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Management Alert

Equal Pay for Equal Work Has Been the Law Since 1963. The Paycheck Fairness Act Significantly Impacts Compensation Practices By Requiring Equal Pay for All Individuals In a Job Regardless of Enhanced Qualifications and Other Business-Related Factors.

By Paul H. Kehoe and Lawrence Lorber

On April 9, 2014, the Paycheck Fairness Act (S. 2199) ("PFA"), a bill amending the Equal Pay Act ("EPA"), failed to receive the 60 votes necessary to move the bill to the Senate floor for debate. Senate Majority Leader Reid pledged to hold additional votes on the PFA in the future. The day before the Senate vote, President Obama held a White House ceremony where he issued an Executive Order requiring regulations to increase transparency regarding compensation data of government contractor employees and a directive to the Secretary of Labor to proceed with the regulatory process to have the OFCCP require more compensation data from government contractors. A link to the Seyfarth's One Minute Memo on this development is here. There has been much discussion both in the legal and non-legal press regarding the impact of the PFA if it were to become law. The below discussion describes various important legal difficulties presented by the PFA.

As drafted, the PFA would have major implications for all employers' compensation practices, ultimately making it nearly impossible for employers to defend against different pay rates for individuals in the same job, even when those differences are based on enhanced qualifications such as training, experience, education or market forces. This week's vote followed a hearing last week before the U.S. Senate Health, Education, Labor and Pensions (HELP) Committee chaired by Senator Mikulski. Seyfarth's Camille Olson testified on behalf of the U.S. Chamber of Commerce as the only employer advocate. Linked is Ms. Olson's testimony and a supplementary statement also a part of the Senate Record.

The PFA would impact employers in significant ways. If passed, the PFA would (1) effectively eliminate the factor other than sex defense, (2) impose unlimited compensatory and punitive damages, upon all employers, regardless of size, and without a showing of intentional sex discrimination; and (3) provide a more attorney-friendly class action device, among other amendments.

I. The PFA Would Effectively Eliminate The "Factor Other Than Sex" Defense

Currently under the EPA, an employer must prove that any wage differential between workers is justified, most commonly by a "factor other than sex." Five Circuit Courts of Appeals have held that the "factor other than sex" defense must be business-related. Three others have held that the "factor other than sex" must be sex-neutral and uniformly-applied. Proponents of the PFA assert that these three circuits have created a "gaping loophole" in the EPA, and therefore, the PFA is necessary to close an alleged "loophole". This view misreads or misunderstands what those courts have held.

The existing factor other than sex defense is no "loophole". To be sure the defense is broad, but it has limits and safeguards. For example, the very cases that PFA proponents cite make explicit that the factor must be "bona fide" and go on to warn that the factor other than sex defense must be applied in good faith and was not intended to create a "convenient escape"

from liability. There is no need to add to an employer's burden by requiring heightened standards of business necessity.

Yet, the PFA rewrites the "factor other than sex" defense and represents a radical departure from all current interpretations of the EPA. The PFA would adopt a modified version of the "job-related and consistent with business necessity" test now limited to Title VII disparate impact claims to each and every individual pay decision that an employer makes. Under that statutory scheme, an employer would be required to prove for each wage decision that the ultimate business goal achieved by the higher pay is significantly correlated with the job's requirements and bears a demonstrable relationship to the successful performance of the job. Even then, the employer remains liable if a plaintiff can show an alternative employment practice would serve the same business purpose. In addition, an employer would be required to prove that a pay differential was justified at the time that the decision was made.

In practice, the PFA would make it virtually impossible for employers to match competing offers for superior talent where an individual of the opposite sex in the same job would be making less or to offer additional compensation for qualifications beyond what is minimally required for the job. Finally, if an employer had the financial ability to "round up" all employees' wage rates qualifies as an "alternative practice", then any pay differential would likely trigger automatic wage increases for all workers in a particular job category, regardless of variations in education, training or experience.

II. The PFA Would Increase Penalties for Equal Pay Violations

Currently under the EPA, employers are liable for back pay, front pay, liquidated damages, interest and attorneys' fees. If enacted, the PFA permits unlimited compensatory and punitive damages, in addition to the currently available damages. Unlike Title VII, no statutory caps based on the size of the employer exist under the PFA.

Notably, the EPA is a remedial, strict liability statute where a worker does not have to show intent to recover damages. Under all other employment antidiscrimination laws, compensatory and punitive damages are only available once a worker has proven intent. Even then, those other laws limit these type of damages. Perversely, the PFA not only requires no showing of intentional discrimination, it contains no limits on punitive and compensatory damages.

III. The PFA Creates a More Plaintiff-Friendly Class Action Mechanism

Currently under the EPA, collective actions have a relatively lower test for class certification, but require plaintiffs to opt-in to an action by providing written notice to the court. The PFA allows class actions under Federal Rule of Civil Procedure 23, which covers all alleged victims unless they opt-out of the class. As a result of larger classes under Rule 23, plaintiffs' trial lawyers will have increased bargaining power in pay discrimination claims regardless of the merits or the employees' interest in participation.

Conclusion

If enacted, employers would face a drastically changed landscape regarding pay discrimination compensation decisions as well as litigation over determinations to pay individuals differently based upon a uniform application of bona fide non-sex related factors. While it is not likely that the PFA will pass in the short-term, the issue will remain in the forefront during this, and coming, election years.

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