

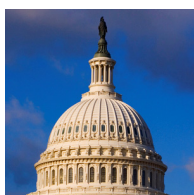
WASHINGTON LABOR & EMPLOYMENT WIRE

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The Washington, D.C., office of Akin Gump is pleased to present to its clients and friends the inaugural edition of its new *Washington Labor & Employment Wire*, a periodic newsletter exploring the busy intersection occupied by public policy, regulation and politics in the area of federal labor and employment law. In an era of divided government and with a presidential election cycle already in full gear, much is at stake for employers.

The *Washington Labor & Employment Wire* will contain several regular features, including the *Bill Tracker* section, which will provide updates on pending and new legislation in the House and Senate; *Hearings on the Hill*, which will summarize important labor and employment-related House and Senate hearings; and the *Agency Activity Alert* section, which will discuss key developments in the Executive Branch. In addition, we present a *Candidate Corner* feature that covers the positions of presidential candidates on labor and employment issues. In this issue, we feature Democratic contender John Edwards and Republican candidate Sen. John McCain.

HEARINGS ON THE HILL

HOUSE SUBCOMMITTEE HOLDS HEARING ON ARBITRATION FAIRNESS ACT OF 2007

On October 25, 2007, the House Judiciary Subcommittee on Commercial and Administrative Law held a hearing to consider the so-called Arbitration Fairness Act of 2007 (H.R.3010). This Act would amend the Federal Arbitration Act to invalidate any pre-dispute arbitration agreement requiring arbitration of an employment, consumer, or franchise dispute, or any dispute arising under any statute “intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.”

Testifying on behalf of the National Employment Lawyers Association, Cathy Ventrell-Monsees claimed that employees are often disadvantaged by arbitration because arbitrators frequently exhibit pro-employer bias, and “can, and frequently do, refuse to follow the law.” She also asserted that courts are overly deferential to arbitrators’ decisions and that arbitration can be costly for employees.

Catholic University Law Professor Peter Rutledge urged the subcommittee to wait until more complete empirical data on arbitration is available before “jettison[ing] the entire enterprise of pre-dispute arbitration agreements” based on problematic anecdotal evidence. Rutledge contended that several of the findings on which H.R.3010 is based are erroneous or are criticisms not unique to arbitration. He posited that eliminating pre-dispute arbitration agreements may disadvantage the very parties the bill is purportedly designed to protect by slowing down dispute resolution and increasing litigation costs for all parties involved. Rutledge disputed claims of arbitrator partiality, and theorized that data cited by defenders of H.R.3010 did not account for employers’ tendency to arbitrate only claims with a high likelihood of success, while settling claims that employees were more likely to win.

No further action has been taken in the House on H.R.3010. The Senate version of the bill, S.1782, was introduced by Sen. Feingold (D-WI) on July 12, 2007 and referred to the Committee on the Judiciary. H.R.3010 has 53 co-sponsors, while S.1782 has six co-sponsors.

SENATE HELP COMMITTEE HOLDS HEARING ON ADA RESTORATION ACT OF 2007

On November 15, 2007, the Senate Committee on Health, Education, Labor and Pensions (HELP) heard testimony from interested parties on the proposed ADA Restoration Act (S.1881), which seeks to “clarify” the factors used to determine whether an individual is disabled within the meaning of the Americans with Disabilities Act (ADA). The Committee received testimony from ADA proponents, disability rights activists, and a management attorney.

John D. Kemp, an attorney and disabilities activist, testified that the Supreme Court has “create[d] a bizarre legal scenario in which an employer can refuse to hire or terminate an individual expressly because of [his or her] disability, and then – when challenged – argue that the individual is not ‘disabled enough’ to fall within the protections of the ADA.”

Former U.S. Attorney General Dick Thornburgh also voiced his support for the proposed legislation. Thornburgh stated that the ADA’s intent and effectiveness has been curtailed by “judicial misinterpretation,” and urged Congress to restore the ADA’s “original intent and protections.”

Management lawyer Camille Olsen cautioned the Committee that the proposed Act would change “the focus of the ADA from whether an individual has a functional disability to whether the individual has an impairment,” thus expanding ADA coverage to encompass “almost any physical or mental impairment – no matter how minor or short-lived.” Olsen contended that, as currently drafted, the Act would not simply clarify the intent of the original ADA but rather would drastically alter core provisions.

S.1881 is still before the HELP Committee and has two co-sponsors. The House version of the legislation, H.R.3195, has 235 co-sponsors and is before several House committees and subcommittees.

SENATE HELP COMMITTEE HOLDS HEARING ON DOL NOMINEES; PROCEDURAL MOVE BY SENATE DEMOCRATS BLOCKS RECESS APPOINTMENTS

On November 1, 2007, the Senate Committee on Health, Education, Labor and Pensions (HELP) held a hearing to consider the nominations of Gregory Jacob to be Solicitor of Labor and Howard Radzely to be Deputy Secretary of Labor. Committee Democrats expressed displeasure with what they described as the “systematic underenforcement” of labor laws by the Bush Administration, but expressed preliminary support for both nominees.

Sen. Kennedy (D-MA), HELP Committee Chairman, called for increased enforcement in low wage industries affecting garment, agriculture and health care workers, specifically in the areas of Wage & Hour and Off-the-Clock compliance. Sen. Kennedy also called for increased protections for emergency workers and first responders, citing the Administration's suspension of the Davis-Bacon Act after Hurricane Katrina and its relaxation of the Occupational Safety and Health Act enforcement at Ground Zero and in post-Katrina New Orleans. Further, he urged action regarding issuance of voluntary ergonomics guidelines and the enforcement of Uniformed Services Employment and Reemployment Rights Act (USERRA) protections for employees on military duty.

Echoing Sen. Kennedy's disapproval of Department of Labor (DOL) priorities under the current Administration, Sen. Brown (D-OH) expressed concern at what he perceived to be the DOL's shift in focus since 2001. Contrasting budget reductions in Wage & Hour and OSHA enforcement over the last five years with an increase in funding of over 50 percent for the Office of Labor Management Standards (OLMS) in the same time period, Sen. Brown raised questions about the burden placed on voluntary union officials. After decades of relative non-enforcement, OLMS in recent years has stepped up enforcement of the Labor-Management Reporting and Disclosure Act, requiring reporting of payments to voluntary union officials through the LM-30 filing.

Speaking in favor of Labor Department initiatives and priorities, Committee Ranking Member Enzi (R-WI) praised the nominees and highlighted DOL efforts in implementing the recently-enacted Mine Improvement and New Emergency Response Act, as well as ERISA enforcement.

In response to questioning, both Radzely and Jacob committed to vigorous enforcement of worker protections and pledged to advance Department priorities. The Committee adjourned without taking action on the nominations.

Radzely currently serves as the Acting Deputy Secretary of Labor and previously served as Solicitor of Labor, as well as Deputy Solicitor and Acting Solicitor. Jacob is currently a Special Assistant to the President for Domestic Policy and previously served in the Department as Deputy Solicitor.

Senate Majority Leader Reid (D-NV) refused to adjourn the Senate for the planned two-week Thanksgiving break, instead scheduling biweekly pro forma sessions until Congress returns in early December. At these pro forma sessions, at least one Senator must briefly open the chamber for debate. Because the Senate officially remained in session, President Bush was unable to make recess appointments during the holiday period. The Senate is expected to adjourn again a few days before Christmas until mid-January, but Sen. Reid is reportedly threatening to continue scheduling pro forma sessions to block recess appointments.

AGENCY ACTIVITY ALERT

DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION

Wage and Hour Division Issues Three New Opinion Letters on Overtime Exemptions and Volunteer Compensation

The Wage and Hour Division (WHD) recently released and posted its first opinion letters since May 2007. The first two opinion letters construed the executive and professional overtime exemptions and the third opinion letter clarified how volunteers can receive limited compensation.

In its August 23, 2007 letter, the WHD determined that court reporters are not exempt from overtime under the Fair Labor Standards Act (FLSA). *See* DOL, Wage & Hour Div., Op. Letter 2007-2NA (Aug. 23, 2007). Court reporters do not qualify for the executive exemption because they do not supervise two or more full-time employees and they do not qualify for the professional exemption because their work does not require advanced knowledge “customarily acquired by a prolonged course of specialized intellectual instruction.” The WHD explained that “[w]ork that can be performed by employees with education and training that is less than a required bachelor’s degree in a particular discipline generally does not qualify as learned professional work under the regulations.”

In its September 17, 2007 letter, the WHD further refined the executive exemption by finding that field inspectors for a membership-based cattle producers association were exempt executives. *See* DOL, Wage & Hour Div., Op. Letter 2007-11 (Sept. 17, 2007). The association had requested guidance on whether its field inspectors, who oversee subordinate market inspectors, were non-exempt under 29 C.F.R. § 541.3(b)(1), which states that the overtime exemptions “do not apply to ... inspectors ... who perform work such as ... conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; ... preparing investigative reports; or other similar work.” The WHD stated that the field inspectors in question “differ from the inspectors described in § 541.3(b)(2), because the Field Inspectors’ primary duty is management of a customarily recognized department, not duties related to investigations.” The WHD emphasized the importance of the inspectors’ primary duty in making the determination.

Finally, on September 17, the WHD clarified what kind of compensation volunteer firefighters could receive under the FLSA. *See* DOL, Wage & Hour Div., Op. Letter 2007-3NA (Sept. 17, 2007). The WHD found several kinds of compensation valid, including: (1) tuition to pay for the Fire Academy and Fire School; and (2) life insurance, a disability policy, and a monthly contribution of \$100 to the state-created retirement fund. However, the WHD opined that a \$550 stipend for income lost from regular employment is probably invalid because “the purpose of this payment is specifically to compensate the firefighters for their lost days of paid work.” Additionally, the WHD expressed doubt as to whether a \$19.72 per call stipend, ostensibly paid to cover volunteers’ incidental costs, constitutes a “nominal payment” under the regulations. Under the WHD’s 20 percent rule, “the Department will presume the fee paid is nominal as long as it does not exceed 20 percent of what the public agency would otherwise pay to hire a full-time ... advisor for the same services.” However, the WHD could not apply the 20 percent rule to the firefighters because it did not have sufficient knowledge of what paid-firefighters received.

DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, AND U.S. CITIZENSHIP AND IMMIGRATION SERVICES

New I-9 Form Goes Into Effect on Nov. 7, 2007 with 30-Day Grace Period

On November 7, 2007, U.S. Citizenship and Immigration Services (USCIS) issued a revised Form I-9, *Employment Eligibility Verification*, and M-274, *Handbook for Employers, Instructions for Completing the Form I-9*. Employers must use the amended Form I-9 for all individuals hired on or after November 7, 2007. The Department of Homeland Security (DHS) published a Notice in the *Federal Register* on November 26, 2007, which provides a 30-day grace period for employers to transition to use of the new Form I-9. After December 26, 2007, employers who fail to use Form I-9 (Rev. 06/05/07) may be subject to all applicable penalties under section 274A of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324a, which is enforced by U.S. Immigration and Customs Enforcement (ICE).

The new Form I-9 makes changes to List A of the List of Acceptable Documents and advises employers that a new employee is not required to provide a social security number unless the employer participates in E-Verify. The new form and manual may be found at: <http://www.uscis.gov/files/form/I-9.pdf> and <http://www.uscis.gov/files/nativedocuments/m-274.pdf>. The Notice in the *Federal Register* may be found at: www.akingump.com/docs/publication/1065.pdf.

Agencies Enjoined from Implementing Safe-Harbor Procedures for Employers Who Receive a No-Match Letter

On October 10, 2007, a federal court issued a preliminary injunction in *AFL-CIO v. Chertoff*, Case No. 07-CV-4472 CRB (N.D. Cal.). The court enjoined the Department of Homeland Security and the Social Security Administration (SSA) from implementing the Final Rule entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." The new rule identifies the receipt of a no-match letter from the SSA as evidence that the employer had "constructive knowledge" that the employees listed in the letter were not authorized to work in the United States. As a result of the litigation, the SSA announced in November that no-match letters would not be sent out in 2007 and that it is unlikely any such letters would be sent out before Spring 2008.

On November 23, Acting Assistant Attorney General Jeffrey Bucholtz filed a motion to stay the proceedings in the case on the basis that "DHS intends to conduct additional rulemaking proceedings to address the issues raised by the Court." For instance, DHS plans to prepare a Regulatory Flexibility Act analysis. The motion is unopposed and requests a stay until March 24, 2008 or until an amended final rule is issued, whichever occurs first. A hearing on the motion has been scheduled for December 14, 2007.

On December 4, the DHS appealed the preliminary injunction to the Ninth Circuit. DHS Secretary Michael Chertoff announced that the department still intends to issue a supplement to the rule that specifically addresses the grounds on which the district court based its injunction. Secretary Chertoff added that "by pursuing these two paths simultaneously, [his] aim is to get a resolution as quickly as possible so [DHS] can move the No-Match Rule forward and provide honest employers the guidance they need."

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

OSHA Issues New Personal Protective Equipment Standard

On November 15, 2007, eight years after its initial proposal and following an AFL-CIO suit to compel promulgation of the rule, OSHA issued a new final rule requiring employers to pay for employee personal protective equipment (PPE). This final rule, which becomes effective on February 13, 2008 and must be implemented by May 15, 2008, applies to OSHA's standards for general industry, shipyard employment, marine terminals, longshoring and construction.

The new standard requires employers to pay for employees' PPE, but does not require employees to use additional PPE. The new rule includes five notable exceptions. First, an employer does not have to pay for non-specialty safety-toe protective footwear and eyewear if an employee can wear these items outside of the job site. Second, if an employer provides metatarsal guards for its employees, but an employee requests to wear shoes or boots with built-in metatarsal protection, the employer does not have to pay for the employees' shoes or boots. Third, the rule does not apply to logging boots required by 29 C.F.R. § 1910.266(d)(1)(v). Fourth, the employer does not have to provide "everyday clothing," such as long sleeve shirts, pants and street shoes. Finally, an employer does not have to pay for

any PPE that an employee loses or intentionally damages. OSHA estimates that this rule will cost employers \$85.7 million annually.

NATIONAL LABOR RELATIONS BOARD

Congressional Action Required to Avoid Looming Vacancies at the National Labor Relations Board

The National Labor Relations Board (NLRB) will face a critical shortage of Board members if Congress fails to confirm at least two presidential nominees before adjourning in December. The five-member Board, currently composed of three Republican and two Democratic members, serves staggered five-year terms. The term of current Chairman Robert Battista expires on December 16. Two other Board members, Democrat Dennis Walsh and Republican Peter Kirsanow, are presidential recess appointees who may only serve until the *sine die* adjournment of Congress in mid-December. Both Walsh, a former Clinton nominee renominated in April 2005 by President Bush, and Kirsanow, initially nominated by President Bush in November 2005, are awaiting Senate confirmation. The NLRB, which had 207 cases pending as of September 30, may experience significant delays in case processing if the impending Board vacancies are not filled.

NLRB Clarifies Backpay Mitigation Burdens

In a 3-2 decision, the Board recently clarified a long-held principle in backpay cases. In *St. George Warehouse*, 351 NLRB No. 42 (Sept. 30, 2007), the Board reaffirmed that an employer bears the ultimate burden of *persuasion* if it alleges that an employee failed to mitigate damages by making reasonable efforts to seek interim employment. However, the Board determined that the employer and the General Counsel shared the burden of *production* with regard to this issue.

An employer is required to “make whole” a wrongfully discharged employee by paying what he or she would have earned normally during the period of the employer’s discriminatory action, less earnings from other employment held during that period. Under the “willful loss of earnings” affirmative defense, an employer may limit its liability by showing that the employee failed to make reasonable efforts to seek and sustain interim employment.

Prior to this decision, an employer was required to demonstrate by a preponderance of the evidence that a former employee failed to make a good faith effort to seek employment. This burden was satisfied if the employer could produce facts sufficient to show that substantially equivalent jobs were available in the former employee’s relevant geographic area, and that the former employee failed to make reasonable efforts to apply for those available jobs.

St. George Warehouse shifts part of the burden of production to the General Counsel. The employer must still produce evidence that there were substantially equivalent jobs within the relevant geographic area, but then the burden of production shifts to the General Counsel to show that the former employee took reasonable steps to seek those available jobs. The Board reasoned that the General Counsel, as the advocate for the discriminatee, was more likely to have information concerning the former employee’s job seeking activities. In their dissenting opinion, Members Liebman and Walsh declared that the majority had departed from over 45 years of established precedent in relieving the wrongdoer-employer of its burden of production.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

EEOC Systemic Initiative Is Showing Results

EEOC's systemic initiative, focused on pursuing more high impact investigation and litigation, is showing results. The number of EEOC Commissioner charge investigations under both Title VII and the ADA has increased dramatically since the systemic initiative was launched in 2006. The EEOC is targeting respondents for its Commissioner charges by evaluating industry-specific practices, its past experiences with particular respondents, including charge histories, and reviews of EEO-1 filings. In 2007, the EEOC announced its E-RACE initiative, which will focus on more subtle forms of race and color discrimination. The EEOC has stated that it will look more carefully at discrimination resulting from hiring and promotion decisions based on discrete employment policies, such as disparate impact resulting from the use of employment or personality tests, credit scores, advanced technology and conviction records.

New EEOC Legal Counsel Appointed

Reed Russell, formerly a counsel in Akin Gump's Washington labor and employment group, has become the new Legal Counsel at EEOC. The EEOC Legal Counsel runs the EEOC's Office of Legal Counsel, which advises the Commission on policy matters.

EEOC Revises Intake Questionnaire Policy

The EEOC has revised its policy on the use of intake questionnaires. When an intake questionnaire contains all the information required by EEOC regulations governing the contents of a charge and constitutes a clear request for the agency to act, the EEOC will "docket" the questionnaire as a charge and provide notice of the charge to the respondent within ten days.

EMPLOYEE BENEFITS SECURITY ADMINISTRATION

Department of Labor Promulgates New Pension Regulation

According to the DOL, only two-thirds of eligible employees participate in their employer's 401(k) plans. Studies suggest that this number could increase to over 90 percent if more employers implemented automatic enrollment plans – plans where the eligible employees "opt-out" rather than "opt-in." Many employers are hesitant to offer such plans because they fear legal liability due to market fluctuations and the applicability of state wage withholding laws. Even when employers offer automatic enrollment, they often set up low-risk, low-return "default" investments.

To remove these obstacles, Congress passed the Pension Protection Act (PPA) in 2006, which directed the Department of Labor to issue regulations making it easier for employers to automatically enroll their employees in contribution plans. On October 23, 2007, Secretary of Labor Elaine Chao announced a final rule providing relief to plan fiduciaries who invest the assets of these automatically enrolled employees in qualified default investment alternatives (QDIA). The new rule (1) provides conditions that must be satisfied for an employer to obtain safe harbor relief from fiduciary liability for investment outcomes; (2) identifies four types of QDIAs; (3) provides a "grandfather" clause for investment plans in existence before the passage of the PPA and this rule; and (4) states that ERISA supersedes any state law that would prohibit or restrict automatic contribution arrangements, regardless of whether such automatic contribution arrangements qualify for the safe harbor.

For more information, see the Department of Labor's Fact Sheet titled *Regulation Relating To Qualified Default Investment Alternatives In Participant-Directed Individual Account Plans* at:

<http://www.dol.gov/ebsa/newsroom/fsODIA.html>.

CANDIDATE CORNER

This is the first in a series of capsules describing the positions of Democratic and Republican presidential candidates on issues of concern to the labor and employment community. We begin the series with former Democratic Sen. John Edwards and Sen. John McCain (R-AZ).

JOHN EDWARDS

"I want to be the president who walks down the White House lawn and says the word union, who walks down the White House lawn and makes certain that America understands the importance of the organized labor movement in the history of America." (Amy Lorentzen, "Edwards Courts Labor Vote," *The Associated Press*, Sept. 3, 2007.)

General

After the 2004 election, Edwards established the Center on Poverty, Work and Opportunity at the University of North Carolina, a foundation for work on economic issues, and traveled the country helping unions organize and supporting campaigns to raise the minimum wage.

Running as a liberal populist, Edwards is outspoken and farther left than any other viable candidates on labor, trade, health care and economic issues. This has positioned Edwards as the candidate of labor and won him the endorsements of a number of major unions.

Positions on Legislation

Edwards has called for increasing the minimum wage to \$9.50 an hour by 2012 and ensuring that it continues to rise by indexing it so that it automatically rises each year along with national averages.

Edwards also supports expanding the Family and Medical Leave Act to let parents take time off from work when they need it. Edwards recently announced his "Bold Plan For Paid Family And Medical Leave," under which he would work with the states to offer eight weeks of paid family and medical leave to all American workers. Edwards' plan would also give an additional 13 million workers the right to take family leave without losing their jobs and require all businesses to offer their workers a minimum of seven paid sick days a year.

In discussing the Employee Free Choice Act, Edwards stated that "[t]his was probably the single most important vote on the future of the middle class cast in the Senate this year. ... Today, a majority of the Senate stood up to make it easier for workers to join a union. A minority of senators showed which side they are on by blocking the bill today – but they won't be able to block it forever. When I'm president, we will have strong, fair labor laws. If a Republican can join the Republican Party by signing their name to a card, any worker in America ought to be able to join a union by doing exactly the same thing."

While in the Senate, Edwards cosponsored the Employment Non-Discrimination Act. He also believes that stronger enforcement is necessary to prevent employment discrimination by federal agencies.

Edwards has proposed a \$90-\$120 billion per year health care plan, including a universal mandate, financed by abolishing tax cuts for those making more than \$200,000. The principles of his plan include –

- requiring businesses and other employers to cover their employees or help finance their insurance
- making insurance affordable by creating new tax credits, expanding Medicaid and SCHIP, reforming insurance laws and taking innovative steps to contain health care costs
- creating regional “Health Care Markets” to share the bargaining power to purchase an affordable, high-quality health plan, increase plan choices and cut costs for businesses offering insurance
- requiring all American residents to get insurance.

JOHN McCAIN

“I am strongly opposed to H.R. 800, the so-called Employee Free Choice Act of 2007. Not only is the bill’s title deceptive, the enactment of such an ill-conceived legislative measure would be a gross deception to the hard working Americans who would fall victim to it.” (Sen. John McCain, *Congressional Record*, June 26, 2007.)

General

Sen. McCain is a fiscal conservative who focuses on national security and immigration issues. At times, Sen. McCain operates as a maverick within his own party.

Positions on Legislation

Sen. McCain was among 16 Republicans to back the Family and Medical Leave Act (FMLA) in 1993. However, Sen. McCain has questioned Democratic proposals to expand the FMLA on the ground that such proposals constitute an “unfunded liability” for businesses. McCain has consistently opposed increases in the minimum wage.

As indicated above, Sen. McCain strongly opposes the Employee Free Choice Act of 2007, which would require employers to recognize bargaining units. ... Sen. McCain also opposes the Employee Non-Discrimination Act, which he believes could “open a floodgate of litigation.”

For many years, Sen. McCain has advocated a guest worker program in the United States, as well as a path to citizenship for undocumented workers already here. After the failure of the most recent immigration reform bill, which he sponsored, Sen. McCain now says that he “got the message” and will secure the border first before moving onto any kind of employment-related immigration changes.

In the healthcare area, Sen. McCain focuses on reducing costs as the solution for more affordable care, using market mechanisms and competition as well as a renewed focus on preventative medicine. Sen. McCain would allow states to experiment with alternative forms of access and insurance. Sen. McCain also advocates expanding insurance coverage through tax incentives rather than expanding government programs. Sen. McCain also seeks to rely upon wireless and paperless technology innovation to save money and lives.

BILL TRACKER

GENETIC INFORMATION NONDISCRIMINATION ACT OF 2007 (H.R.493, S.358)

Core Provisions: This Act would amend Title VII, ERISA, and other laws to prohibit employers and health insurers from discriminating against individuals on the basis of genetic information. Under the Act, employers may not discharge, refuse to hire or otherwise discriminate against employees on the basis of genetic information. Further, the Act prohibits health insurers from adjusting premiums on the basis of genetic information, requiring genetic testing or collecting genetic information for underwriting purposes. The Act provides that genetic information includes results of genetic testing of the individual or his/her family members, as well as the manifestation of a disease or disorder in family members of such individual.

Status: On April 10, 2007, Sen. Kennedy (D-MA) from the HELP Committee submitted Report No. 110-48 recommending passage of S.358. The House passed H.R.493 on April 25, 2007, and it remains currently under consideration by the Senate. The White House supports the passage of genetic information non-discrimination legislation.

PAYCHECK FAIRNESS ACT (H.R.1338, S.766)

Core Provisions: This Act would amend the Equal Pay Act, which prohibits sex-based wage discrimination, to permit a “bona fide factor” affirmative defense only if the employer demonstrates that the factor is job-related or furthers a legitimate business purpose. Making it more difficult for employers to establish affirmative defenses to Equal Pay Act claims, an affirmative defense would no longer be valid where the employee could demonstrate an alternative employment practice that served the same business purpose without producing wage differences. Further, the bona fide factor defense would require a showing by the employer that the bona fide factor was actually applied and used reasonably. The bill also would increase penalties against employers for Equal Pay Act violations by adding compensatory and punitive damage liability.

Status: S.766 was introduced in the Senate by Sen. Clinton (D-NY) on March 6, 2007 and referred to the HELP Committee. In the House, the Subcommittee on Workforce Protections held a hearing on H.R.1338 on July 11, 2007.

RE-EMPOWERMENT OF SKILLED AND PROFESSIONAL EMPLOYEES AND CONSTRUCTION TRADESWORKERS (RESPECT) ACT (H.R.1644, S.969)

Core Provisions: Proposed in response to the NLRB's decision in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (Sept. 29, 2006), holding that employees spending only 10 percent of their time in a supervisory capacity may be considered “supervisors” and thus not entitled to unionize, the RESPECT Act would narrow the definition of supervisor under the NLRA. The RESPECT Act would delete the terms “assign” and “responsibly to direct” from the definition of supervisor – terms that the NLRB expanded to support its rulings – and would also require that statutory supervisors spend a majority of their workday performing supervisory duties.

Status: S.969 was introduced in the Senate by Sen. Dodd (D-CT) on March 22, 2007 and referred to the HELP Committee. In the House, the Committee on Education and Labor reported the bill out of committee on Sept. 19, 2007, by a vote of 26-20.

ARBITRATION FAIRNESS ACT OF 2007 (H.R.3010, S.1782)

Core Provisions: This Act would amend the Federal Arbitration Act to invalidate any pre-dispute arbitration agreement requiring arbitration of an employment, consumer or franchise dispute, or any dispute arising under any statute “intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.” The Act would apply to any dispute that arises after the legislation is enacted, regardless of the date of the pre-dispute arbitration agreement. The Act would not invalidate arbitration clauses in collective bargaining agreements. Congressional findings in H.R.3010 express concern that consumers and employees have few meaningful choices when they sign pre-dispute arbitration agreements, and that mandatory arbitration is becoming increasingly widespread despite possible arbitrator partiality, non-transparency, the lack of “meaningful” judicial review and unfair provisions in arbitration agreements.

Status: H.R.3010 was introduced in the House by Rep. Johnson (D-GA) on July 12, 2007 and hearings were held by the House Judiciary Subcommittee on Commercial and Administrative Law on October 25, 2007 (see *Hearings on the Hill*, Page 1). In the Senate, S.1782 was introduced by Sen. Feingold (D-WI) on July 12, 2007 and referred to the Committee on the Judiciary. H.R.3010 has 53 co-sponsors, while S.1782 has six co-sponsors.

EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) OF 2007 (H.R.3685)

Core Provisions: ENDA would make it illegal for an employer to discriminate with respect to an individual’s actual or perceived sexual orientation. This discrimination would be prohibited in decisions regarding hiring, firing, compensation, and terms, conditions or privileges of employment. Employers also could not adversely limit, segregate or classify employees or applicants because of actual or perceived sexual orientation. The Act would apply to employers with 15 or more employees, but there is an exemption for religious employers.

Status: H.R.3685 was introduced by Rep. Frank (D-MA) on September 27, 2007 and passed in the House on November 7, 2007 by a non-veto-proof tally of 235-184. The legislation was placed on the Senate Legislative Calendar on November 13, 2007. President Bush threatened to veto an earlier version of the bill, but a White House spokesman said the administration would need to review recent changes to ENDA before making a final decision on the fate of the Act.

SECURE AMERICA THROUGH VERIFICATION AND ENFORCEMENT (SAVE) ACT (H.R.4088, S.2368)

Core Provisions: The SAVE Act would require employers to verify employees’ eligibility to work in the U.S. using the E-Verify program. The Social Security Commissioner would annually notify employers of any employees whose Social Security account numbers did not match that employee’s name or date of birth, and the employee would have ten days to correct the mismatch, or the employer would be required to terminate the employee. Employers of more than 250 employees would be required to start verifying employee status as soon as the law is enacted, with verification requirements for smaller employers phasing in over the ensuing two to four years. The SAVE Act would also increase border patrol, increase the investigative abilities of Immigration and Customs Enforcement and create a new infrastructure for the detention, processing and removal of illegal aliens.

Status: H.R.4088 was introduced by Rep. Shuler (D-NC) on November 6, 2007 and referred to the House Homeland Security, Judiciary, Ways and Means, Education and Labor, Oversight and Government Reform, Armed Services, Agriculture, and Natural Resources Committees. S. 2368 was introduced by Sen. Pryor (D-AR) on November 15, 2007

and referred to the Senate Committee on the Judiciary. H.R.4088 currently has 112 co-sponsors, while S.2368 has one co-sponsor.

PRIVATE SECTOR WHISTLEBLOWER PROTECTION STREAMLINING ACT (H.R.4047)

Core Provisions: Modeled after the whistleblower protections available for federal employees, this Act would prohibit discrimination or retaliation against employees who report misconduct, cooperate with an investigation, refuse to act, or assist another in asserting their rights under applicable federal or state laws or regulations. The legislation provides for an administrative complaint process under a newly established office within the Employment Standards Administration at the Department of Labor or an alternative federal court route.

Status: H.R.4047 was introduced by Rep. Woolsey (D-CA) on November 1, 2007 and referred to the House Committee on Education and Labor. The legislation currently has 13 co-sponsors.

LILLY LEDBETTER FAIR PAY ACT OF 2007 (H.R.2831, S.1483)

Core Provisions: Intended to reverse the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074 (May 29, 2007), this Act (titled the Fair Pay Restoration Act of 2007 in the Senate) would amend Title VII to allow claims brought within 180 days of receiving any paycheck affected by a discriminatory decision involving pay, no matter how far in the past the underlying act of discrimination allegedly occurred. In *Ledbetter*, the Supreme Court required such a suit to be brought within 180 days of the actual discriminatory decision.

Status: H.R.2831 was introduced by Rep. Miller (D-CA) on June 22, 2007, passed in the House on July 31, 2007, and placed on the Senate Legislative Calendar on August 2, 2007. S.1483 was introduced by Sen. Kennedy (D-MA) on July 20, 2007 and referred to the HELP Committee. The House bill has 93 co-sponsors and the Senate bill has 31 co-sponsors. On July 27, 2007, the White House announced that President Bush would veto H.R. 2831 if presented to him.

PROTECTING AMERICA'S WORKERS ACT (H.R.2049, S.1244)

Core Provisions: This Act would expand the existing Occupational Safety and Health Act. The Act enhances the penalties for "repeat" and "willful" violations, increasing employer fines from \$70,000 to \$100,000 and allowing imprisonment of management employees for up to ten years. The Act also prohibits unclassified citations, which may increase the likelihood of collateral state litigation and criminal prosecutions. Furthermore, the Act provides for greater protection for "whistleblowers" by creating new procedural options and remedies for employees who are discriminated against for reporting unsafe conditions or for refusing to perform duties because of a danger of serious injury or impairment to health. For instance, the time to file discrimination charges is extended from 30 to 180 days and employees are permitted to object to government findings and request a hearing. In addition, employees may receive all reasonable costs and expenses, including attorneys' fees. Finally, the Act requires employers to provide personal protective equipment to employees at no cost.

Status: Sen. Kennedy (D-MA) and Rep. Woolsey (D-CA) introduced S.1244 and H.R.2049, respectively, on April 26, 2007. S.1244 has been referred to the HELP Committee. H.R.2049 has been referred to the Subcommittee of Workforce Protections of the House Committee Education and Labor.

FAIR PAY ACT OF 2007 (H.R.2019, S.1087)

Core Provisions: This Act would amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on the basis of sex, race or national origin. The Act requires employers to provide equal pay for jobs that are comparable in skill, effort, responsibility and working conditions. It also prohibits companies from reducing other employees' wages to achieve this pay equity. In addition, the Act mandates that employers disclose their job categories and pay scales to the public. Under this Act, an employer can pay different wages to employees based on seniority, merit or production. Finally, the Act provides for two alternate enforcement mechanisms, either filing a complaint with the EEOC or filing suit in federal court for compensatory and punitive damages.

Status: Sen. Harkin (D-IA) introduced S.1087 on April 11, 2007. Rep. Norton (D-DC) introduced H.R.2019 on April 24, 2007. On July 9, 2007, H.R.2019 was referred to the Subcommittee of Workforce Protections of the House Committee Education and Labor.

EMPLOYEE FREE CHOICE ACT OF 2007 (H.R.800)

Core Provisions: This Act would allow a union to secure certification as a bargaining representation by presenting the Board with authorization cards from a majority of employees in a proposed bargaining unit. In addition, the Act provides new procedures to ensure employers and unions reach an initial agreement. In particular, bargaining must begin within ten days of a written request by the union and, if the parties are unable to reach an initial collective bargaining agreement within 90 days, then either party can request mediation. If the mediation is unsuccessful after 30 days, the dispute will be resolved through arbitration, which will have a binding effect for two years. Finally, the Act strengthens enforcement requirements and remedies with respect to unfair labor practices during union organizing drives. For example, the Act imposes liquidated damages in the amount of twice the back pay awarded and civil penalties of \$20,000 for each time an employer willfully or repeatedly violates the employees' right to organize.

Status: Rep. Miller (D-CA) introduced H.R.800 on February 5, 2007. The bill passed in the House of Representatives by a roll call vote on March 1, 2007, and is currently under consideration by the Senate. On February 28, 2007, the White House announced that President Bush would veto H.R.800 if presented to him.

ADA RESTORATION ACT OF 2007 (H.R.3195, S.1881)

Core Provisions: This Act would amend the ADA to respond to three 1999 Supreme Court decisions requiring courts to consider "mitigating measures" to determine whether an individual is "disabled" under the ADA. The elimination of the "mitigating measures" test would mean that the decision of whether individuals are physically or mentally impaired could not take into account the corrective effects of medication or adaptive devices. The Act would also remove the requirement that a disability "substantially limit" the claimant's ability to perform "major life activities," and allows the employer to argue as a defense to a charge of discrimination that the claimant is not a "qualified individual with a disability."

Status: H.R.3195 was introduced in the House by Rep. Hoyer (D-MD) on July 26, 2007, and hearings were held by the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties on October 4, 2007. In the Senate, S.1881 was introduced by Sen. Harkin (D-IA) on July 26, 2007, and hearings were held by the Senate Committee on Health, Education, Labor, and Pensions on November 15, 2007 (see *Hearings on the Hill*, Page 2). H.R.3195 currently has 235 co-sponsors, S.1881 currently has two co-sponsors.

SUGGESTIONS

We welcome feedback from you, our audience. Please feel free to contact us with suggestions for issues to be covered in future editions of the *Washington Labor & Employment Wire*. If you have any suggestions, please contact Bob Lian at blian@akingump.com. If you would like us to add any of your colleagues to our mailing list, please contact Laurie Spielman at lspielman@akingump.com

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