Paycheck Fairness Act May Become Reality in "Lame Duck" Senate Session

A vote on the Paycheck Fairness Act (reintroduced in the Senate on September 14, 2010 and re-designated as S. 3772, formerly S. 182, 11th Cong. (2010)), could occur as early as next Wednesday, November 17, 2010. By reintroducing a new version of the Paycheck Fairness Act, Senate Majority Leader Harry Reid, D-Nevada, hoped to revive the gender-based pay equity legislation that has been stalled in committee for almost 18 months. The House of Representatives passed its version of the legislation on January 9, 2009.

Speculation has increased since election night about Democratic Party priorities for the "lame duck" Congressional session spanning the brief period between the election and the end of the year. The Republican party picked up 60 House seats and will take control of the House in January. Democrats will retain control of the Senate, but with a reduced majority. President Obama has been clear that equal pay issues are priorities for his administration.

If passed, the Paycheck Fairness Act would alter the landscape of equal pay, similar to the way in which the Civil Rights Restoration Act of 1991 altered the contours of Title VII. In addition to strengthening enforcement and augmenting remedies, the new legislation would make substantive changes by eliminating employer defenses and altering burdens of proof. It also facilitates class action litigation against employers.

- **Punitive Damages.** Unlike Title VII, where punitive damages are capped based on employer size up to a maximum of $300,000 compensatory and punitive damages under the proposed Paycheck Fairness Act would be unlimited. Punitive damages must be supported by findings of "malice" or "reckless indifference."

- **Definition of "establishment."** The Equal Pay Act would require equal pay for men and women who perform substantially equal work in the same establishment. The new law covers pay disparities between employees working not only in the same physical location, but between employees working in the same "county of similar subdivision of a state." This change has implications for employers with more than one location in a single county. Pay for employees at a corporate headquarters may need to line up with pay grades for a call center or retail operation in the same county. Employees working in a less expensive suburb could have their compensation compared to the compensation of employees working in a more expensive urban area in the same county.

- **Opt-out class actions.** Currently under the Equal Pay Act, FLSA-style opt-in class actions are the rule. Employees not opting in are not bound by the judgment. Under the new legislation, any class action for gender-based pay discrimination may be maintained as an opt-out class action under Rule 23 of the Federal Rules of Civil Procedure, meaning that class

members are part of the litigation unless they affirmatively opt-out. This typically translates into larger class sizes, making the cases more attractive to plaintiff class action attorneys.

- **Disclosure of confidential wage information**. Currently, under the National Labor Relations Act and some state laws, employees may not be disciplined for discussing their wages. The new legislation would broaden these protections, encouraging sharing of compensation information and creating a remedy for employees who suffer an adverse employment action for inquiring about, discussing or disclosing compensation information. The new legislation also would require the EEOC to collect compensation data, and it provides little guidance or assurance about whether such data would remain confidential and be protected from disclosure to the public and competitors.

- **Restricted/Eliminated Affirmative Defenses.** Current Equal Pay Act affirmative defenses include proof that the pay differential is based on a seniority system, merit system, quality or quantity of production, or factors other than sex. Under the new legislation, "factors other than sex" would be replaced with a bona fide factor other than sex if business necessity demands it and no alternative employment practice will serve the same business purpose. "Bona fide factor other than sex" means, for example, education, training or experience, but must be job-related. Subjective factors and practical factors such as prior salary history would not satisfy the new standard. Even objective differences in qualifications, such as a college degree, could be rejected as a basis for increased compensation unless enhanced compensation for college graduates is justified by business necessity. These standards could result in more frequent denials of summary judgment for employers, and result in protracted wrangling over whether a particular qualification is a "business necessity" or whether another business practice would be just as effective.

Even if legislative effort on passage of the Equal Pay Act ultimately stalls, the expectation is that federal agencies, largely unaffected by election results, will continue or increase their regulatory efforts in this area. Both the OFCCP and the EEOC have already stepped up enforcement efforts on pay disparity issues over the last year, and many expect that over the next two years, these and other federal agencies will seek to advance President Obama's labor and employment agenda through enforcement and rule-making.

For example, the OFCCP recently announced increased focus on pay inequality issues. The agency is in the process of rescinding its pay equity guidance issued in 2006 and will be issuing an Advance Notice of Proposed Rule Making in the new year. Click *here* to view a previous alert on "OFCCP Takes Steps To Rescind Compensation Guidelines." This week OFCCP internally announced that it would cease inspecting I-9 forms during audits so that it could focus its audit activites on its key objectives such as pay equity. Click here to read the "OFCCP Inspection of I-9s: A Thing of the Past."

What Should Employers Do?

Employers should watch the developing legislation and agency agendas closely. In light of the increased attention to equal pay issues and increased enforcement by federal agencies, employers would be wise to review their pay practices in an attorney-client privileged self-audit. Pay discrimination violations prosecuted by the federal government can include a third party imposing new and different pay practices in your organization, backpay and interest for two or three years, and other remedies.

By identifying and remedying any pay inequities that cannot be supported by legitimate, non-discriminatory factors and considerations, employers will be in a stronger position to achieve compliance and to minimize potential risks under current law, as well as be better prepared to address future developments in the law. As human resources and in-house counsel assess ways to manage and mitigate risk in these uncertain economic times, a pay equity analysis is one of the most valuable ways to invest limited resources. Moreover, if an employer finds an area of vulnerability, it is critical to conduct these studies under attorney-client privilege.

Seyfarth Shaw has a wealth of experience assisting clients in conducting privileged pay practice self-audits and pay equity analyses. Please contact your Seyfarth counsel or any Labor and Employment attorney on our website for more information about this important risk management and mitigation assistance.

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