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Proposed Amendments to the Equal Pay Act Could Have Far Reaching Effects

By Bethany C. McCurdy, Esq.

In 1963, President Kennedy signed the Equal Pay Act ("EPA") into law. At the time it was estimated that women earned an average of $.59 to every dollar earned by a man. Since the enactment of the EPA, that number has changed to approximately $.79 for every dollar earned. While the gap has narrowed significantly, the issue of pay disparity has recently resurfaced in Congress with the introduction and passage of several bills.

In January 2009, President Obama signed the Lilly Ledbetter Fair Pay Act ("Ledbetter Act") into law. One of the most significant aspects of the Ledbetter Act was that it extended the statute of limitations for filing a wage discrimination claim. Shortly before the enactment of the Ledbetter Act, the Paycheck Fairness Act (H.R.12) was passed by the House of Representatives and taken under consideration by committee in the Senate. On April 28, 2009, an additional bill aimed at equal pay, the Fair Pay Act of 2009 (H.R.2151/S.904), was reintroduced to both the House and Senate. It has not been voted upon yet by either house of Congress, but is also under consideration in both.

Both the Paycheck Fairness Act ("PFA") and the Fair Pay Act ("FPA") introduce additional concepts into the equal pay arena by amending the EPA. One of the more significant outcomes of both the FPA and the PFA could be their effect on the basic way equal pay claims are analyzed. Currently, an employer may defend a pay discrimination claim under the EPA by showing that a plaintiff is not performing work that is substantially equal to that of those employees of the opposite sex who are alleged to be paid more. What qualifies as substantially equal work is a factual analysis, but has generally been interpreted as requiring that the jobs are substantially the same, including that they require equal skill, effort and responsibility and are performed under similar working conditions. It is this part of the analysis where the FPA would have the greatest impact.

As proposed, the FPA would require employers to conduct a "comparable worth" analysis when examining how it pays and values certain groups of employees in addition to the other factors that are currently considered. Specifically, the FPA includes a provision that would prohibit employers from paying different wages to its employees even if the jobs performed are "dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions." The bill also targets jobs that are "dominated" by one particular group, be it sex, race or national origin.

If the FPA passes, it is difficult to predict how this section would be interpreted; however, as written it could mean that two groups of employees, even if they perform completely different tasks (for example a grounds crew who performs landscaping and maintenance and spends a majority of time outdoors versus clerical staff who works indoors), could be considered comparable for purposes of the EPA.

In addition to the comparable worth analysis, another potentially significant change is the modification of the affirmative defenses available to employers. Currently, under the EPA, there are four affirmative defenses employers may assert to justify pay differentials among its employees: seniority, merit, quantity or quality of production, or any factor other than sex. 29 U.S.C. 206 (d). It is the broad "any factor other than sex" defense that would be affected by the PFA. This defense has been referred to as a "catch-all" and has previously provided employers fairly wide latitude when defending an EPA claim.

The PFA proposes that this defense be more strictly defined and could potentially foreclose many defenses that have been asserted previously. Specifically, in order to avail themselves of the affirmative defense, employers would be required to show that the "other factor" is not based upon or derived from any sex-based difference in compensation, is job-related to the position in question, and is consistent with business necessity.

Also included in both the FPA and the PFA are provisions that, even if an employer has successfully offered a defense to a claim of pay discrimination, the employee may still prevail if he or she shows that the employer could accomplish the same business

purpose without a disparity in pay, and that the employer has refused to adopt the alternative practice.

In addition to the above, other significant concepts included in the proposed bills are as follows:

Fair Pay Act

- Extending coverage of the EPA to prohibit wage discrimination on the basis of national origin and race in addition to sex; and
- Requiring employers to report to the EEOC and publicly disclose job categories and pay scales.

Paycheck Fairness Act

- Providing enhanced remedies to prevailing plaintiffs and including the recovery of both compensatory and punitive damages;
- Expressly prohibiting retaliation against an employee who discloses or otherwise discusses his or her wages with other employees;
- Providing that class actions will automatically include class members unless they expressly "opt out" of the class; and
- Expanding the "establishment" or physical location where comparable employees work. Currently, it is generally limited to a single facility and would expand to facilities in the same county or political subdivision. Note that the FPA does not include similar language.

It is important to note that while neither bill has been passed, with the momentum built by the Ledbetter case and the renewed interest in the equal pay concept, employers should remain aware of these potential changes and how they could affect their pay structures, policies and practices.

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