

# POLICY MATTERS

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**POWADA.** On May 21, the House Committee on Education and Labor held a hearing on the "[Protecting Older Workers Against Discrimination Act](#)" (POWADA, H.R. 1230, S. 485). In a nutshell, this bill would reverse the Supreme Court's Gross decision concerning so-called "mixed motive" cases in which the Court held that the Age Discrimination in Employment Act has a "but for" standard which requires a plaintiff to show that age was the motivating factor in the employer's decision in question as opposed to merely a motivating factor, i.e. one of many. The basic justification for this change is that Title VII of the 1964 Civil Rights Act takes a different approach in these "mixed motive" cases by providing that if a plaintiff shows that an improper factor was a factor in the decision, the plaintiff can prevail even if that factor was not the primary one driving the employer's decision in the underlying personnel action. However, remedies in such a case are limited to injunctive relief and attorney's fees. This structure was enacted through the 1991 Civil Rights Act amendments to Title VII, and proponents of POWADA argue they are simply asking for equivalent treatment for older workers. Similar changes are made to the Americans with Disabilities Act and the Rehabilitation Act. Further, this mixed motive analysis would also be applied to retaliation cases. The bill, which has bipartisan support, is strongly supported by the AARP. Stay tuned for further developments as the business community develops its position.

**Equality Act.** On May 17, the House passed the [Equality Act](#) (H.R. 5), 236-173, with 8 Republicans in support. As previously reported, this bill would amend a number of civil rights laws by adding sexual orientation and gender identity as additional protected categories. Its precursor in the employment area was the Employment Non-Discrimination Act (ENDA), although ENDA contains a number of limiting provisions not found in the employment provisions of the Equality Act. The bill is broadly supported by the business community but has a very uncertain future in the Senate where it would have to be marked up by the Senate Judiciary Committee. Opposition to the bill is not focused on the employment area but rather on its potential effects on private areas such as bathrooms and dressing rooms, male and female gender separations in sports, and religious freedom. Notably, three cases raising the question of whether Title VII of the 1964 Civil Rights Act covers sexual orientation and/or transgender workers in employment have been recently teed up for the Supreme Court to decide.

**Colorado Enacts Tough Pay Equity Law.** This week, Colorado Governor Polis signed one of the most demanding pay equity laws in the nation. Colorado will require employers to provide all employees simultaneous notification of job opportunities and mandates inclusion of the applicable pay scale on all job postings. The Equal Pay for Equal Work Act also includes a salary history ban, applies based on gender identity, and provides for liquidated damages for successful claims. There is a partial safe harbor provision for employers who conduct pay analyses. For more on the law, which applies to all employers employing any employees in Colorado and goes into effect January 1, 2021, see Seyfarth's [Client Alert](#).

**DOL's Spring 2019 Agenda Released.** Twice a year, the Executive Branch prepares the Unified Agenda and Regulatory Plan, known less formally as the "Reg Agenda." This year, the Trump Administration released its Spring 2019 Reg Agenda, in which it details its regulatory priorities for the near term, as well as long-term actions. The Department of Labor's [Reg Agenda](#) contains many familiar faces: apprenticeships, the H-visa programs, joint employment, the overtime salary threshold increase, tipped employee regulations, and a wide variety of OSHA initiatives make repeat appearances on the agenda. The Department's long-term [action list](#)—which identifies regulatory matters for which the Department does not have specific regulatory actions planned in the next 12 months -- contains a number of new initiatives, including proposed changes to several key Wage & Hour Division regulations: fluctuating workweek, section 7(i)/commissioned employees, and section 3(m) treatment of board, lodging, and "other facilities" as wages. The latter two provisions have not been meaningfully addressed in more than 40 years.

**NLRB Stalling Out on Joint Employment?** The NLRB's [long-term agenda](#) includes its rulemaking on joint employment — with the timing of a next action listed as "to be determined" — as well as its anticipated revisions to representation case rules. Apparently jumping to the front of the active [Reg Agenda](#) line are the Board's proposed rule on whether students who perform services at a private college or university in connection with their studies are "employees" under the NLRA and its proposed rule on access to an employer's private property. Both proposals are expected in September 2019.

**EEOC Plans Wellness Regs for December.** The lack of a quorum has hindered the EEOC for a couple of years now. Its [current agenda](#) includes a number of procedural and technical proposals, as well as a few related to government employees. And, of course, the EEOC continues to list on its agenda amendments to the ADA and GINA regulations related to incentives and employer-sponsored wellness plans. In August 2017, the EEOC was ordered—in litigation that is still pending-- to reconsider its previous iteration of the regulations. The target date for a new proposal is December 2019, a slight delay from the last anticipated date of June 2019, but one which was necessary due to the lack of a quorum of commissioners.

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