Barack Obama or John McCain can accomplish, depending on the size of the margin.

“Obama’s challenge is to have a Democratic majority and prove they can get something done,” says Robert Kyle, a Hogan & Hartson partner, who was a Clinton Administration official. “And his left wing may want to get more done than he thinks he can achieve. For McCain, the position is more holding the line against a Democratic majority in Congress. So they both have challenges, but there will be a different feel to each Presidency.”

Candida Wolff, also a Hogan & Hartson partner and former White House adviser to President George W. Bush, agrees. “McCain’s going to be put into a position where he has to play defense more than offense,” she says, “while Obama will be more offensive, but trying to control the offense.”



ILLUSTRATIONS BY MARY ANN SMITH

Labor Legislation

WHEN LILLY LEDBETTER STEPPED UP to the podium on the second night of the Democratic National Convention, the message was clear: Democrats are aggressively courting the support of working people—and their unions—in their battle to regain the White House.

Ledbetter became the symbol of gender-based pay inequity when the U.S. Supreme Court rejected her claim against Goodyear Tire & Rubber Co., which she said paid her less than her male counterparts for nearly two decades.

But the high court ruled that Ledbetter had filed her complaint after the statute of limitations expired because the company's original decision on her pay—perpetuated through the years—had occurred many years earlier. That decision fueled a move in Congress to pass the Lilly Ledbetter Fair Pay Act, which restarts the 180-day time limit for filing a complaint each time an employee receives an unequal paycheck. The bill passed the House, but Senate Democrats couldn't muster enough votes to overcome a Republican filibuster.

Labor and employment legislation such as the Ledbetter Act presents a clear divide between Barack Obama, who has vocally supported a pro-union, pro-worker agenda in Congress, and John McCain, who has been silent on or opposed to those bills.

For example, while Obama returned to Washington during the heated presidential primary to vote to end the filibuster on the Ledbetter Act, McCain stayed on the campaign trail. When quizzed by reporters, he affirmed his support for equal pay but not the Ledbetter bill, adding, "This kind of legislation, as is typical of what's being proposed by my friends on the other side of the aisle, opens us up to lawsuits for all kinds of problems." He proposed more education and training for women as a better way to level the playing field.

The Ledbetter Act is one of about 30 Democratic-sponsored labor and employment bills awaiting the results of the November



election. Some, such as the Employee Free Choice Act (EFCA), are union-organizing tools, while others, such as the bills expanding coverage under the Family Medical Leave Act (FMLA), would apply equally to employers with no union activity. The fact that there are so many bills waiting for action, and the assumption by observers on both sides that the Democrats will increase their control of Congress—possibly to the point of being able to overturn vetoes if McCain is elected—means general counsel should gird for a new batch of labor and employment laws.

"My expectation is that if Obama is president, you will either see Obama pushing a lot of this labor legislation, or Congress pushing the bills and Obama signing them," says Candida Wolff, until recently a legislative adviser to President George W. Bush and now a partner at Hogan & Hartson. "And I think you will see them passed in the first 100 days. A lot of these labor and employment issues are freestanding bills already

passed [in the House], so you will see early movement. If it's McCain, it's going to be Congress pushing them and forcing McCain to veto them or to sign them."

Among the most contentious of the pending bills is EFCA. This bill, strongly opposed by business interests, requires certification of a union where 50 percent of the workers sign cards, eliminating the current secret ballot election process. It also requires mandatory arbitration if the two parties can't reach an initial contract in the first 120 days.

"The 800-pound gorilla is EFCA," says John Toner, of counsel at Seyfarth Shaw. "If passed in its current form, its impact would be dramatic. It would change the basic approach to labor relations, particularly with respect to union organizing."

Obama is an original co-sponsor of EFCA and has pledged to push for its passage. His opponent hasn't commented on it publicly.

"I have not heard McCain make a pronouncement on EFCA, but do I think he would veto that? I suspect he would," says



Fred McClure, managing partner of the Washington, D.C., office of Sonnenschein, Nath & Rosenthal and a legislative adviser to Presidents Ronald Reagan and George H.W. Bush.

“Do I think he would be able to sustain a veto? That would depend on the makeup of the Senate. On that one, I think you would have a mix of Republicans and Democrats supporting him on the veto—it depends on the part of the country they are from,” McClure says.

Because the composition of the Senate is crucial to the fate of EFCA, the legislation has become a major issue in Senate campaigns in states including Maine and Massachusetts, according to Toner.

“The sophisticated GCs who are against more activist, labor-oriented agendas are much more focused on the Senate [than the White House], on whether we will get 60 [Democrats] or close enough so you only have to peel away a Republican here or there to actually get the legislation through,” says Joseph Andrew, former national chair of the Democratic National Committee and now a partner at Sonnenschein.

While political observers on both sides of the fence predict a big push in Congress to move long-stalled labor and employment legislation early next year, a continued economic downturn might delay parts of the Democratic agenda.

Obama, for example, would expand the FMLA to include employers with 25 or more employees—currently it applies to businesses with 50 or more—and would add leave for parents to participate in school activities.

“Increasing coverage under the FMLA is a big issue because it will be costly for the employer,” says Ellen Kearns, of counsel at Foley & Lardner. “I think it will be driven more by the economy than by anything else. If we are still in a down time, I can’t imagine they are going to saddle the employer with more cost.”

Still, Kearns expects a significant impact on the workplace from a frustrated Democratic Congress.

“Maybe what happens in Congress is that you have this big surge of legislation and then you have a little down time,” she says. “But I do think the surge is coming back. I do.” ★

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Climate Champions



JOHN MCCAIN AND BARACK OBAMA HAVE remarkably similar views on combating climate change. Both favor reducing greenhouse gas emissions throughout a market-based “cap and trade” system and investments in clean technologies. So the question is not whether McCain or Obama wants to take action against global warming; the question is how high up it will be on their legislative agendas. Because while the presidential candidates may talk about driving regulatory changes and budget allotments to address global warming, making that happen won’t be easy.

“While climate change is an issue that will attract a lot of attention, it is going to take longer to work through than people think because of the challenges of assembling a majority,” says Robert Kyle, a partner at Hogan & Hartson. Kyle was a senior official in the White House Office

of Management and Budget during the Clinton administration.

McCain has spoken out for action on climate change when many of his fellow Republicans opposed it. He made implementation of a carbon cap and trade system a major theme of his campaign—pledging to reduce carbon emissions to 1990 levels by 2020 and to 60 percent below 1990 levels by 2050. His intention to move toward eliminating carbon emissions is written into the 2008 GOP platform. But the challenge of bringing along conservatives in his party was highlighted when he picked Alaska Gov. Sarah Palin as his running mate. A few days later, Newsmax.com quoted Palin as doubting whether global warming is caused by human activity.

“McCain is kind of on the perimeter of where his party is [on global warming],” says Candida Wolff, a partner at Hogan & Hartson and the former assistant to President George W. Bush for legislative affairs. “McCain’s challenge is keeping his party with him or viewing it as an opportunity to work across the aisle to get reforms that he believes are necessary through.”

For his part, Obama matches McCain’s goal for 2020 carbon emissions levels and raises him one—pledging to use a cap and trade program to reduce emissions by 80 percent below 1990 levels by 2050. Another difference is Obama would auction off 100 percent of the emission allowances, investing the proceeds in renewable energy projects. McCain initially would allot allowances to businesses without charge, though the permits “will eventually be auctioned to support the development of advanced technologies,” according to McCain’s Web site.

“These are not just incidental differences,” says Howard Learner, who is advising Obama on environmental policy. He points to Obama’s tougher 2050

emissions goal. “These are fundamental differences on reducing carbon dioxide—whether we auction off permits to create a level playing field and use the revenues to invest in renewable energy or, as Sen. McCain suggests, give them away.”

But some Washington observers dismiss such differences as insignificant compared to the larger issue of whether any climate change program will be advanced.

“The wild card is the economy and whether that stops everything, because that’s the major issue,” Kyle says.

“The economics will drive a lot of it,” agrees Wolff. “[The new president] will have to look at all the issues that need to be addressed and figure out in his own mind when in a four-year period he wants to start moving them and which ones make sense to move sooner rather than later. The big issues like the environment take an inordinate amount of time, and you can only move so many of them in a Congress because you can’t put enough political capital into too many issues.”

Fred McClure, legislative adviser to Presidents George H.W. Bush and Ronald Reagan and managing partner of Sonnenschein, Nath & Rosenthal’s Washington, D.C., office, agrees that new presidents have to prioritize. “Is health care more important than climate change because they can’t have it all? Or is it more important to do energy? And then you have to think about the little event going on over in Iraq, and being able to continue to pay for that.”

But former Michigan Gov. James Blanchard, a delegate to the 2008 Democratic National Convention and a partner at DLA Piper, sees these big issues affecting business as largely nonpartisan.

“No matter who is president there will be action on health care, and no matter who is president there will be serious action on climate change,” Blanchard says. ★

Border Battles



IN THE PAST TWO YEARS, FEDERAL AGENTS ARRESTED NEARLY 200 business owners, managers and supervisors on criminal charges for allegedly employing undocumented workers. Industries dependent on low-wage workers—such as agriculture, hospitality, landscaping and food processing—face a diminishing labor pool, increased compliance costs and heightened liability due to the stepped up workplace enforcement. And even high-tech employers share the pain, frustrated by inadequate numbers of H-1B visas to meet their need for highly skilled employees.

Yet except when addressing groups of Hispanic voters, immigration reform is rarely on the lips of the two presidential candidates.

For one thing, it is a politically explosive issue, with immigrants taking to the streets by the tens of thousands to assert the need for change, while a substantial portion of the American public remains convinced that immigration reform will foster terrorism and crime.

For another, it's not a topic on which John McCain and Barack Obama can clearly differentiate themselves. On one of the most divisive political issues of the 21st century, the two candidates are almost totally aligned. Both have advocated for comprehensive immigration reform that would allow temporary workers to enter the country legally and illegal workers already here to become citizens after learning English and paying a fine.

In fact, in the face of strong opposition from his own party, McCain introduced immigration reform legislation with Sen. Edward Kennedy, D-Mass., in 2005, a role that cost him support during the GOP primary. Ultimately, Congress reached an impasse on the issue.

"This has been a big issue for McCain and one that has defined him in some instances and made him vulnerable early in

the primary process," says Fred McClure, a managing partner of Sonnenschein, Nath & Rosenthal's Washington, D.C. office, and a legislative adviser to Presidents Ronald Reagan and George H.W. Bush. "John has some pretty strong views on immigration, and he reached across the aisle."

For his part, Obama signed on as a co-sponsor of the McCain-Kennedy bill and asserted on the Senate floor that "the time to fix our broken immigration system is now." Even though President George W. Bush also tried unsuccessfully to push immigration reform, Democrats are perceived to be more amenable than the GOP.

"When you talk to general counsel about immigration reform, on the top of their agenda is, 'How will I avoid liability? How will this cost less?'" says Joseph Andrew, former national chair of the Democratic National Committee and a partner at Sonnenschein. "In the long run, this is a big winning issue for the Democrats [with the business community]. It helps Obama because the perception is that McCain is for it but can never get it through his own party."

But if employers are expecting immediate relief from Immigration and Customs Enforcement scrutiny under a new administration, they can think again—regardless of who wins the election. Both McCain and Obama recognize the political need to couple a plan that allows more immigrants to enter and stay in the country with strong border and employer enforcement programs.

McCain learned a lesson from the failure of his immigration reform bill three years ago. His Web site says his top priorities will be border security and an improved electronic employment verification system to "identify and aggressively prosecute employers that continue to hire illegal immigrants."

Obama's Web site cites the need for "tough, practical" reforms that include "stronger enforcement at the border and in the workplace." He has co-sponsored legislation to create an improved employment verification system.

Candida Wolff, a partner at Hogan & Hartson, handled President Bush's unsuccessful immigration reform effort as his assistant for legislative affairs. She thinks a continued short-term squeeze on employers is needed to create the kind of national crisis that will force Congress to act.

"The question for each candidate is, how are they going to handle the enforcement issue? What is their Homeland Security secretary going to do?" Wolff says. "I think the lesson from the last time around is that they are going to have to keep it fairly tight in terms of border enforcement and enforcement on employers, because it takes a crisis to drive the politics. Until the pain is really felt, the politics don't change on culture issues." ★

Liability in Limbo

WHEN IT COMES TO HOW THE ELECTION COULD SHAPE TORT reform, the consensus is that the in-house bar dodged a major bullet when former trial lawyer John Edwards withdrew from the Democratic primaries. When he dropped out, the debate over whether Congress should impose more controls on frivolous lawsuits to relieve liability on business—or roll back current ones in order to protect consumers—virtually disappeared from the political radar screen.



The Republicans have dropped tort reform from their agenda this year, and it was never high on John McCain's list of priorities, according to Fred McClure, managing partner of the Washington, D.C., office of Sonnenschein, Nath & Rosenthal and a legislative adviser to Presidents George H.W. Bush and Ronald Reagan. "[Tort reform is] kind of a Republican issue, but not necessarily a McCain issue," he says.

McCain did, however, work with the American Tort Reform Association (ATRA) in 1994 to write and pass the General Aviation Revitalization Act, which limited malpractice suits against aircraft manufacturers.

"McCain supported it, he was diligent and we worked with him from day one to the day it went to President Clinton," says Victor Schwartz, general counsel of ATRA. "He was very strong and very helpful on that bill."

McCain spoke in the Republican primaries against "frivolous lawsuits and excessive damage awards," supporting award caps and bemoaning the practice of defensive medicine. But, Schwartz says, tort reform hasn't been important to McCain in the general election, in contrast to President George W. Bush, who pushed it as a priority when he ran for office.

"[McCain] has not been a consistent supporter of all tort

reform efforts and really has not shown a huge interest in the subject," Schwartz says. "McCain is not a negative on [tort] reform, but he has other priorities."

Obama also seems to have other priorities, and the record he does have on tort reform is mixed. One of his top advisers, Michael Strautmanis, used to handle congressional relations for the Association of Trial Lawyers of America, now known as the American Association for Justice. That group threw its support behind Obama following Edwards' withdrawal, holding a fundraiser for the Democratic nominee.

"All things considered, he's going to be empathetic to the trial lawyer point of view, and more importantly, they'll have access [to him]," Schwartz says. That could put Obama under pressure to roll back some tort reform legislation passed in recent years.

On the other hand, Obama has shown moderation on the issue. As a U.S. senator, he was among the minority of Democrats to support the U.S. Chamber of Commerce-backed Class Action Fairness Act, which made it more difficult to bring class actions.

In 2006, Obama introduced legislation that tackled the medical liability problem by focusing on error reduction. At the time he criticized the current tort system for jeopardizing patient safety by creating an "intimidating liability environment." (The bill died in committee.) And capping liability in medical malpractice cases is one area where tort reform may become an election issue.

"Where you will see some tort reform issues surface is in the debate over health care reform in terms of the medical malpractice issue," says Thomas Boyd, co-chair of the government affairs practice group at DLA Piper. He served in the Justice Department under Presidents George H.W. Bush and Ronald Reagan. Boyd says tort reform is much more likely in a McCain administration than an Obama administration "because historically the Democratic Party is much more likely to side with the trial lawyers."

But Obama's writings from his days as a professor at the University of Chicago Law School have reassured general counsel, who "found many things to like in them," says Joseph Andrew, a partner at Sonnenschein and former national chair of the Democratic National Committee.

"The trial lawyers are nervous about Obama because of his history," he says. "That has allowed GCs to say, 'Here's a Democrat that maybe I can deal with on tort reform issues.'" ★

To read more about the candidates' views, visit InsideCounsel.com.



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Judicial Constraints



BOTH BARACK OBAMA AND JOHN MCCAIN LIKE TO CAST themselves as conciliators—people who can work across the aisle to make things happen in Congress.

Whoever ends up in the White House will test that peace-maker quality when they present nominees to the federal district, circuit and Supreme Courts. McCain will likely try to appoint strict constructionists, and Obama is likely to pick judicial activists. But regardless of the nominee, the president will need the wisdom of Solomon to win his or her confirmation. That's because the stalemate that developed between Congress and the Bush White House has become a test of wills.

"There is enough bitterness back and forth that it's like the Hatfields and the McCoys," says Robert Kyle, a partner at Hogan & Hartson. Kyle was a senior official in the White House under President Clinton. "It's now gotten so bad that nobody wants to stop the fighting because they remember the last time."

With crucial seats expected to open up on the Supreme Court, judicial selection and confirmation has heightened importance. Justices John Paul Stevens, 88, and Ruth Bader Ginsburg, 75, are expected to retire in the next four years. The federal district and circuit courts have vacancies as well.

Both candidates have been clear about the types of judges they are looking for.

At a May campaign stop, McCain said, "The moral authority of our judiciary depends on judicial self-restraint, but this authority quickly vanishes when a court presumes to make law instead of apply it." McCain's Web site states he would oppose "liberal judicial activists" in matters dealing with reproductive rights and the definition of marriage. And asked in August at a Saddleback Church forum in California which Supreme Court justices he would not have nominated, he cited the court's so-

called liberal branch: Justices Stephen Breyer, David Souter, Stevens and Ginsburg.

Obama does not discuss judicial philosophy on his Web site but at a July 2007 Planned Parenthood conference he told listeners, "We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old. And that's the criteria by which I'm going to be selecting my judges." At the Saddleback Church forum, he said he would not have nominated Justice Clarence Thomas because he wasn't "a strong enough jurist or legal thinker at the time." Justice Antonin Scalia also made his list, with Obama conceding that the two "just disagree."

While the candidates' judicial choices may be at polar ends of the debate over social issues such as abortion, that may have relatively little effect on business cases. "On business issues [McCain and Obama nominees] probably wouldn't be so much different," says Jeffrey Sarles, co-leader of Mayer Brown's Supreme Court and appellate group. "If you look at some of the Clinton appointees like Justices Breyer and Ginsburg, they often bloc with the more conservative judges on those issues."

And the challenge of getting nominees confirmed will cause either candidate to pick relative moderates.

"The President is going to have to figure out a way to come up with a candidate that will pass muster based on the makeup of the senate after this election. He's got to get someone who can garner at least 60 votes," says Fred McClure, who handled the nominations of Justices Scalia, Souter and Thomas as a legislative adviser to former Presidents Ronald Reagan and George H. W. Bush. McClure is now managing partner of the Washington, D.C., office of Sonnenschein, Nath & Rosenthal.

Winning confirmation also will mean giving senators—some of whom think they should name judges for federal courts in their states—a bigger say than the Bush administration did.

It's worth remembering that McCain was a leader in organizing the "Gang of 14," the bipartisan coalition of senators who banded together in 2005 to compromise on contentious judicial nominations. Obama also promises to work with both parties to move nominations along.

"Both of them have talked about ... wanting to get past some of the fights of today," says Stuart M. Benjamin, professor at Duke University School of Law. "Obama or McCain could try to bring back nominating commissions—which Jimmy Carter had—but more likely will simply try to engage in more and broader consultation than Bush has. That lets more people give input on [nominees] who have some level of acceptability to some reasonably wide-ranging group of people." ★