

THOUGHT LEADERSHIP

LEGAL UPDATES

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Services

Labor & Employment
Pay Equity

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Pay Equity Cases—the Next Wave of Major Litigation

Over the last decade, the litigation of choice for many plaintiffs' attorneys has been Wage and Hour collective actions. Recent commentary suggests that most of the "low-hanging fruit" cases have been filed and resolved, and that we may see a trend toward pay equity cases, especially if the Paycheck Fairness Act legislation, currently under consideration in Congress, becomes the law of the land.

Regardless of whether the Paycheck Fairness Act becomes law, it is clear that pay equity is a high priority of the Administration; it was prominently featured in the President's State of the Union Address this year and his creation of the National Equal Pay Enforcement Task Force and Equal Pay Initiative that will coordinate federal agency equal pay enforcement activities. The federal budget has increased resources for the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor to enforce current laws, including the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, as amended, both of which prohibit gender discrimination in terms of compensation.

When the Equal Pay Act became law in 1963, the median wage of women was 59 percent that of men. By 2007, that gap had closed to 78 percent. While statisticians can argue about the relevance of these unrefined data, the gap remains large enough to be the focus of additional legislation and focused enforcement and already has the attention of the EEOC and plaintiffs' bar.

The House of Representatives passed a Paycheck Fairness bill in conjunction with the Lilly Ledbetter Fair Pay Act in January 2009, but the Senate approved only the Ledbetter portion, which President Obama signed into law on January 30, 2009. On March 11, 2010, the Senate Health, Education, Labor and Pensions Committee held hearings on S. 182, the Paycheck Fairness Act. During testimony before that Committee, the acting Chair of the EEOC

testified that over a 13-year span ending in 2009, the EEOC received 30,312 charges alleging sex-based pay discrimination and the EEOC is presently in litigation on 14 cases involving wage discrimination. He also noted that the EEOC has recently increased its lawyer and investigative staff by 150 positions and has requested \$18 million in additional funding for enforcement in Fiscal Year 2011.

The OFCCP has likewise bolstered its enforcement capabilities with a goal of adding additional enforcement employees this year and will continue its focus on compensation discrimination. The Department of Labor has also announced that it will investigate the recipients of Recovery Act (American Reinvestment and Recovery Act) funds for compliance with federal labor and employment laws.

What This Means to You

Given the current political posturing in the United States Senate, it seems unlikely that the Paycheck Fairness Act will become law any time soon. However, all the signs are pointing to increased activity in agency enforcement and litigation in pay equity issues, especially those that are gender-based. An employer should give serious consideration to getting ahead of that curve by conducting audits of its workforce to determine whether problematic disparities exist that cannot be explained by legitimate and non-discriminatory reasons and take appropriate corrective action to remedy such imbalances. Any such audits should be conducted under the attorney-client privilege so that the audit conclusions and recommendations are not discoverable, should claims arise.

Contact Info

If you have any questions about this or other employment matters, please contact your Husch Blackwell Sanders attorney.

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