Congressional Committee Votes In Favor Of Pay Equity Law

Insights
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The House Committee on Education and Labor just voted in favor of the Paycheck Fairness Act (H.R. 7, S.270), which, if ultimately enacted, would amend federal wage and hour law "to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex, and for other reasons." The Paycheck Fairness Act, or PFA, notes that the Equal Pay Act (EPA) "has not worked as Congress originally intended," and concludes that "improvements and modifications to the law are necessary to ensure that the Act provides effective protection to those subject to pay discrimination on the basis of sex."

Statute Would Clarify Catchall Provision Of Pay Equity Law

In its current form, the EPA prohibits employers from paying employees less than other "similarly situated" employees (performing substantially equal work; requiring substantially equal skill, effort, and responsibility; under substantially similar working conditions) of the opposite sex, except where such payment is made based on (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, or (4) a differential based on any factor other than sex (also known as the "catchall" provision). The PFA would limit the catchall provision to apply only to "a ***bona fide factor*** other than sex, such as education, training, or experience" (which is how some, but not all, courts currently interpret it).

The PFA would further limit the catchall provision to circumstances where an employer can show such factor (1) "is not based on or derived from a sex-based differential in compensation," (2) "is job-related with respect to the position in question," (3) "is consistent with business necessity," and (4) "accounts for the entire differential in compensation at issue."

Moreover, if the employee can show an "alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt it," the PFA would provide that the catchall provision does not apply.

Anti-Retaliation Provisions Would Be Broadened

The PFA also would significantly broaden the anti-retaliation provisions of the Fair Labor Standard Act (FLSA). Whereas it now only applies, in pertinent part, where an employee "has filed a complaint or instituted or caused to be instituted any proceeding under or related to [the FLSA], or has testified or is about to testify in any such proceeding," the PFA would extend it to cover "any investigation, proceeding, hearing, or action under or related to this Act, including an investigation conducted by the employer."

The new anti-retaliation provision would also cover situations where an employee "has inquired about, discussed, or disclosed the wages of the employee or another." Finally, it also would prohibit an employer from prohibiting an employee from discussing or disclosing information about wages (unless the employee is responsible for safeguarding such information about other employees, such as payroll or HR, in which case, their disclosure can be limited in certain ways).

The Role Of Pay History Would Be Clarified

The PFA also would make it unlawful for an employer to (1) seek wage history information from current employees, (2) rely on wage history to determine whether to hire, or how much to pay, or (3) retaliate against an employee for exercising protected rights or opposing an illegal practice under the PFA. The PFA would certainly help to resolve the debate about this specific issue, which as recently as this week was further muddied by the U.S. Supreme Court.

Penalties associated with violations of this provision would include a civil penalty of $5,000 for the first offense, increased by $1,000 for each additional offense, not to exceed $10,000, and "special damages" not to exceed $10,000 plus attorneys' fees.

Miscellaneous

Notably, the PFA also would significantly enhance the potential damages for FLSA violations, including the potential for punitive damages where the employee can show the employer "acted with malice or reckless indifference."

The PFA also would call for the reinstatement of certain pay equity programs and pay equity data collection, which can be onerous for employers. Among other things, it would provide that the Office of Federal Contract Compliance Programs to ensure its employees use the "full range of investigatory tools" at their disposal and "implement a survey to collect compensation and other employment-related data (including hiring, termination, and promotion data) and designate not less than half of all nonconstruction contractor establishments each year to prepare and file such survey."

Where Do We Go From Here?

The February 26 House committee vote on the PFA fell along party lines, with Democrats predictably championing it, and Republicans arguing it will not solve the problem at issue. Those opposing the bill suggested it will only lead to more and more lawsuits of "questionable validity."

The PFA is not new; one form or another has been introduced consistently since the 1990's. While it is likely to be voted on favorably in the Democratic-controlled House, it is likely to stall in the Republican-controlled Senate. That said, as readers of this blog are aware, many of these same, or similar, provisions appear in many of the pay equity laws that have been popping up the states for a few years now, and it is likely only a matter of time before some further form of pay equity legislation is enacted on the federal level. We'll track this piece of legislation and provide updates, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date

information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our Pay Equity Practice Group.

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